

2. Defendant's repeated violations of provisions prohibiting overflows, bypasses or washouts specified in Defendant's four 2000 NPDES permit numbers: TN0023582, TN0023574, TN0021822 and TN0061743 (hereinafter NPDES Permits), Sections 301 (a)(e) and 402 (a)(b) CWA, 33 U.S.C. Sections 1311 (a)(e) and 1342 (a)(b);
3. Defendant's repeated violations of the monitoring and reporting requirements of its NPDES Permits, Sections 308(a) and 402, CWA, 33 U.S.C. §§1318(a) and 1342;
4. Defendant's repeated violations of its NPDES permit mandates requiring the Defendant to place and maintain signs at each outfall and each bypass and/or sewer overflow points in the sanitary sewer collection system to alert and warn the public, Section 402(a)(b), CWA, 33 U.S.C. 1342 (a)(b);
5. Defendant's repeated violations of its NPDES Permits which require the Defendant as a permittee and subject to Tennessee's Anti-Degradation Statement to comply with effluent limitations and schedules of compliance required to implement applicable water quality standards, to comply with other state and federal regulations, and to comply with a standard permitting no discharge of pollutants, Sections 301(a)(e), 303(a), 402(a)(b) CWA, 33 U.S.C. Sections 1311 (a)(e), 1313(a), 1342(a)(b); 40 CFR 131.12(a)(1) and TAR 1200-4-3-.06;
6. Defendant's repeated unlawful discharge of pollutants (pathogens) from its sanitary sewer collection system into Tennessee's 303(d) listed streams, First Creek, Second Creek, Third Creek and Goose Creek, Upper Tennessee River Basin; or allowing such sanitary sewer overflows SSOs to occur in locations which discharge into these

four 303(d) listed streams without a permit. Such unlawful discharges violate water quality standards and significantly contribute to the stream status of non-supporting designated uses for several miles in each stream contrary to Section 301(a)(e), 303(d) and 402(a)(b), CWA, 33 U.S.C. Sections 1311(a)(e), 1313(d) and 1342(a)(b). Also: TCA Section 69-1-103(9), (21) and (22) Definitions; 33 U.S.C. 1362 (CWA 502), (6), (12), (14), (16) and (19) – Definitions; Tennessee’s Proposed Final 2002 303(d) List of impaired streams, p.50;

II. Jurisdiction and Venue

7. This Court has subject matter jurisdiction under Section 505(a), CWA, 33 U.S.C. §1365(a).

8. On July 16, 2003, the Plaintiff, Tennessee Clean Water Network (TCWN) gave notice of the violations and its intent to file suit to the Administrator of the United States EPA in Washington; the Regional Administrator of EPA, Region 4, Atlanta, Georgia; the Tennessee Department of Environment and Conservation (TDEC); and to the Defendant as required by Section 505(b)(1)(A), CWA, 33 U.S.C. § 1365 (b)(1)(A). Exhibit 1 – [60 day Notice of Intent to sue with attachments.]

9. More than 60 days have passed since notice was served on EPA, Washington (July 22), EPA, Atlanta (July 22), TDEC (July 18) and on the Defendant (July 18 and July 25). Neither the EPA nor TDEC has commenced and is diligently prosecuting a civil or criminal action in a Court of the United States, or a State; and neither EPA nor TDEC has commenced an administrative civil penalty action under Section 309(g)(6), CWA, 33

U.S.C. and 1319(g)(6), nor has the Defendant paid a penalty assessed under this section or comparable state law to redress the violations prior to or since the July 16, 2003 notice letter.

10. Venue is appropriate in the Eastern District of Tennessee pursuant to Section 505(c)(1), CWA, 33 U.S.C. 1365(c)(1) because the source of the violations is located within this District.

III. Parties

11. Plaintiff, Tennessee Clean Water Network (TCWN), files this action and sues the Defendant on behalf of itself and its members. The TCWN is a statewide, non-profit, membership organization incorporated under the laws of Tennessee, with its principal place of business in Knoxville, Tennessee. The network's members include 171 individual and organizational members of which approximately 35 members live within the Defendant's district boundaries. The stated purpose of TCWN includes "the education and promotion of the protection, restoration and enhancement of Tennessee's waters and the communities which depend upon them."

12. The Plaintiff is actively involved with water quality issues in Tennessee, including but not limited to, commenting on NDPEs permit applications statewide, attending public meetings and hearings held by TDEC statewide, commenting on U.S. Corps of Engineers Section 404, CWA, permit applications, appearing before the Tennessee Water Quality Control Board, which sits in Nashville monthly, and commenting on proposed new rules and water quality standards, offering proposed language to the Board and to

TDEC to improve the anti-degradation policy and strengthen water quality standards, printing an electronic newsletter monthly to all members, public speaking, promoting and encouraging greater public participation in water quality related decisions by local, state and federal governments, and publicly promoting and encouraging the development of citizen based watershed groups to monitor and protect the quality of the streams and rivers in those watersheds.

13. The interests of the TCWN have been, are being and will be adversely affected by the Defendant's continuing violations of the terms and conditions of its NPDES permits, and it's continuing violations of the CWA.

14. Members of TCWN who live in Knox County and within the district boundaries of the Defendant have experienced sewage overflows in their homes and yards, on public streets, in public parks, in Greenways and in creeks and streams which flow into the Holston and Tennessee Rivers. These TCWN members are directly injured and adversely affected by numerous sanitary sewer overflows (SSO's) and bypasses of untreated or partially treated raw sewage into their yards and homes, streams, creeks, and rivers in the Fort Loudoun Lake watershed as well as into public streets, public parks, storm drains and other areas from at least the year 2000 to the present day in 2003.

15. The Defendant, Knoxville Utilities Board, (KUB), operates a system of utilities in Knoxville, Knox County, Tennessee. Included within the utility system is a sanitary sewer system (or waste water system) which KUB operates within a 200 square mile service area both inside and outside the city limits of Knoxville, Tennessee. KUB has operated this wastewater system since 1987. Within its service area, KUB exclusively

controls the provision of sewer services, and no other business or utility operates a sanitary sewer system.

16. The wastewater system is intended to receive raw sewage from homes and businesses in and around Knoxville and to convey these wastes to the four sewage treatment plants operated by KUB. After treatment of the sewage, the treated wastewater is discharged into the Tennessee and Holston Rivers. Because the system collects and conveys raw sewage, KUB's system of pipes, conduits, mains, trunklines, and pumping stations should be so constructed and maintained that raw sewage does not escape from the system before it reaches a particular treatment plant.

17. KUB is governed by a Board of Commissioners composed of citizens. On plaintiff's information and belief, the present members of the Board of Commissioners are Gloria Ray (Chairman), Bruce Anderson, Samuel P. McKenzie, Thomas Jones, J.E. Berry, III, Sharon Miller and George W. Archer. KUB is authorized by Private Act and Article XI of the Charter for the City of Knoxville and required to fix rates to be charged to industrial, commercial, and residential users for services rendered by the wastewater system. KUB's designated President and Chief Executive Officer is Larry Fleming, and its Senior Vice-President/Chief Operating Officer is Bill Elmore.

IV. Statutory Background

18. Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants from a point source into navigable waters of the United States, unless the discharge is in compliance with various enumerated sections of the Act. Among other things, Section

301(a) prohibits such discharges not authorized by, or in violation of the terms of, an NPDES permit issued pursuant to Section 402 of the Act, 33 U.S.C. §1342.

19. Section 308 of the Act, 33 U.S.C. §1318, requires NPDES permittees to establish and maintain records; install, use and maintain monitoring equipment; sample effluents; and report on a regular basis to the permit-issuing agency regarding the facility's discharge of pollutants. The reports include Discharge Monitoring Reports (DMRs).

20. Section 303(a) CWA, 33 U.S.C. 1313(a) requires States to maintain existing water quality standards approved by EPA. Section 303(c) requires States to implement a 3 year public review of its water quality standards, modifying and/or revising those standards when necessary to protect the designated uses of the navigable waters involved and the water quality criteria for such waters.

Section 303(d) requires that States identify and establish a priority ranking for waterbodies for which technology-based effluent limitations required by Section 301 are not stringent enough to attain and maintain applicable water quality standards. For these priority waters, the States must establish Total Maximum Daily Loads (TMDLs) for the pollutants causing the impairment in those waterbodies and submit the list of impaired waterbodies and TMDLs to EPA. EPA is required to establish these lists and TMDLs if a State fails to do so. A TMDL is a quantitative assessment of pollutants that cause water quality impairments in a particular waterbody. 40 CFR 130.2(i) A TMDL specifies the total amount of a particular pollutant that a segment of water may receive (from point, non-point, and natural background sources) without exceeding applicable water quality criteria, allocates allowable pollutant loads among the sources contributing the pollutant

to the waterbody, and provides the basis for attaining or maintaining water quality standards. 40 CFR 130.7

21. Section 402 CWA, 33 U.S.C. 1342, establishes the NPDES permit system and implements the Clean Water Act's prohibition on unauthorized discharges by requiring a permit for every discharge of pollutants from a point source to waters of the United States. Permits, which are issued by EPA or states authorized pursuant to Section 402 of the CWA, give the permittee the right to discharge specified pollutants from specified outfalls, normally for a period of five years. The permit usually sets numerical limitations on the authorized discharges and imposes other conditions on the permittee. State programs must be at least as stringent as the federal program.

22. Section 402(o) CWA, is an anti-backsliding provision that expressly prohibits renewal, reissue or modified permits from containing effluent limitations less stringent than the comparable effluent limitation(s) in the previous permit. There are narrow exceptions to this prohibition, but in no event may such a reissued, renewed or modified permit contain less stringent effluent limitations required by effluent guidelines or result in a violation of a water quality standard under Section 303 CWA, 33 U.S.C. 1313. See Section 502 (11) CWA, 33 U.S.C. Section 1362 (11) [definition of effluent limitation].

23. Section 505(a) CWA, 33 U.S.C. § 1365, authorizes citizens to bring suit for violation of any "effluent standard or limitation" under the Act. Section 505(f)(6), 33 U.S.C. § 1365(f)(6), defines "effluent standard or limitation". Section 505(d) provides for recovery of litigation costs.

24. Section 309 CWA, 33 U.S.C. §1319, provides for federal and state civil, criminal and administrative penalties, and does not preclude civil penalties in citizen suits except in very narrow circumstances not applicable here. 33 U.S.C. §309(g)(6).

V. Factual Allegations

25. The Administrator of EPA authorized TDEC, pursuant to Section 402(a)(2) CWA, 33 U.S.C. §1342(a)(2), to issue NPDES permits on December 28, 1977. The applicable Tennessee law is the Tennessee Water Quality Control Act, T.C.A. §69-3-101, et seq.

26. Pursuant to the Administrator's delegation of authority and the Tennessee Water Quality Control Act, TDEC issued to KUB the following NPDES Permits:

Permit No. TN0023582 for the operation and maintenance of the Kuwahee sewage treatment plant (STP), on June 30, 2000. This permit expired on June 30, 2002. Exhibit 2; Permit No. TN0023574 for the operation and maintenance of the Fourth Creek STP, on June 30, 2000. This permit expired June 30, 2002. Exhibit 3; Permit No. TN0021822 for the operation and maintenance of the Loves Creek STP, issued on June 30, 2000. This permit expires on June 30, 2004. Exhibit 4; and Permit No. TN0061743 for the operation and maintenance of the East Bridge STP, on June 30, 2000. This permit expires on January 31, 2004. Exhibit 5.

27. NPDES Permit Nos. TN0023582 and TN0023574 allows the discharge of treated municipal wastewater into the Tennessee River, navigable waters of the United States. Permit Nos. TN0021822 and TN61743 allow the discharge of treated municipal wastewater into the Holston River, navigable waters of the United States.

28. On July 31, 2000, the Defendant filed an administrative “Petition for Appeal” to each of the NPDES permits issued by TDEC, which the Defendant denominated as “protective appeals”, and expressly requested that no hearing be set before the Tennessee Water Quality Control Board (TWQCB). Exhibit 6 [Appeal Letter]

29. For the past 3 years, no evidentiary hearing on any one of these permit appeals has been held before the TWQCB. Two of the NPDES permits, Kuwahee STP and Fourth Creek STP, expired on June 30, 2002. The Defendant continues to operate these two STPs on expired permits.

30. Each of the NPDES permits (Exhibits 2-5) expressly prohibit “overflows” (part II, c.3.); “bypass” (part II, c.6.); “washout” (part II, c.7.).

Additionally, each permit sets forth in Part I precise effluent limitations for each pollutant discharged, the daily minimum percentage of removal of certain pollutants, the monitoring frequency, and provides explicitly: “note: the permittee shall achieve 85% of CBOD5 and TSS on a monthly average basis. The permittee shall report all instances of overflow and or bypasses.” [40 CFR § 133.102(a)(b); 40 CFR 122.41(L)(6)(7)]

31. Other terms and conditions of the NPDES permits pertinent to this action are:

PART I, A. Effluent Limitations and Requirements

“The wastewater discharge must be disinfected to the extent that viable coliform organisms are effectively eliminated...”

“There shall be no distinctly visible floating scum, or other matter contained in the wastewater discharge. ...”

“The wastewater discharge shall not contain pollutants in quantities that will be hazardous or otherwise detrimental to humans, livestock, wildlife, plant life, or fish and aquatic life in the receiving stream”.

PART I, C. Definitions

“A dry weather overflow event is defined as one day or any portion of a day in which discharge of wastewater from the collection or treatment system other than through the permitted outfall occurs and is not directly related to a rainfall event. ...”

“A sanitary sewer overflow event is defined as an unpermitted discharge of wastewater from the collection or treatment system other than through the permitted outfall that is directly related to a rainfall event. ...”

PART I, D. 5. Bypass and Overflow Reporting

“On the DMR the permittee must report the number of sanitary overflows, dry-weather overflows and in-plant bypasses separately.”

PART II, A. 4. Proper Operation and Maintenance

“The permittee shall at all time properly operate and maintain all facilities and systems (and all related appurtenances) for collection and treatment which are installed or used by the permittee to achieve compliance with the terms and conditions of this permit. Proper operation and maintenance also includes adequate laboratory and process controls and appropriate quality assurance procedures. This provision requires the operation of back-up or auxiliary facilities or similar systems, which are installed by permittee only when the operation is necessary to achieve compliance with the conditions of the permit. ...”

PART II, C. 1. Effect of Non-Compliance

“All discharges shall be consistent with the terms and conditions of this permit. Any permit non-compliance constitutes a violation of applicable state and federal laws and is grounds for enforcement action, permit termination, permit modification or denial or permit reissuance.”

PART II, C. 5. Adverse Impact

“The permittee shall take all reasonable steps to minimize any adverse impact to the waters of Tennessee resulting from non-compliance of this permit...”

PART III, E. Placement of Signs

“Within sixty (60) days of the effective date of this permit, the permittee shall place and maintain a sign(s) at each outfall and any by-pass.overflow point in the collection system. For the purposes of this requirement any by-pass.overflow point that has discharged five (5) or more times in this last year must be so posted. ...”

PART III, F. Antidegradation

“Pursuant to the rules of the Tennessee Department of Environment Conservation, Chapter 1200-4-3-.06, titled ‘Tennessee Antidegradation Statement,’ and in consideration of the department’s directive in obtaining the greatest degree of effluent reduction achievable in municipal, industrial, and other waste, the permittee shall further be required, pursuant to the terms and conditions of this permit, to comply with the effluent limitations and schedules of compliance required to implement applicable water quality standards, with a State Water Quality Plan or other state or federal laws or regulations, or where practicable, to comply with a standard permitting no discharge of pollutants.”

32. KUB’s past, present and continuing operation of its collection system is replete with violations of the Clean Water Act, including the release of millions of gallons, of raw, untreated sewage that has been discharged onto private property, greenways, parks, streets and into streams, creeks, the storm drain system serving the City of Knoxville and into the Tennessee River. Such unpermitted and illegal discharges come from manholes, sewer pipes, pumping stations, and other parts of the KUB’s system. For each illegal discharge, large quantities of harmful pollutants, including but not limited to fecal coliform bacteria, are released. Such releases of raw sewage, without treatment and at locations other than permitted discharge points do not meet the effluent limitations and other standards established by the Clean Water Act nor the Tennessee Water Pollution Control Act and are direct violations of its NPDES permits. Sanitary sewer overflows are unpermitted discharges of pollutants, and directly violate 33 U.S.C. §1311(a)[CWA §301]; [40 CFR 122.41(a)]

33. Plaintiff's 60-day notice of intent to sue is attached to this complaint as Exhibit 1 and includes three other attachments labeled A, B and C. Attachment A to Exhibit 1, is a compilation of violations of NPDES Numbers TN0023582 (Kuwahee), TN0023574 (Fourth Creek), TN0021822 (Loves Creek) from November, 2002 through May, 2003 totaling an estimate of 218 violations of the numeric effluent limits stated in Part I of those three permits. The reported effluent violations shown in Attachment A also reveal that the Kuwahee STP experienced a "washout" at least once in February, 2003; and that the Fourth Creek STP experienced a "washout" at least once in January, 2003, and at least once in February, 2003.

34. A "washout" is caused by improper operation of the STP or more wastewater entering the STP than it is designed to treat and discharge. (NPDES Permits, Part II, 7) "Washouts" are indicated in the months of January and February, 2003 where the TSS (Total Suspended Solids) daily minimum percentage of removal is less than the forty percent required by the permits; and where the TSS monthly average load or weekly average load greatly exceeds the allowed pounds per day (lbs/da.)

35. "Washouts" are prohibited and each day of a "washout" is a separate violation of the NPDES permits and the CWA. (NPDES Permits, Part II, 7.); 33 U.S.C. §1311(a)(e) (CWA 301(a)(e))

36. Attachment A, KUB also failed to provide an explanation for TSS, BOD and other permit violations or explain preventive actions which it is required to do in Part I, D. 5. of its NPDES permits. 33 U.S.C. §1318(a)(c) (CWA 308), 40 CFR 122.41(1)(6)(7)(8); Exhibit 1, Attachment A.

37. Attachment B is a compilation of overflow violations of NPDES permits: TN0023582 (Kuwahee), TN0023574 (Fourth Creek), TN0021822 (Loves Creek), and TN0061743 (East Bridge) from January, 2000 through May, 2003 totaling an estimate of 766 violations of the NPDES Permits prohibiting “overflows.” (Part II, C. 3.)
38. Attachment C is a compilation of violations of NPDES Numbers TN0023582 (Kuwahee) and TN0023574 (Fourth Creek) from January, 2000 through May, 2003 totaling an estimate of 198 violations of the NPDES Permits prohibiting “bypasses.” (Part II, C.6.) Permit non-compliance is a violation of the Clean Water Act. 33 U.S.C. 1311 (SWA 301); 40 CFR 122.41(a).
39. The Defendant has failed and refused to comply with Part I, D. 5. Of each of its NPDES permits which require and command it to report on its Discharge Monthly Reports (DMRs) the "Number of Sanitary Sewer Overflows, Dry-Weather Overflows and In-Plant Bypasses separately.” Instead, KUB states at the bottom of its DMRs the following: “all bypasses are reported separately pending appeal of our NPDES permit.” This is a direct violation of the plain language of the permit in violation of 33 U.S.C. §1318(a)(c) (CWA § 308), 40 CFR §122.41(1)(2)(4). Further, the Defendant is not pursuing an appeal of its NPDES permits.
40. Plaintiff alleges that the Defendant has violated Part III, E. of the four NPDES permits which mandate KUB to “Place and maintain sign(s) at each outfall and any bypass/overflow point in the collection system,” within 60 days of the effective date of the permit. For purposes of this requirement, the permit provides that “any bypass/overflow point that has discharged five (5) or more times in the last year must be so posted.” KUB has failed to post the required signs at all the bypass/overflow points in

the collection system and, on limited occasions where signs have been placed, these warning signs have been later removed or not maintained by KUB. The NPDES permits do not allow KUB to remove warning signage once the signs have been displayed.

41. Plaintiff alleges that KUB is subject to the Tennessee Anti-Degradation Statement (TAR 1200-4-3-.06) which requires KUB as a permittee to comply with effluent limitations and schedules of compliance required to implement applicable water quality standards, to comply with other state or federal laws and regulations, and to comply with a standard permitting no discharge of pollutants. NPDES Permits Part II, F. (40 CFR 131.12(a)(1))

42. KUB has violated and continues to violate its NPDES permits, Part II, A. 4., Proper Operation and Maintenance; Part II, F, Anti-Degradation; and each and every other term and condition of its NPDES Permits set forth in the preceding paragraphs. Moreover, each and every permit non-compliance is a violation of the Clean Water Act, 33 U.S.C. §§1251-1387 and the Tennessee Water Pollution Control Act, TCA §69-3-101-122 and is grounds for enforcement action, civil penalties, injunctive relief, permit termination, permit modification or denial of permit re-issuance. 33 U.S.C. §1311(a)(e) [CWA 301(a)(e)]; 1319(b)(d)(g) [CWA 309(b)(d)(g)]; 1342 (o) [CWA 402(o)]; 1365 [CWA 505]; 40 CFR 122.41

43. In addition to the NPDES permit violations, Plaintiff alleges that at least four (4) streams and tributaries in the Fort Loudoun Reservoir Watershed, First Creek, Second Creek, Third Creek and Goose Creek, (within KUB's District) are listed as impaired for pathogens (fecal coliform bacteria) and other pollutants on Tennessee's 2000 303(d) list and on Tennessee's proposed final 2002 303(d) list. Exhibit 7 [p. 50, 2002 303(d) list]

On April 12, 2002, KUB was warned by certified letter from TDEC that the state agency was greatly concerned with KUB's continued sanitary sewer overflows without a permit into these 303(d) listed streams in violation of the Clean Water Act. Exhibit 8 [TDEC Letter]

44. The State of Tennessee, Department of Environment and Conservation (TDEC) prepared a TMDL (Total Maximum Daily Load) for fecal coliform (pathogens) in First Creek, Second Creek, Third Creek, Goose Creek, Fort Loudoun Lake Watershed, Knox County, Tennessee in accordance with 33 U.S.C. Section 1313(d) (CWA 303(d)). The TMDL was submitted to the EPA on April 4, 2002 and approved by the EPA on February 11, 2003. The TMDL identified point and non-point sources of pollutants in the watershed and identified the Defendant as "the primary wastewater control authority within the Fort Loudoun Lake Watershed impacted by the TMDL." (TMDL, p. 19)

45. Sanitary sewer overflows (SSOs) are discharges of pollutants and are not permitted by the NPDES Permits (Part II, C. 3.). Unlawful discharges of untreated sewage (pollutant) or inadequately treated sewage (pollutant) from a point source such as a pipe, sewer, ditch, channel, tunnel, etc into waters of the United States are subject to all the enforcement measures allowed by law. 33 U.S.C. §1362(5)(12)(14)(16)(19) [CWA 502(5)(12)(14)(16)(19)]; 33 U.S.C. §1319 [CWA 309]; 33 U.S.C. 1311(a)(e) [CWA 301]; 40 CFR 122.41(a)(2).

46. On January 17, 2003, former TDEC Commissioner Milton Hamilton, Jr., issued an Administrative Order and Assessment to KUB as a result of multiple SSO violations detailed in the Order from December 11, 2001 – November 30, 2002. The Commissioner's Order charged KUB with polluting waters of the State by violating its

NPDES permits, failing to properly operate and maintain its collection system and by discharging wastewater from locations other than through permitted outfall points. Additionally, the Order charged the Defendant with the failure to make adequate efforts to mitigate the public health hazard associated with sewage overflows. The Order directed KUB to file certain reports over a period of time, to submit a corrective action plan in two phases and meet a schedule of other time lines culminating in full compliance with its NPDES permits by December 31, 2010. Other provisions required KUB to make information, particularly health hazards, readily available to the public through notices to the news media, on KUB's website and specifically a plan by September, 2003 to allow public participation in the preparation of KUB's Correction Action Plan. The Commissioner assessed KUB a civil penalty in the total sum of \$500,000.00, but required payment of \$400,000.00 only upon default.

47. On February 18, 2003, the Defendant appealed the Commissioner's Order and Assessment to the Tennessee WQCB. Again, by cover letter, KUB's legal counsel denominated the action as "a protective appeal", and expressly requested a hearing not be set. Exhibit 7 [Appeal Letter 2]

48. On May 20, 2003, an Administrative Agreed Order was filed with the Tennessee Secretary of State for resolution of the TDEC Commissioner's Order and Assessment dated January 17, 2003. The Agreed Order concludes that KUB violated its 2000 NPDES permits, Part II, A. 4. (proper operation and maintenance), and Part II, C. 3.; and the Tennessee Water Control Act § 69-3-108(a)(b)(1)(3)(6) and TCA 69-3-114(b) by allowing "a large number of collection system overflows" in 2001, "including overflows into streams listed by the department as impaired due to high bacterial levels" (Agreed

Order pages 3-6). Additionally, the Agreed Order details hundreds of overflows into public streets and public parks near public recreational facilities. For calendar year 2002, KUB reported 252 overflows. (Agreed Order page 5) Exhibit 10 – [Agreed Order]

49. Significantly, the Agreed Order includes provisions that define what sanitary sewer overflows will be addressed, remediated, or otherwise eliminated by certain programmatic requirements such as the Sanitary Sewer Overflow Evaluation Report (SSOER), and, provides an exception for other SSOs. Specifically, KUB is required to make sure additional flows resulting from new sewer connections are not connected to parts of the system which have experienced “chronic overflows.” The applicable language in this portion of the Agreed Order states: *“For the purposes of this Section “chronic overflows” means greater than five overflows in any one location (one or more manholes that are collectively within 500 yards of each other) occurring due to the same cause during any 12 month period unless said overflow(s) is due to a storm event in excess of a 2-year 24-hour rainfall.”* (emphasis added) (Agreed Order, Section XIII, para. 6, pp.14-15)

50. Beginning September 30, 2004, the Agreed Order requires KUB to update the Sanitary Sewer Overflow Evaluation Report, the basis for eliminating SSO violations, but permits KUB to exclude certain SSO occurrences: “This SSOER and subsequent SSOERs shall include all previous overflow locations, unless there has been no overflows at that location for more than thirty-six (36) months unless said overflow was the result of a storm event in excess of the 2-year 24 hour rainfall.” (Agreed Order, Section XIII, para. 8, p. 16) (Emphasis added)

51. The practical effect of the Agreed Order is not to require KUB to address, remediate, or otherwise fix all illegal sanitary sewer overflows.

52. Plaintiff alleges that the sanction of SSOs for an indefinite time is a radical departure from and a modification to the 2000 NPDES Permits, without public hearings, that expressly provide that “the permittee shall operate the collection system so as to avoid overflows.” Not only is KUB discharging untreated raw sewage into the waters of the United States without a permit in violation of 33 U.S.C. §1311(a) [CWA, §301], but also in violation of 33 U.S.C. §1342(o)(1)(3)-Anti-backsliding [CWA, §402]. Also, 40 CFR §122.44(1); 122.45(a).

53. In addition to failing to address all Clean Water Act violations for sanitary sewer overflows, the Agreed Order improperly attempts to resolve outstanding NPDES permit issues that remain under administrative appeal as of July 31, 2000 and completely fails to address other violations of the Clean Water Act such as internal plant bypasses and washouts. Neither the original January 17, 2003 Order and Assessment nor the resulting Agreed Order addresses numeric effluent violations and other permit violations committed and being committed by KUB as alleged supra, in paragraphs 30, 33, 34, 35, 36, 38, 39 and 40.

54. The Agreed Order was executed on May 20, 2003 and filed with the Secretary of State on the same day. No evidentiary hearing was held by the Tennessee WQC Board before entering the Agreed Order.

55. The Agreed Order assessed the Defendant “a contingent civil penalty” of \$475,000.00, contingent on the Defendant providing \$120,000.00 funding for a Supplemental Environmental Project (SEP) aimed at environmental education for adults

and children, completely unrelated to violations of Defendant's NPDES permits and/or the CWA. The Defendant has not paid a civil penalty, nor is it required to pay a penalty unless and until it defaults on one or more of the schedules of compliance set forth in the Order [Agreed Order, pp. 17-19]

56. Neither the TDEC nor the Defendant filed the Agreed Order with any state Court of record as allowed in TCA §69-3-115(e) and therefore the Agreed Order remains an Administrative Order. Any civil penalty sought by TDEC in the future must be presented to a court of record as required in TCA §69-3-115(a)(1)2)(D) and (a)(3) for judicial review.

57. Prior to the January 17, 2003 Order and Assessment issued by the former TDEC Commissioner, no notice was provided to the public with an opportunity to comment on the proposed Order as provided in 33 U.S.C. §1319(g)(4) [CWA, 309(g)(4)], and therefore, the Plaintiff had no reasonable opportunity to challenge nor object to the subsequent Agreed Order "contingent" civil penalties, or any provision contained therein.

58. This action is not barred by the Agreed Order. 33 U.S.C. §1319(g)(6) [CWA, 309(g)(6)]

59. Since the filing date of the Agreed Order, May 20, 2003, the Defendant has continued to violate its NPDES permits and Section 301(a)(e) CWA, 33 U.S.C. §1311(a)(e).

A. In June 2003, the Defendant reported the following violations of the terms and conditions of its NPDES permits: Kuwahee (TN0023582), 7 SSOs and 2 bypasses; Loves Creek (TN0021822), 2 SSOs. Collective Exhibit 11.

- B. In July 2003, the Defendant reported the following violations of the terms and conditions of its NPDES permits: Kuwahee (TN0023582, 13 SSOs and 8 bypasses; Loves Creek (TN0021822), 4 SSOs; Fourth Creek (TN0023574), 3 SSOs and 4 bypasses; and East Bridge (TN0061743), 1 SSO. Collective Exhibit 12.
- C. In August 2003, the Defendant reported the following violations of the terms and conditions of its NPDES permits: Kuwahee(TN0023582), 5 SSOs and 2 bypasses; Fourth Creek (TN0023574), 2 SSOs. Collective Exhibit 13.

VI. Causes of Action

60. Plaintiff restates and incorporates the allegations of paragraphs 1 – 59 of this Complaint by reference.
61. Each of the sewage discharges identified in the previous paragraphs are discharges from a point sources or source into navigable waters of the United States or in locations which likely flow into navigable waters of the United States within the meaning of 33 U.S.C. Section 1311, [CWA 301].
62. Defendant has failed in numerous instances enumerated in the aforementioned paragraphs and in the exhibits attached to this Complaint and continues to fail to comply with its NPDES permits including failures to comply with the effluent limitations, to monitor its discharge properly, and to report its monitoring results on DMRs, as a result, defendant has violated Sections 301(a)(e) and 402 CWA, 33 U.S.C. §1311(a)(e) and §1342.
63. Defendant is subject to an injunction ordering the defendant to cease all of its permit violations.

64. Defendant is subject to assessment of civil penalties for its permit violations pursuant to Sections 309(d) and 505 of the Act, 33 U.S.C. §1319(d) and 1365.

65. For the purpose of assessing the maximum penalty for which defendant may be liable, each instance of defendant's violation of its NPDES permits constitutes a separate violation of Section 301(a) pursuant to Section 309(d), 33 U.S.C. §1319(d), for each day on which it has occurred or will occur after the filing of this complaint.

VII. Relief Requested

WHEREFORE, plaintiff respectfully requests this Court to grant the following relief:

A. Declare defendant to have violated and to be in violation of the Clean Water Act, 33 U.S.C. §1311 and 1342;

B. Enjoin the Defendant, Knoxville Utilities Board, from discharging pollutants and waste except in compliance with the prohibitions, terms and conditions of its 2000 NPDES permits;

C. Require and command the Defendant to completely clean up, and adequately protect the public from sewer overflow events, and educate the public about the health hazards created by, unlawful discharges of pollutants and waste;

D. Require and command the Defendant to provide alerts to the local news media including local television channels of sanitary sewer overflows (SSOs) in public streets or public parks or on any public property within 24 hours of the event, or an advanced 24 hour notice if SSOs are anticipated.

- E. Require and command the Defendant to include the public in meaningful participation (other than mere comments) in the preparation of its Phase I and Phase II Corrective Action Plan/Engineering Report (CAP/ER) required in the Agreed Order, Section XIII, para. 5, p. 12-13 and parag.9, pp. 16-17.
- F. Require and command the Defendant to fully comply with the discharge prohibitions, effluent limitations, and requirements of its 2000 NPDES permits;
- G. Require and command the Defendant to fully comply with the reporting requirements of their NPDES permits;
- H. Require and command the Defendant to cease adding any new sewer connections to any part of its sewage collection system, particularly those with chronic overflows, until the Defendant conducts necessary repairs to its sewer lines, pump stations, STPs and other parts of the sewer collection system to fully comply with the terms and conditions of each of its 2000 NPDES permits;
- I. Order the Defendant pay civil penalties of \$25,000.00 per day of violation for each violation documented herein and the exhibits attached hereto, pursuant to 33 U.S.C. §1319(d) and 1365(a);
- J. Retain jurisdiction over this matter until such time as the Defendant has come into compliance with the Clean Water Act, and the prohibitions, terms and conditions of their 2000 NPDES permits;

K. Award the plaintiff costs including reasonable attorney, witness and consultant fees as authorized by the Clean Water Act, 33 U.S.C. §1365(d); and,

L. Award such other relief as this Court deems necessary and proper.

Respectfully Submitted,

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