

IN THE UNITED STATES DISTRICT COURT
 FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

UNITED STATES OF AMERICA,

and

STATE OF WEST VIRGINIA by and through
 the DEPARTMENT OF ENVIRONMENTAL
 PROTECTION and the DEPARTMENT OF
 HEALTH AND HUMAN RESOURCES,

Plaintiffs,

v.

TOWN OF FORT GAY,

Defendant.

Civ. No. 3:09-0855

COMPLAINT

The United States of America, by authority of the Attorney General of the United States and through the undersigned attorney on behalf of the Administrator of the United States Environmental Protection Agency ("EPA"), and the State of West Virginia ("State") by and through the West Virginia Department of Environmental Protection ("WVDEP") and the West Virginia Department of Health and Human Resources ("WVDHHR"), (collectively, "Plaintiffs") file this Complaint, and allege as follows:

NATURE OF ACTION

I. This is a civil action brought pursuant to Section 504(a) of the Clean Water Act ("CWA"), 33 U.S.C. § 1364(a), and Section 1431 of the Safe Drinking Water Act ("SDWA"), 42 U.S.C. § 300i(a), to require Defendant, the Town of Fort Gay, West Virginia, to abate the imminent and substantial endangerment to the health of persons presented by the discharge of untreated sewage from pipes, manholes and pumping stations, and the potential introduction of

contaminants from untreated sewage into a tributary upstream of the intake for drinking water supplied by the Town of Fort Gay. This action is also brought pursuant to Section 309(b) and (d) of the CWA, 33 U.S.C. § 1319(b) and (d); Section 1414(a)(1) and (b) of the SDWA, 42 U.S.C. § 300g-3(a)(1) and (b); Section 22 of the West Virginia Water Pollution Control Act (“WPCA”), W. Va. Code § 22-11-22; and Chapter 16, Article 1, Section 9a of the West Virginia Code, W. Va. Code § 16-1-9a for injunctive relief and for the assessment of civil penalties against Defendant for numerous violations of the Clean Water Act; the Safe Drinking Water Act; the West Virginia Water Pollution Control Act; Chapter 16, Article I of the West Virginia Code; and the regulations implementing those statutes.

JURISDICTION, VENUE, AUTHORITY AND NOTICE

2. This Court has jurisdiction over the parties and subject matter of this action pursuant to 28 U.S.C. §§ 1331, 1345, 1355, and 1367; Sections 309(b) and 504(a) of the CWA, 33 U.S.C. §§ 1319(b) and 1364(a); and Sections 1414 and 1431(a) of the SDWA, 42 U.S.C. §§ 300g-3, 300i(a).

3. Venue is proper in the Southern District of West Virginia pursuant to 28 U.S.C. §§ 1391(b) and 1395(a), Sections 309(b) and (e) and 504 of the CWA, 33 U.S.C. §§ 1319(b) and (e), 1364, and Sections 1414(b) and (g)(3)(C) and 1431(a) of the SDWA, 42 U.S.C. §§ 300g-3(b) and (g)(3)(C), 300i(a), because it is the judicial district where Defendant is located, where a substantial part of the events or omissions giving rise to the claim occurred, and where the alleged violations occurred.

4. The United States has provided notice of this action to the State pursuant to Section 309(b) of the CWA, 33 U.S.C. § 1319(b), and Section 1414(a) of the SDWA, 42 U.S.C.

§ 300g-3(a), and the WVDEP has joined as plaintiff pursuant to Section 309(e) of the CWA, 33 U.S.C. § 1319(e).

5. Authority to bring this civil action on behalf of the United States is vested in the Attorney General of the United States pursuant to Section 506 of the CWA, 33 U.S.C. § 1366, Section 1450(f) of the SDWA, 42 U.S.C. § 300j-9(f), and 28 U.S.C. §§ 516 and 519.

6. WVDHHR, which has jurisdiction over compliance by public water systems in the State with national primary drinking water regulations and State drinking water regulations, has requested, pursuant to Section 1414(b)(2)(B) of the SWDA, 42 U.S.C. § 300g-3(b)(2)(B), that the United States join it as co-Plaintiff in this matter.

DEFENDANT

7. Defendant, the Town of Fort Gay, is an incorporated municipality located in Wayne County, West Virginia.

8. Defendant is a political subdivision of the State, duly formed under the laws of the State.

9. Defendant is a “person” within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5); Section 1401(12) of the SDWA, 42 U.S.C. § 300f(12); and Section 3(15) of the WPCA, W. Va. Code § 22-11-3(15).

10. Defendant is a “municipality” within the meaning of Section 502(4) of the CWA, 33 U.S.C. § 1362(4) and Section 1401(10) of the SDWA, 42 U.S.C. § 300f(10).

11. Defendant owns and operates a “treatment works” as that term is defined in Section 212(2) of the CWA, 33 U.S.C. § 1292, and a “publicly owned treatment works” (“POTW”) as that term is defined in EPA regulations implementing the CWA, 40 C.F.R. § 122.2 (cross-referencing the definition at 40 C.F.R. § 403.3(q)).

12. Defendant owns and operates the Fort Gay Water Works.

13. The Fort Gay Water Works is a “public water system” within the meaning of Section 1401(4) of the SDWA, 42 U.S.C. § 300f(4), W. Va. Code § 16-1-9a, and W. Va. Code St. R. § 64-3-3.8 that is also a “community water system” within the meaning of Section 1401(15) of the SDWA, 42 U.S.C. § 300f(15), and W. Va. Code St. R. § 64-4-3.10.

14. Defendant is a “supplier of water” within the meaning of Section 1401(5) of the SDWA, 42 U.S.C. § 300f(5).

LEGAL BACKGROUND

Clean Water Act and Water Pollution Control Act

15. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant by any person except as authorized by a National Pollutant Discharge Elimination System (“NPDES”) permit issued by the EPA or an authorized State pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

16. Section 502(12) of the CWA, 33 U.S.C. § 1362(12), defines “discharge of a pollutant” to include “any addition of any pollutant to navigable waters from any point source.”

17. Section 502(7), 33 U.S.C. § 1362(7), defines “navigable waters” to be the “waters of the United States, including the territorial seas.”

18. Section 8 of the WPCA, W. Va. Code § 22-11-8, prohibits the discharge of any pollutant by any person into waters of the State of West Virginia, except, *inter alia*, in compliance with applicable water quality standards and a West Virginia NPDES permit issued pursuant to the WPCA.

19. Section 3(23) of the WPCA, W. Va. Code § 22-11-3(23) defines “waters” as “any and all water on or beneath the surface of the ground, whether percolating, standing, diffused or

flowing, wholly or partially within [the State of West Virginia], or bordering [the State of West Virginia] and within its jurisdiction...[.]”

20. Section 502(6) of the CWA, 33 U.S.C. § 1362(6), and Section 3(17) of the WPCA, W. Va. Code § 22-11-3(17), includes “sewage” in the definition of “pollutant.”

21. Section 502(14) of the CWA, 33 U.S.C. § 1362(14), defines “point source” as “any discernable, confined and discrete conveyance . . . from which pollutants are or may be discharged.”

22. Under Section 402(a) of the CWA, 33 U.S.C. § 1342(a), the Administrator of the EPA may issue NPDES permits to authorize the discharge of pollutants into waters of the United States, subject to the conditions and limitations set forth in such permits.

23. Section 402(b) of the CWA, 33 U.S.C. § 1342(b), provides that a state may establish its own permit program, and after receiving the EPA’s authorization of its program, may issue NPDES permits.

24. At all times relevant to this Complaint, the State of West Virginia has been authorized by EPA to administer an NPDES program for regulating the discharges of pollutants into navigable waters within each state’s jurisdiction. 47 Fed. Reg. 2263-01. Pursuant to W. Va. Code §§ 22-1-5, 22-1-7, and 22-11-4(a), the WVDEP, through the Director of the Division of Water and Waste Management, is the state regulatory agency that administers the NPDES permit program in West Virginia.

25. Pursuant to 40 C.F.R. § 122.41 and W. Va. Code St. R. § 47-10-5, an NPDES permit must include all the conditions in the paragraphs of 40 C.F.R. § 122.41 and W. Va. Code St. R. § 47-10-5, respectively, including the duty to comply with the permit.

26. Section 504 of the CWA, 33 U.S.C. § 1364, authorizes the Administrator of the EPA, upon receipt of evidence that a pollution source or combination of sources is presenting an imminent and substantial endangerment to the health of persons or to the welfare of persons, to bring suit on behalf of the United States to immediately restrain any person causing or contributing to the alleged pollution, to stop the discharge of pollutants causing or contributing to such pollution, or to take such other action as may be necessary.

27. Section 309(b) of the CWA, 33 U.S.C. § 1319(b), authorizes the Administrator of the EPA to commence a civil action to obtain appropriate relief, including a permanent or temporary injunction, when any person: discharges without a permit in violation of Section 301 of the CWA, 33 U.S.C. § 1311; violates any permit condition or limitation in a permit issued under Section 402 of the CWA, 33 U.S.C. § 1342; or violates any order issued by the Administrator of the EPA.

28. Pursuant to Section 309(d) of the CWA, 33 U.S.C. § 1319(d), the court may impose civil penalties not to exceed \$25,000 per day for each day in which such violation occurs on or before January 30, 1997, \$27,500 per day for each day of violation after January 30, 1997 (Pub. L. 104-134, 61 Fed. Reg. 69360 (Dec. 31, 1996), \$32,500 per day for each day in which such violation occurred after March 15, 2004, (69 Fed. Reg. 7121 (Feb. 13, 2004), and \$37,500 for each day in which such violation occurred on or after January 12, 2009 (*see* 73 Fed. Reg. 75340, 75345 (Dec. 11, 2008).

29. Section 22 of the WPCA, W. Va. Code § 22-11-22, authorizes WVDEP to commence a civil action for injunctive relief to compel compliance with, and enjoin violations of, any provision of the WPCA or any term or condition of an NPDES permit issued under the WPCA. Section 22 of the WPCA also provides that any person who violates any provision of an

NPDES permit issued pursuant to Section 8 of the WPCA, W. Va. Code § 22-11-8, is subject to a civil penalty of up to \$25,000 per day for each violation.

Safe Drinking Water Act

30. Section 1412 of the SDWA, 42 U.S.C. § 300g-1, directs the EPA to promulgate regulations governing the provision of safe drinking water.

31. In order to fulfill Section 1412 of the SDWA, the EPA promulgated the National Primary Drinking Water Regulations (“NPDWR”) at 40 C.F.R. Part 141. See 42 U.S.C. § 300f(1).

32. The NPDWR govern the contaminant limitations, monitoring requirements, public notification requirements, and other requirements for regulated drinking water systems.

33. Section 1413 of the SDWA, 42 U.S.C. § 300g-2, provides that the states shall have primary enforcement responsibility for public water systems provided that certain conditions are met.

34. At all times relevant to this Complaint, the State of West Virginia has primary enforcement authority for public water systems within its jurisdiction, and such authority is exercised through the WVDHHR.

35. Section 1411 of the SDWA, 42 U.S.C. § 300g, subjects each public water system to the NPDWR.

36. Section 1401(4) of the SDWA, 42 U.S.C. § 300f(4), and 40 C.F.R. § 141.2, define a “public water system” as “a system for the provision to the public of water for human consumption through pipes or other constructed conveyances, if such system has at least fifteen service connections or regularly serves at least twenty-five individuals.” The term includes any

collection, storage, and distribution facilities under the control of the operator of the system and used primarily in connection with the system.

37. Pursuant to W. Va. Code § 16-1-9a and W. Va. Code St. R. § 64-3-3.8, a “public water system” is defined as “any water supply or system that regularly supplies or offers to supply water for human consumption through pipes or other constructed conveyances, if serving at least an average of twenty-five (25) individuals per day for at least sixty (60) days per year, or which has at least fifteen (15) service connections.”

38. Section 1401(5) of the SDWA, 42 U.S.C. § 300f(5), and 40 C.F.R. § 141.2, define “supplier of water” as “any person who owns or operates a public water system.”

39. Section 1401(15) of the SDWA, 42 U.S.C. § 300f(15), and 40 C.F.R. § 141.2 define a “community water system” as “a public water system which serves at least 15 service connections used by year-round residents or regularly serves at least 25 year-round residents.”

40. Section 1401(6) of the SDWA, 42 U.S.C. § 300f(6) defines “contaminant” as “any physical, chemical, biological, or radiological substance or matter in water.”

41. If an owner or operator of a public water system is in violation of the SDWA or the NPDWR, at the request of and after providing notice to the State, the EPA may bring a civil action pursuant to Section 1414(a) and (b)(2) of the SDWA, 42 U.S.C. § 300g-3(a) and (b)(2). In such civil action, the EPA is authorized to seek both injunctive relief and civil penalties. 42 U.S.C. § 300g-3(b).

42. Similarly, Section 1431 of the SDWA, 42 U.S.C. § 300i(a), authorizes the EPA, upon receipt of information that a contaminant is present in or is likely to enter a public water system and may present an imminent and substantial endangerment to the health of persons, and where appropriate State and local authorities have not acted to protect the health of such persons,

to take such actions as deemed necessary to protect the health of such persons. These actions may include commencing a civil action for appropriate remedies, including a restraining order or permanent or temporary injunction. 42 U.S.C. § 300i(a).

43. Section 1431 of the SDWA, 42 U.S.C. § 300i(a), provides that to the extent the Administrator of the EPA determines it to be practicable in light of such imminent endangerment, the Administrator shall consult with State and local authorities to confirm the correctness of the information on which such action proposed to be taken under Section 1431 of the SDWA is based and to ascertain the action which such authorities are or will be taking.

44. Section 1414(b) of the SDWA, 42 U.S.C. § 300g-3(b), provides that in a civil action to require compliance with NPDWRs, the court may enter such judgment as protection of public health may require and impose civil penalties not to exceed \$25,000 per day for each day in which such violation occurs on or before January 30, 1997, \$27,500 per day for each day of violation after January 30, 1997 (Pub. L. 104-134, 61 Fed. Reg. 69360 (Dec. 31, 1996), \$32,500 per day for each day in which such violation occurred after March 15, 2004, (69 Fed. Reg. 7121 (Feb. 13, 2004), and \$37,500 for each day in which such violation occurred on or after January 12, 2009 (*see* 73 Fed. Reg. 75340, 75345 (Dec. 11, 2008)).

GENERAL ALLEGATIONS

45. The Town of Fort Gay is located in Wayne County, West Virginia.

46. Tug Fork is a river located to the west of the Town of Fort Gay.

47. Tug Fork is a perennial tributary of the Big Sandy River, which is in turn a perennial tributary of the Ohio River.

48. Mill Creek is a perennial tributary of Tug Fork.

49. Mill Creek, Tug Fork, the Big Sandy River, and the Ohio River are “waters of the United States” within the meaning of the Clean Water Act.

Defendant’s Wastewater Treatment Plant

50. Defendant owns and operates a sewage collection system that serves approximately 300-400 accounts.

51. Defendant’s sewage collection system includes several miles of sewer pipes and interceptor pipes of various sizes, 30 manholes, one lift station, and nine pump stations.

52. Defendant’s nine sewage pump stations are known as:

- a. The Apperson Pump Station
- b. The Bridge Mart Pump Station
- c. The Cass Street A Pump Station
- d. The Cass Street B Pump Station
- e. The Cass Street C Pump Station
- f. The Cedar Heights A Pump Station
- g. The Cedar Heights B Pump Station
- h. The Orchard Street Pump Station; and
- i. The Route 37 Pump Station.

53. Defendant’s sewage collection system conveys sewage to a sewage treatment plant known as the Fort Gay Wastewater Treatment Plant.

54. Defendant’s sewage treatment plant is designed to treat approximately 92 thousand gallons of sewage a day.

55. Defendant’s sewage treatment plant is an aerated lagoon system.

56. The sewer pipes in Defendant's sewage collection system are all separate sanitary sewers, meaning that they are designed to solely carry wastewater, rather than a combination of wastewater and stormwater.

57. On or about December 18, 1996, the State issued NPDES Permit No. WV0085359 to Defendant ("1996 NPDES Permit").

58. NPDES Permit No. WV0085359 authorizes Defendant to discharge treated wastewater from Defendant's sewage treatment plant into the Big Sandy River, subject to the effluent limitations and other conditions stated in the permit.

59. NPDES Permit No. WV0085359 was re-issued to Defendant on February 8, 2005 and remains effective until February 7, 2010 ("2005 NPDES Permit").

60. NPDES Permit No. WV0085359 does not authorize Defendant to discharge untreated sewage from its sewage collection system into waters of the United States.

Defendant's Public Water System

61. Defendant owns and operates a water treatment plant that supplies drinking water through pipes to approximately 860 service connections to residents of Fort Gay and the surrounding community.

62. Defendant's water treatment plant and the associated water distribution system are collectively known as the Fort Gay Water Works.

63. The Fort Gay Water Works has more than 15 service connections that are used year-round by residents.

64. The Fort Gay Water Works regularly serves more than 25 year-round residents.

65. The Fort Gay Water Works intake is located along the Tug Fork River approximately 0.37 miles downstream from the intersection of Mill Creek and Tug Fork.

Potential Contamination/Pollution of Water

66. When one of the pump stations listed in paragraph 52 fails, untreated sewage will overflow from the pump station and discharge onto the ground.

67. When untreated sewage discharges from any of the following pump stations (the “Tier I Pump Stations”) onto the ground, such discharges are likely to flow into Mill Creek, and from there into Tug Fork, upstream of the water intake for the Fort Gay Water Works:

- a. the Route 37 Pump Station;
- b. the Cedar Heights A Pump Station;
- c. the Cedar Heights B Pump Station; or
- d. the Orchard Street Pump Station.

68. When untreated sewage enters Tug Fork via Mill Creek, it is likely to enter the Fort Gay Water Works and contaminate the drinking water supplied to the Town of Fort Gay.

69. Whenever untreated sewage is being discharged from the following pump stations (the “Tier II Pump Stations”) onto the ground, such discharges are likely to reach waters of the United States downstream of the water intake for the Fort Gay Water Works:

- a. The Bridge Mart Pump Station;
- b. The Cass Street A Pump Station; or
- c. The Cass Street B Pump Station.

Health Risks Related to Sewage

70. When untreated sewage leaks, spills or overflows from Defendant’s pump stations or sewage pipes onto the ground, it can flow and has flowed onto residential yards, basements, and public streams and rivers, where people can come into contact with it.

71. Untreated sewage contains viruses and protozoa as well as other parasites.

72. Infection with organisms contained in untreated sewage can cause a number of adverse health effects ranging from minor illnesses such as sore throats and mild gastroenteritis (causing stomach cramps and diarrhea) to life-threatening ailments such as cholera, dysentery, infectious hepatitis, and severe gastroenteritis.

73. Children, the elderly, people with weakened immune systems, and pregnant women are at more risk for adverse consequences from such infections than the general population.

Defendant's Compliance History

74. Since January 2003 through the present, the WVDEP has issued at least 23 Notices of Violation to Fort Gay concerning its wastewater treatment and conveyance system.

75. In April 2007, the WVDHHR completed a Sanitary Survey of Defendant's public water system. The Sanitary Survey noted numerous significant and minor deficiencies concerning operator compliance with State regulations, overall system management and operation, treatment, finished water storage and the distribution system.

76. On various dates from October 2002 through the present, boil water notices have been issued to the customers of the Fort Gay Water Works for events including, but not limited to, frequent line breaks, lack of proper certified water operator coverage, and equipment malfunction.

FIRST CLAIM FOR RELIEF (CWA § 504 and W. Va. Code § 22-11-22: Imminent and Substantial Endangerment to the Health of Persons) (Federal and State Claim)

77. Paragraphs 1-76 are realleged and incorporated herein by reference.

78. Defendant has repeatedly allowed untreated sewage to discharge from Tier I Pumping Stations, including but not limited to the following incidents:

- a. From approximately February 4, 2007 until approximately February 10, 2007, Defendant discharged untreated sewage from the Orchard Street Pump Station into Mill Creek;
- b. From approximately March 5, 2007 until approximately April 11, 2007, Defendant discharged untreated sewage from the Route 37 Pump Station into Mill Creek;
- c. From approximately March 7, 2007 until approximately March 13, 2007, Defendant discharged untreated sewage from the Orchard Street Pump Station into Mill Creek;
- d. From approximately September 17, 2007 until approximately October 1, 2007, Defendant intermittently discharged untreated sewage from the Orchard Street Pump Station into Mill Creek;
- e. From approximately October 1, 2007 until at least October 31, 2007, Defendant continuously discharged untreated sewage from the Orchard Street Pump Station into Mill Creek;
- f. From approximately April 21, 2008 until approximately May 15, 2008, Defendant discharged untreated sewage from the Orchard Street Pump Station into Mill Creek;
- g. From approximately December 8, 2008 through approximately February 6, 2009, Defendant discharged untreated sewage from the Cedar Heights A Pump Station into Mill Creek;
- h. From at least January 15, 2009 and ending sometime before February 3, 2009, Defendant discharged untreated sewage from the Orchard Street Pump Station into Mill Creek; and
- i. On or about May 13, 2009, the WVDEP observed that the Route 37 Pump Station was not operating and was discharging untreated sewage into Mill Creek.

79. Defendant has repeatedly allowed untreated sewage to discharge from Tier II Pumping Stations, including but not limited to the following incident: from approximately January 9, 2009 to approximately February 6, 2009, Defendant discharged untreated sewage from the Cass Street A Pump Station into the Big Sandy River.

80. From approximately January 28, 2009 until approximately February 3, 2009, a pipe blockage caused sewage to overflow near 3120 Court Street, Fort Gay, West Virginia, and likely entered Mill Creek.

81. Overflowing sewage pumping stations and broken sewer pipes constitute a “pollution source or combination of sources” within the meaning of Section 504(a) of the Clean Water Act, 33 U.S.C. § 1364(a).

82. Defendant’s discharges of untreated sewage from its wastewater collection and conveyance system constitute a “discharge of pollutants” as defined in Section 502(12) of the CWA, 33 U.S.C. § 1362(12).

83. Defendant, as the owner and operator of the wastewater collection and conveyance system, is a “person causing or contributing to the alleged pollution” within the meaning of Section 504 of the CWA, 33 U.S.C. § 1364.

84. Under W. Va. Code St. R. § 47-10-5.4, a permittee has a duty to take all reasonable steps to minimize or prevent any discharge in violation of its NPDES permit which has a reasonable likelihood of adversely affecting human health or the environment.

85. Defendant has failed to take all reasonable steps to minimize or prevent any discharge in violation of its NPDES permit which has a reasonable likelihood of adversely affecting human health or the environment.

86. Due to the condition of Defendant's wastewater collection and conveyance system, pump stations are likely to fail again and discharges due to line breaks or overflows are likely to occur in the near future causing untreated sewage to be released onto public and private property and reach waters of the United States.

87. The risk of future discharges of untreated sewage from Defendant's wastewater collection and conveyance system is presenting an "imminent and substantial endangerment to the health and welfare of persons" within the meaning of Section 504 of the CWA, 33 U.S.C. § 1364.

88. Unless Defendant is ordered by the Court, pursuant to Section 504 of the Clean Water Act, 33 U.S.C. § 1364, and W. Va. Code § 22-11-22, to take steps immediately to cease all unpermitted discharges of untreated sewage, to undertake an expeditious repair and rehabilitation program of the sewage pumping stations, and to take such other action as may be necessary, such discharges will continue to present an imminent and substantial endangerment to the health and welfare of persons.

SECOND CLAIM FOR RELIEF
(SWDA § 1431: Imminent and Substantial Endangerment to the Health of Persons)
(Federal and State Claim)

89. Paragraphs 1-88 are realleged and incorporated herein by reference.

90. Untreated sewage is a "contaminant" as defined by Section 1401(6) of the SDWA, 42 U.S.C. § 300f(6).

91. In February 2009 inspection, the EPA found the following problems with the Fort Gay Water Works:

- a. the water intake screen had been removed;
- b. rapid mixers in the rapid mixing tank did not work; and

c. back-up pumps were missing for the raw water feed pumping, transfer pumping between the coagulation system and the filter, and high pressure service pumping.

92. The operating condition of the Fort Gay Water Works may limit its ability to treat drinking water.

93. The Fort Gay Water Works, even in peak operating condition, may not be capable of rendering water contaminated with untreated sewage safe to drink.

94. The consumption of drinking water supplied by the Fort Gay Water Works during or following a discharge of untreated sewage from the Tier I Pump Stations may present a threat to human health.

95. Upon information and belief, Defendant has not issued boil water notices to its customers in response to the discharges from Tier I pump stations.

96. Due to the condition of the Tier I Pump Stations, they are likely to fail again in the near future causing untreated sewage, a contaminant, to enter Mill Creek, where it is likely to be conveyed to Tug Fork and then enter the Fort Gay Water Works.

97. The introduction of untreated sewage into the raw water supply of the Fort Gay Water Works presents or may present an imminent and substantial endangerment to the health of persons.

98. Despite the best efforts and actions of the WVDHHR, and other state and local authorities, the health of persons using Defendant's public water system continues to be at risk.

99. Unless enjoined by an order of the Court pursuant to SDWA § 1431, 42 U.S.C. 300i, Defendant will continue to violate the SDWA.

THIRD CLAIM FOR RELIEF
(CWA § 301(a): Unpermitted Discharges of Pollutants into Waters of the United States)
(Federal and State Claim)

100. Paragraphs 1-99 are realleged and incorporated herein by reference.

101. Defendant does not have a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, or W. Va. Code § 22-11-8, to discharge pollution into waters of the United States or the State from any of the pump stations identified in Paragraph 52.

102. Defendant has discharged untreated sewage into waters of the United States and the State from pump stations, manholes and pipes on numerous occasions, including some or all of the discharges listed in paragraphs 78, 79, and 80.

103. Defendant's many unpermitted discharges of raw sewage have resulted in whole or in part from Defendant's failure to properly manage, operate, and maintain its collection and conveyance system and the failure to have on-line and in operation those systems of treatment and control necessary to achieve compliance with the respective NPDES permits.

104. Defendant has failed to take all measures necessary to contain and clean up such discharges of pollutants to State waters as required by the WVDEP Emergency Response Spill Alert System found in Section IV.1 of Defendant's currently effective NPDES permit and Section F.1 of Defendant's 1996 NPDES permit.

105. Each day of each unpermitted discharge of pollutants to waters of the United States or the State is a separate violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a), or Section 8 of WPCA, W. Va. Code § 22-11-8, respectively.

106. Sections 309(b) and (d) of the CWA, 33 U.S.C. §§ 1319(b) and (d), provide that any person who violates Sections 301 or 308 of the CWA, 33 U.S.C. §§ 1311 or 1318, shall be subject to injunctive relief and a civil penalty. The statutory maximum civil penalty amounts that may be awarded per day for each violation are set forth in Paragraph 28.

107. Section 22 of the WPCA, W. Va. Code § 22-11-22, provides that any person who violates any provision of an NPDES permit issued pursuant to Section 8 of the WPCA, W. Va.

Code § 22-11-8, shall be subject to injunctive relief and civil penalty. The statutory maximum civil penalty amount that may be awarded per day for each violation are set forth in Paragraph 29.

108. Defendant will continue to discharge pollutants to waters of the United States and the State without a permit in violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a), and Section 8 of the WPCA, W. Va. Code § 22-11-8, unless enjoined by the Court.

**FOURTH CLAIM FOR RELIEF
(CWA: Failure to Comply with NPDES Permit)
(Federal and State Claim)**

109. Paragraphs 1-108 are realleged and incorporated herein by reference.

110. Section IV.2 of Defendant's currently effective 2005 NPDES permit, Section F.2 of Defendant's 1996 NPDES Permit, 40 C.F.R. § 122.41(6)(i), and W. Va. Code St. R. § 47-10-5.12c require Defendant to orally report to the WVDEP any noncompliance with the NPDES permit, including but not limited to spills or accidental discharge, which may endanger health or the environment, within 24 hours from the time that Defendant becomes aware of the circumstances. Within 5 days of the time Defendant becomes aware of the circumstances, a written submission shall also be submitted providing a description of the noncompliance and its cause; the period of noncompliance, including exact dates and times; and if the noncompliance has not been corrected, the anticipated time it is expected to continue; and steps taken or planned to reduce, eliminate, and prevent re-occurrence of noncompliance.

111. On numerous occasions since 2004, Defendant has failed to fully and properly report unpermitted discharges of raw sewage from its POTW system in accordance with such reporting requirements.

112. Section C.3 of Defendant's 2005 NPDES Permit requires the operation and maintenance of Defendant's sewage treatment facility be performed or supervised by a certified

operator possessing at least a Class I certificate for Waste Water Treatment Plant Operators issued by the State.

113. Upon information and belief, since 2006 a maintenance employee for the Town of Fort Gay has performed and supervised day-to-day operation and maintenance of the facility, rather than a Class I certified operator.

114. Defendant's 2005 NPDES Permit, Appendix A, Part II.1; 1996 NPDES Permit, Section D.1; and W. Va. Code St. R. § 47-10-5.5 require Defendant at all times to properly operate and maintain all facilities and systems of treatment and control and related appurtenances which are installed or used by permittee to achieve compliance with the conditions of its permit. This provision further requires the operation of back-up or auxiliary facilities or similar systems which are installed by permittee to achieve compliance with the conditions of the permit.

115. Defendant has:

- a. failed to install and/or maintain backup pumps at eight pump stations in accordance with design requirements;
- b. failed to install and/or maintain necessary equipment for providing emergency backup power to prevent an overflow from critical pump stations;
- c. failed to keep pump stations free of grease and debris;
- d. failed to properly maintain the facility's lagoon aerators and remove excess sludge and vegetation from lagoon perimeters; and
- e. failed to properly maintain the facility's chlorine contact unit and flow meter.

116. Section C.20 of Defendant's currently effective NPDES permit and Section G.11 of the 1996 NPDES Permit require Defendant to implement a program to identify and eliminate

sources of inflow and infiltration (I/I) within 90 days of the permit effective date as well as to provide written quarterly progress reports thereafter on implementation of the program.

117. Defendant has neither submitted a plan to address inflow and infiltration (I/I) nor submitted quarterly progress reports for I/I reduction within 90 days of the initial permit effective dates or at any time to date.

118. Defendant's 1996 NPDES Permit required Defendant to sample once per month the treated wastewater discharged from its main outfall, 001, and test the levels of total Kjeldahl nitrogen according to specified protocols in order to determine whether it is in compliance with discharge limits in its permit.

119. Upon information and belief, Defendant has never tested its discharges of wastewater for total Kjeldahl nitrogen.

120. Defendant's 2005 NPDES Permit requires Defendant to sample at specified intervals the treated wastewater discharged from its main outfall, 001, and test the levels of specified pollutants, including five-day biochemical oxygen demand ("BOD₅"), total residual chlorine, total recoverable zinc, total recoverable lead, total recoverable copper, total phosphorous, and total nitrogen. Defendant must also measure the flow of water through the plant and test the percent removal of biochemical oxygen demand and total suspended solids.

121. Upon information and belief, Defendant never completed the required sampling, testing or reporting for BOD₅, total residual chlorine, total recoverable zinc, total recoverable lead, total recoverable copper, total phosphorous, or total nitrogen. In addition, Defendant has not measured or reported flow through the plant or completed influent sampling to determine percent removal of biochemical oxygen demand and total suspended solids.

122. Section A of Defendant's 1996 and 2005 NPDES permits contain effluent limitations for its POTW based on Federal Water Quality Standards for pollutants such as BOD₅, TSS, and fecal coliform bacteria.

123. On numerous occasions since 2004, Defendant has discharged pollutants, including but not limited to, fecal coliform bacteria, BOD₅, TSS, total residual chlorine, and ammonia nitrogen, in violation of the effluent limitations authorized in the NPDES permit.

124. Section C.8 and Appendix A, Part III.2 of Defendant's 2005 NPDES Permit, and Section E.2 of Defendant's 1996 NPDES Permit, require Defendant to submit to the WVDEP a monthly Discharge Monitoring Report ("DMR") no later than 20 days or postmarked no later than 15 days following the end of each month.

125. Defendant failed to complete and/or timely submit certified DMRs to the WVDEP for the periods between August through December 2004, January through December 2005, January through December 2006, February through December 2007, January through December 2008, and January through February 2009.

126. Appendix A, III.6 of Defendant's currently effective NPDES permit, and Section E.6. of Defendant's 1996 NPDES Permit require all records of monitoring taken pursuant to the permit be recorded and retained for at least three years. In addition, Appendix A, I.10(b) of Defendant's 2005 NPDES Permit and Section C.10(b) of Defendant's 1996 NPDES Permit require Defendant to maintain records for inspection/copying.

127. On various dates since May 2001, Defendant has failed to retain and produce upon inspection self-monitoring records for sampling, analysis, or flow measurement.

128. Since May 2001, Defendant has failed to maintain adequate operation and maintenance records.

129. Sections 309(b) and (d) of the CWA, 33 U.S.C. §§ 1319(b) and (d), provide that any person who violates any permit condition or limitation in an NPDES permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, shall be subject to injunctive relief and a civil penalty. The statutory maximum civil penalty amounts that may be awarded per day for each violation are set forth in paragraph 28.

130. Section 22 of the WPCA, W. Va. Code § 22-11-22, provides that any person who violates any provision of an NPDES permit issued pursuant to Section 8 of the WPCA, W. Va. Code § 22-11-8, shall be subject to injunctive relief and civil penalty. The statutory maximum civil penalty amount that may be awarded per day for each violation are set forth in Paragraph 29.

131. Defendant will continue to violate its NPDES permit unless enjoined by the Court.

**FIFTH CLAIM FOR RELIEF
(CWA: Failure to Comply with EPA Administrative Order)
(Federal Claim Only)**

132. Paragraphs 1-131 are recalled and incorporated herein by reference.

133. On or about January 3, 2003, the EPA issued an Order for Compliance ("2003 EPA Order") to Defendant.

134. Defendant consented to the terms of the 2003 EPA Order.

135. The 2003 EPA Order noted several violations of federal law including: frequent exceedences of NPDES permit limits; failure to retain records; failure to report overflows; failure to perform adequate operation and maintenance of the facility; failure to properly take, preserve, and analyze samples; and failure to properly report discharges.

136. The 2003 EPA Order required Defendant, among other things, to perform the following tasks by specified deadlines:

- a. submit a written process control strategy for the treatment plant that addressed specified criteria and implement the strategy upon approval by the EPA;
- b. review the plant design to determine its adequacy to consistently comply with its NPDES permit;
- c. sample the lagoon to determine the depth of accumulated sludge;
- d. submit a plan and schedule for modifying the facility so that it can consistently comply with its NPDES permit;
- e. review the laboratory program to determine what lab and sampling equipment must be purchased, and prepare and submit to the EPA a schedule for purchasing such equipment;
- f. develop and submit to the EPA Standard Operating Procedures (SOPs) that outline all sampling, lab procedures, and Quality Assurance/Quality Control (QA/QC) measures for review;
- g. develop and submit to the EPA a written preventative maintenance program;
- h. develop a budget for the WWTP with plans for equipment replacement and lagoon cleaning; and
- i. provide quarterly progress reports to the EPA detailing Defendant's compliance with the 2003 EPA Order.

137. Upon information and belief, Defendant has not performed any of the tasks listed in Paragraph 136.

138. Sections 309(b) and (d) of the CWA, 33 U.S.C. §§ 1319(b) and (d), provide that any person who violates an order issued by the EPA Administrator under Section 309(a), 33

U.S.C. § 1319(a), shall be subject to injunctive relief and a civil penalty. The statutory maximum civil penalty amounts that may be awarded per day for each violation are set forth in paragraph 28.

139. Defendant will continue to violate such Administrative Order unless enjoined by the Court.

**SIXTH CLAIM FOR RELIEF
(CWA: Failure to Comply with State Administrative Orders)
(State Claim Only)**

140. Paragraphs 1-139 are realleged and incorporated herein by reference.

141. On February 3, 2006, the WVDEP issued Order No. 5839 to Defendant, ordering it, among other things, to:

- a. comply with all terms and conditions of its NPDES permit; and
- b. submit a proposed corrective action plan detailing how Defendant will come into compliance with its permit.

142. On October 31, 2007, the WVDEP issued Order No. 6330 to Defendant, ordering it, among other things, to:

- a. immediately cease unlawful discharge from the Bridge Mart lift station;
- b. immediately take all measures necessary to remediate the affected areas, including removing certain sewage materials and disinfecting the land surface; and
- c. immediately take measures to come into compliance with its NPDES permit.

143. As detailed in the Fourth Claim for Relief, above, Defendant is not complying with all terms and conditions of its NPDES permit.

144. Pursuant to West Virginia Code, Chapter 22, Article 11, Section 22, any person who fails to comply with an order of the Director of the WVDEP is subject to injunctive relief and a civil penalty not to exceed \$25,000 per day of such violation.

145. Defendant will continue to violate such Administrative Orders unless enjoined by the Court.

SEVENTH CLAIM FOR RELIEF
(Violation of State Drinking Water Regulations)
(Federal and State Claim)

146. Paragraphs 1-145 are recalled and incorporated herein by reference.

147. Pursuant to Section 1411 of the SDWA, 42 U.S.C. § 300g, Defendant must comply with the NPDWR located at 40 C.F.R. Part 141.

148. Pursuant to 40 C.F.R. § 141.70(c), a public water system using a surface water source must be operated by qualified personnel who meet the requirements specified by the State.

149. West Virginia Water System Operator Regulations require all Class II public water systems to have a certified operator with certification equal to or greater than the system classification present at all times when the plant is operational. W. Va. Code St. R. § 64-4-5.1.

150. On August 26, 2008, the WVDHHR observed the Fort Gay Water Works in operation without anyone present.

151. Pursuant to Section 1414(b) of the SDWA, 42 U.S.C. § 300g-3(b), Defendant is liable for civil penalties that may be awarded per day as set forth in paragraph 44, and for injunctive relief requiring compliance with the NPDWRs.

152. Upon information and belief, the unattended operation of the Fort Gay Water Works was not due to accident, sudden illness, or other emergency.

153. Defendant willfully operated the Fort Gay Water Works unattended on August 26, 2008.

154. Pursuant to W. Va. Code § 16-1-9a(d), Defendant is liable for injunctive relief and, for willful violations of W. Va. Code St. R. § 64-4-5.1, for civil penalties of up to \$5,000 per day.

155. Defendant will continue to violate 40 C.F.R. § 141.70(c) and W. Va. Code St. R. § 64-4-5.1 unless enjoined by the Court.

PRAYER FOR RELIEF

WHEREFORE, the United States of America respectfully requests that this Court grant the following relief:

1. A preliminary and permanent injunction directing Defendant to take such steps as are necessary to eliminate or minimize the imminent and substantial risk to human health posed by the unpermitted discharge of untreated sewage from its POTW collection and conveyance system, in accordance with Section 504(a) of the CWA, 33 U.S.C. § 1364, and Section 1431 of the SDWA, 42 U.S.C. § 300i(a);

2. A preliminary and permanent injunction directing Defendant to take all steps necessary to come into permanent and consistent compliance with the CWA, including but not limited to the prohibition on unpermitted discharges contained in Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

3. A permanent injunction directing Defendant to take all steps necessary to comply with all terms and conditions of its NPDES permits that relate to its POTW and its collection and conveyance system, including but not limited to the General Conditions requiring "Proper Operation and Maintenance";

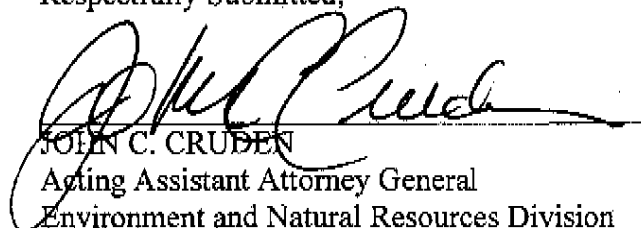
4. A permanent injunction directing Defendant to take all steps necessary to come into permanent and consistent compliance with the SDWA, 42 U.S.C. §§ 300f-300j-26 and the NPDWR, 40 C.F.R. Part 141;

5. A judgment assessing civil penalties against Defendant and in favor of the United States and the State;

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

7. Grant such other and further relief as this Court deems appropriate.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "John C. Cruden", is written over a horizontal line. The signature is fluid and cursive.

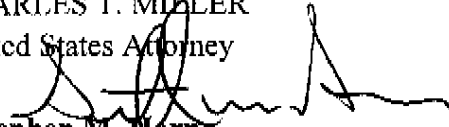
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Dated: July 27, 2009



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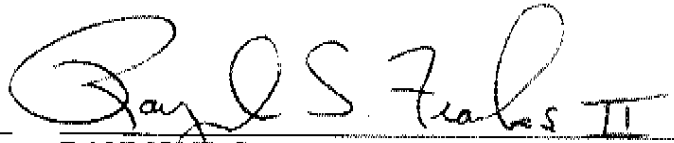
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Chris Curtis

7/16/09
Date

Acting Commissioner

Bureau for Public Health

WV Department of Health and Human Resources