

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
(Western Division)

THE UNITED STATES OF AMERICA)
and THE STATE OF TENNESSEE, *ex. rel.*)
ROBERT E. COOPER, JR., in his official)
capacity as the Attorney General and)
Reporter of Tennessee)

Plaintiffs,)

v.)

THE CITY OF MEMPHIS)

Defendant.)

Case No. 2:10-cv-02083-SHM-dkv
Hon. Samuel H. Mays, Jr.

AMENDED COMPLAINT

The United States of America, by authority of the Attorney General of the United States and through the undersigned attorneys, acting at the request of the Administrator of the United States Environmental Protection Agency (“EPA”) and the State of Tennessee, *ex. rel.* Robert E. Cooper, Jr., Attorney General and Reporter of Tennessee, acting at the request of the Tennessee Department of Environment and Conservation (“TDEC”), filed a complaint in this matter on February 5, 2010. Following extended settlement discussions among the parties, the United States and Tennessee file this amended complaint and allege as follows:

NATURE OF ACTION

1. This is a civil action for penalties and injunctive relief brought under Sections 301 and 402 of the Clean Water Act (“the Act”), 33 U.S.C. §§ 1311 and 1342, and under Tenn. Code

Ann. §§ 69-3-101 through 138 of the Tennessee Water Quality Control Act (“TWQCA”), against the City of Memphis (“Memphis”), acting by and through the Environmental Engineering Section of the Public Works Department, for discharges of pollutants from at least July 2003 through the date this Complaint is filed, including discharges of pollutants from unpermitted point sources, and for violations of foam effluent limitations and other conditions established in the National Pollutant Discharge Elimination System (“NPDES”) permits issued to Memphis by TDEC pursuant to its EPA-approved permit program under Section 402 of the Act, 33 U.S.C. § 1342.

JURISDICTION AND VENUE

2. This Court has subject matter jurisdiction over this action pursuant to Section 309(b) of the Act, 33 U.S.C. §§ 1319(b), and 28 U.S.C. §§ 1331, 1345, and 1355, and over the Parties. This Court has supplemental jurisdiction over Tennessee’s state law claims under the TWQCA pursuant to 28 U.S.C. § 1367(a) because the state law claims are related to the federal law claims and form part of the same case or controversy.

3. The United States has authority to bring this action on behalf of the Administrator of EPA (“Administrator”) under Section 506 of the Act, 33 U.S.C. § 1366. The Attorney General has the authority to bring this suit on behalf of the State of Tennessee in accordance with Tenn. Code Ann. § 8-6-109 and the common law of Tennessee.

4. Venue is proper in the Western District of Tennessee pursuant to 28 U.S.C. §§ 1391(b) and 1395(a), because it is the judicial district in which Memphis is located and in which the alleged violations occurred.

5. Notice of the commencement of this action has been provided to the State of

Tennessee pursuant to Section 309(b) of the Act, 33 U.S.C. § 1319(b).

DEFENDANT CITY OF MEMPHIS

6. Defendant Memphis is a governmental entity that adopted home rule under Tenn. Const. Art. XI § 9. Memphis is responsible for the operation and maintenance of two major wastewater treatment plants and approximately 2,400 miles of sanitary sewers, 85,000 manholes, and approximately 100 pump stations. Memphis operates its sewage collection and treatment system pursuant to two NPDES permits issued under Section 402(b) of the Act, 33 U.S.C. § 1342 and Tenn. Code Ann. § 69-3-108(e), authorizing the discharge of pollutants from certain outfalls. Memphis collects and transports sewage from external jurisdictions including the: City of Bartlett; Town of Collierville; City of Germantown; City of Lakeland; and Horn-Lake Creek Basin Sewer District, Mississippi.

**CLEAN WATER ACT AND TENNESSEE WATER QUALITY CONTROL ACT
STATUTORY REQUIREMENTS**

7. Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the “discharge of pollutants” by any person into waters of the United States except in compliance with that Section, including, where applicable, a NPDES permit issued pursuant to Section 402 of the Act, 33 U.S.C. § 1342.

8. Similarly, Tenn. Code. Ann. § 69-3-108(b) of the TWQCA prohibits the discharge of pollutants to waters of the State, or to “a location from which it is likely that the discharged substance will move into waters” without a valid permit, and Tenn. Code Ann. § 69-3-114(b) provides that it is illegal to act “in a manner or degree” that is violative of any permit provision. Furthermore, Tenn. Code. Ann. § 69-3-114(a) prohibits the discharge or placement of substances

in a location where the substances, by themselves, or in combination with others, could cause pollution to the waters of the State, as defined in Tenn. Code Ann. § 69-3-103(22).

9. Section 402(a) of the Act, 33 U.S.C. § 1342(a), provides that the permit-issuing authority may issue a NPDES permit which authorizes the discharge of any pollutant, but only in compliance with the applicable requirements of Section 301 of the Act, 33 U.S.C. § 1311, and such other conditions as the Administrator determines are necessary to carry out the provisions of the Act.

10. Section 402(b) of the Act, 33 U.S.C. § 1342(b), provides that EPA may approve a state NPDES permitting program within its jurisdiction. The State, through TDEC, is authorized to issue NPDES permits in Tennessee, and does so in accordance with its TWQCA, Tenn. Code Ann. §§ 69-3-105(h), 107(14), and 108(e), and Tenn. Comp. R. & Reg., chs. 1200-4-1, 1200-4-3, 1200-4-5, 1200-4-10.

11. Section 308 of the Act, 33 U.S.C. § 1318 and Tenn. Code Ann. §§ 69-3-108 and 113, authorize EPA and TDEC to require inspection and monitoring to determine compliance with the Act, the TWQCA, and NPDES permits through Discharge Monitoring Reports (“DMRs”) and quality assurance requirements. Data submitted on DMRs must accurately reflect the pollutants in, and toxicity of, the discharges of the permittee.

12. Section 309(b) of the Act, 33 U.S.C. § 1319(b), authorizes the Administrator to commence a civil action for appropriate relief, including a permanent or temporary injunction, when any person is in violation of Section 301 of the Act, 33 U.S.C. § 1311, or any permit condition or limitation in an NPDES permit issued pursuant to Section 402 of the Act, 33 U.S.C. 1342. TWQCA provides similar authority to the Commissioner. Tenn. Code Ann. §§ 69-3-107,

114, 115, and 117.

13. Section 309(d) of the Act, 33 U.S.C. § 1319(d), provides that any person who violates Section 301 of the Act, 33 U.S.C. § 1311, or violates any permit condition or limitation in a NPDES permit issued pursuant to Section 402 of the Act, 33 U.S.C. § 1342, shall be subject to a civil penalty not to exceed \$32,500 per day for each violation which takes place on or after March 15, 2004, and a civil penalty not to exceed \$37,500 per day for each violation which takes place after January 12, 2009, 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 Improvement Act of 1996 (31 U.S.C. § 3701 note; Pub. L. 104-134, enacted April 26, 1996; 110 Stat. 1321); 40 C.F.R. Part 19 (73 Fed. Reg. 75346 (Dec. 11, 2008)). The TWQCA provides that any person that violates effluent standards, water quality standards, permit terms or conditions, filing requirements, or fails to allow or perform entry, inspecting, monitoring or reporting requirements, is subject to a civil penalty of up to \$10,000 per day for each day during which the act or omission continues. Tenn. Code Ann. § 69-3-115(a)(1). Polluters or violators can also be liable for damages including state investigation and enforcement costs, removing any pollution, and compensation for loss of wildlife, fish, aquatic life and any other actual damages caused by the pollution or violation. Tenn. Code Ann. § 69-3-116.

GENERAL ALLEGATIONS

14. At all times relevant herein, Memphis, by and through the Environmental Engineering Section of its Public Work Department, has operated and maintained wastewater treatment plants ("WWTPs"), and an associated separate sanitary sewer collection system

("sanitary sewer system") which receive and treat wastewater from residential, commercial, and industrial sources within Memphis and surrounding areas. The collection and transmission systems for the WWTPs include gravity sewer lines, force mains, lift stations, pump stations, and manholes.

15. The City of Memphis is a municipality. It is a city created by or pursuant to Tennessee law and has jurisdiction over disposal of sewage, industrial wastes, or other wastes.

16. Because Memphis is a municipality, at all times relevant herein, Memphis is a person, within the meaning of Section 502(5) of the Act, 33 U.S.C. § 1362(5) and Tenn. Code Ann. § 69-3-103(20).

17. The Maynard C. Stiles Wastewater Treatment Plant ("M.C. Stiles WWTP") and T.E. Maxson Wastewater Treatment Plant ("T.E. Maxson WWTP"), as defined by 33 U.S.C. § 1281, are devices and systems used in the storage, treatment, recycling, and reclamation of municipal sewage or industrial wastes of a liquid nature.

18. The M. C. Stiles and T.E. Maxson WWTPs are "treatment works" within the meaning of Section 212(2) of the Act, 33 U.S.C. § 1292(2) and "sewerage systems" under Tenn. Code Ann. § 69-3-103(28).

19. The Memphis sanitary sewer system and M. C. Stiles and T.E. Maxson WWTPs, as defined by 33 U.S.C. § 1362(14), are discernible, confined and discrete conveyances, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, or rolling stock from which pollutants are or may be discharged.

20. The Memphis sanitary sewer system and M.C. Stiles and T.E. Maxson WWTPs are point sources within the meaning of Section 502(14) of the Act, 33 U.S.C. § 1362(14) and

“sources” within the meaning of Tenn. Code Ann. § 69-3-103(29).

21. At all times relevant herein, Memphis has discharged one or more pollutants, including, but not limited to, sewage as defined in 33 U.S.C. § 1362(6), from its sanitary sewer system and the M. C. Stiles and T.E. Maxson WWTPs.

22. At all times relevant herein, Memphis has discharged one or more pollutants, including, but not limited to, sewage defined in Tenn. Code Ann. § 69-3-103 (21), from its sanitary sewer system and the M. C. Stiles and T.E. Maxson WWTPs.

23. The Loosahatchie River and its tributaries (Hydrologic Unit Code 08010209), Wolf River and its tributaries (Hydrologic Unit Code 08010210), Horn Lake-Nonconnah Creek and its tributaries (Hydrologic Unit Code 08010211), and the Lower Mississippi River (Hydrologic Unit Code 08010100) and its tributaries [hereinafter collectively referred to as “Memphis area waters”] are waters of the United States and waters of Tennessee.

24. “Memphis area waters” are “navigable waters” under Section 502(7) of the Act, 33 U.S.C. § 1362(7) and 40 C.F.R. § 122.2, meaning they are waters of the United States, including the territorial seas.

25. “Memphis area waters” are “waters” of the State under Tenn. Code Ann. § 69-3-103(33), meaning any and all water, public or private, on or beneath the surface of the ground, that are contained within, flow through, or border upon Tennessee or any portion thereof, except those bodies of water confined to and retained within the limits of private property in single ownership that do not combine or effect a junction with natural surface or underground waters.

26. At all times relevant herein, Memphis has “discharged pollutants” from “point sources” within the meaning of Section 502(14) of the Act, 33 U.S.C. § 1362(14), into

“navigable waters” within the meaning of Section 502(7) of the Act, 33 U.S.C. § 1362(7).

27. At all times relevant herein, Memphis has discharged “pollutants” from “sources” under Tenn. Code Ann. § 69-3-103 (21), (29), into “waters” of the State under Tenn. Code Ann. § 69-3-103(33).

28. Pursuant to Section 402(a) of the Act, 33 U.S.C. § 1342(a), and Tenn. Code Ann. § 69-3-108(e), TDEC issued Memphis NPDES permits currently in effect for the following WWTPs:

a. M.C. Stiles WWTP was issued Permit Number TN0020711 on March 31, 2000. This permit was administratively extended. The permit was reissued on or about November 30, 2011. The new NPDES permit was appealed an the prior 2000 NPDES permit conditions remain effective to the extent provided by law.

b. T.E. Maxson WWTP was issued Permit Number TN0020729 on March 31, 2000. This permit was administratively extended. The permit was reissued on or about December 6, 2011. The new NPDES permit was appealed an the prior 2000 NPDES permit conditions remain effective to the extent provided by law.

29. At all relevant times herein, Memphis’ NPDES permits have authorized Memphis to discharge treated municipal wastewater from its WWTPs to the Mississippi River at river mile 725 and river mile 738.8, subject to certain limitations and conditions set forth in the NPDES permits.

30. The NPDES permits establish certain limitations on the mass and concentration of pollutants Memphis may discharge from its WWTPs during a given period. The NPDES permits also require Memphis to monitor its discharges and submit periodic DMRs to TDEC.

31. The permits require Memphis at all times to properly operate and maintain all facilities and systems (and related appurtenances) for collection and treatment installed or used by Memphis to achieve compliance with the terms and conditions of the permit. This provision requires the operation of backup or auxiliary facilities or similar systems which are installed by a permittee only when the operation is necessary to achieve compliance with the conditions of the permit.

FIRST CLAIM FOR RELIEF
UNPERMITTED DISCHARGES FROM SANITARY SEWER SYSTEMS

32. Paragraphs 1 through 31 are realleged and incorporated herein by reference.

33. On numerous occasions between July 2003 and the date this amended complaint was filed, Memphis discharged untreated sewage into "Memphis area waters" and other Tennessee "waters" from discharge points within its sanitary sewer system which were not and are not authorized by any NPDES permit.

34. Each of the discharges referred to in Paragraph 33 involved a discharge of pollutants from a point source into navigable waters of the United States and waters of the State, within the meaning of CWA Section 502, 33 U.S.C. § 1362 and Tenn. Code Ann. § 69-3-103(33), without authorization under an NPDES permit or other exception specified in Section 301(a) of the Act, 33 U.S.C. § 1311(a), in violation of CWA Sections 301, 33 U.S.C. § 1311 and Tenn. Code Ann. §§ 69-3-108(b)(6) and 114.

35. Each day of unpermitted discharges by Memphis referred to in Paragraph 33 constitutes a separate violation of CWA Section 301, 33 U.S.C. § 1311 and Tenn. Code Ann. §§ 69-3-108(b)(6), 114, and 115.

36. Under CWA Sections 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); 69 Fed. Reg. 7121 (Feb. 13, 2004); and 73 Fed. Reg. 75346 (Dec. 11, 2008), codified at Title 40 of the Code of Federal Regulations (CFR) Part 19, Memphis is liable for 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 and \$37,500 per day for each violation occurring after January 12, 2009. Under Tenn. Code Ann. § 69-3-115, Memphis is liable for a civil penalty of up to \$10,000 per day during which a violation of Tenn. Code Ann. §§ 69-3-108 and 114 occurs.

37. Unless restrained by an order of the Court, Memphis will continue to violate CWA Section 301, 33 U.S.C. § 1311 and Tenn. Code Ann. §§ 69-3-108 and 114, by discharging untreated sewage from unpermitted discharge points within its sanitary sewer system into “Memphis area waters.”

SECOND CLAIM FOR RELIEF
FAILURE TO COMPLY WITH STANDARD PERMIT CONDITIONS -
PROPER MANAGEMENT, OPERATION, AND MAINTENANCE

38. Paragraphs 1 through 37 are realleged and incorporated herein by reference.

39. On numerous occasions between July 2003 and the date this Complaint was filed, in addition to the discharges referred to in Paragraph 33, Memphis has allowed spills of untreated sewage to occur from various points within its sanitary sewer system that did not reach navigable waters of the United States or waters of Tennessee.

40. From at least July 2003, and continuing through the date this Complaint was filed,

Memphis failed to comply with Tenn. Code Ann. § 69-3-108(e)(3), which is incorporated by reference in Part II.A.4 of each NPDES permit issued by TDEC to Memphis, 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 Memphis, to achieve compliance with the conditions of the permits, as evidenced, in part, by the discharges and spills referred to in Paragraph 33 and 39.

41. Each day Memphis failed to comply with the operation, maintenance, and reporting provisions of the NPDES permits issued to it as set forth in Paragraph 40 constitutes a separate violation of CWA Sections 301 and 402, 33 U.S.C. §§ 1311 and 1342, and Tenn. Code Ann. §§ 69-3-108(e)(3), 114, and 115.

42. Under CWA Sections 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); 69 Fed. Reg. 7121 (Feb. 13, 2004); and 73 Fed. Reg. 75346 (Dec. 11, 2008), codified at Title 40 of the Code of Federal Regulations (CFR) Part 19, Memphis is liable for 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, and civil penalty of up to \$37,500 per day for each violation of CWA Sections 301 and 402, 33 U.S.C. §§ 1311 and 1342, occurring on or after January 12, 2009. Under Tenn. Code Ann. § 69-3-115, Memphis is liable for a civil penalty of up to \$10,000 per day during which a violation of Tenn. Code Ann. §§ 69-3-108 and 114 occurs.

43. Unless restrained by an order of the Court, Memphis will continue to violate

CWA Sections 301 and 402, 33 U.S.C. §§ 1311 and 1342 and Tenn. Code Ann. §§ 69-3-108 and 114, 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 Memphis, to achieve compliance with the conditions of its permits.

THIRD CLAIM FOR RELIEF
FAILURE TO COMPLY WITH FOAM EFFLUENT PERMIT CONDITION

44. Paragraphs 1 through 43 are realleged and incorporated herein by reference.

45. From at least February 2005 until the date this Amended Complaint was filed, Memphis failed to comply with effluent permit condition Part I.A. in its M.C. Stiles WWTP NPDES permit which provides: "There shall be no distinctly visible floating scum, oil, or other matter contained in the wastewater discharge [from the M.C. Stiles WWTP]."

46. On August 28, 2008, an EPA inspector took numerous photos of the M.C. Stiles WWTP which showed foam discharging from the M.C. Stiles WWTP into the Mississippi River. The foam plume from M.C. Stiles is visible in these photographs downstream of the M.C. Stiles Plant.

47. In November and December 2009, a citizens group submitted photographs to EPA that show visible foam effluent discharges from the M.C. Stiles WWTP in the Mississippi River on numerous occasions including: February 2005, January 2006, September 2008, October 2008, November 2008, December 2008, January 2009 and February 2009.

48. Each day Memphis discharged foam from the M.C. Stiles WWTP in violation of the conditions and effluent limitations established in its NPDES permit is a separate violation of the permit. Section 301 of the Act, 33 U.S.C. § 1311, and Tenn. Code Ann. §§ 69-3-108(b), 69-

3-114 and 115.

49. Under CWA Sections 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); 69 Fed. Reg. 7121 (Feb. 13, 2004); and 73 Fed. Reg. 75346 (Dec. 11, 2008), codified at Title 40 of the Code of Federal Regulations (CFR) Part 19, Memphis is liable for 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; and a penalty of up to \$37,500 per for each violation occurring on or after January 12, 2009. Under Tenn. Code Ann. § 69-3-115, Memphis is liable for a civil penalty of up to \$10,000 per day during which a violation of Tenn. Code Ann. §§ 69-3-108 and 114 occurs.

50. Unless restrained by an order of the Court, Memphis will continue to violate CWA Sections 301 and 402, 33 U.S.C. §§ 1311 and 1342 and Tenn. Code Ann. §§ 69-3-108 and 114 by failing to eliminate foam effluent from M.C. Stiles' wastewater discharge.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, the United States of America and the State of Tennessee request that the Court enter judgment on their behalf as follows:

A. Pursuant to Section 309(b) of the Act, 33 U.S.C. § 1319(b), and to Tenn. Code Ann. §§ 69-3-108(b), 114, and 117, order Memphis to undertake a program to achieve permanent and consistent compliance with all terms and conditions of its NPDES permits, the Clean Water Act, the TWQCA, and the regulations promulgated thereunder for all of its WWTPs, including their related collection and transmission systems;

B. Pursuant to Section 309(b) of the Act, 33 U.S.C. § 1319(b) and Tenn. Code Ann. §§ 69-3-108(b), 114, and 117, order Memphis: (a) to take measures to improve operation and maintenance and prevent future overflows of pollutants; (b) to install and maintain backup electrical generators at pumping stations; (c) to repair and maintain deteriorating and broken sewer lines, pumps, and mains; (d) to undertake additional measures to prevent grease buildups and blockages; (e) to undertake measures to prevent the inflow and infiltration of runoff and rainwater into the sanitary sewer system; (f) to provide proper training and audits of Memphis employees to ensure proper operation and maintenance of the City's WWTPs and sanitary sewer system; (g) to undertake measures to prevent the outflow of untreated sewage from the sanitary sewer system; and (h) to take such other action as may be necessary;

C. Pursuant to Section 309(b) of the Act, 33 U.S.C. § 1319(b) assess civil penalties against Memphis of up to \$32,500 per day for each day of violation that occurred on or after March 15, 2004 and a penalty of up to \$37,500 per for each violation occurring on or after January 12, 2009 and pursuant to Tenn. Code Ann. § 69-3-115, assess civil penalties of up to \$10,000 per day during which Memphis violated Tenn. Code Ann. §§ 69-3-108 and 114.

D. Grant the United States and Tennessee such other relief as the Court deems appropriate.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, William W. Siler, Assistant U.S. Attorney, certify that the foregoing has been electronically filed on this date. I further certify that to the best of my knowledge, a true and correct copy of the foregoing, along with a Notice of Electronic Filing, will be served electronically through the Court's ECF system to –

Stephanie D. Matheny, Attorney, P.O. Box 1521, Knoxville, TN 37919, attorney for Tennessee Clean Water Network, Intervenor Plaintiff.

Carmalita P. Carletos-Drayton and Barbaralette G. Davis, City Attorney's Office, 125 N. Main Street, Room 314, Memphis, TN 38103, attorneys for the City of Memphis.

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s/ William W. Siler
Assistant U.S. Attorney

Date: April 16, 2012