

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

UNITED STATES OF AMERICA,)	
)	
and)	
)	
THE STATE OF OHIO,)	
)	
Plaintiffs,)	
)	Civil Action No. 18-cv-90
v.)	
)	
THE CITY OF MIDDLETOWN, OHIO,)	
)	
)	
Defendant.)	
_____)	

COMPLAINT

The United States of America, by authority of the Attorney General of the United States, and on behalf of the Administrator of the United States Environmental Protection Agency (“U.S. EPA”), and the State of Ohio (“State”), by the authority of its Attorney General and on behalf of the Ohio Environmental Protection Agency (“OEPA”), allege as follows:

Nature of Action

This is a civil action brought by the United States and the State under the Clean Water Act (“CWA”) against the City of Middletown, Ohio. For many years, Middletown has illegally discharged sewage and other pollutants from its sewage collection and treatment systems to the Great Miami River. Pursuant to Sections 309(b) and (d) of the CWA, 33 U.S.C. § 1319(b) and (d), this action seeks injunctive relief and the assessment of civil penalties against Middletown for violations of the conditions and limitations of Middletown’s National Pollutant Discharge Elimination System (“NPDES”) permits.

Jurisdiction, Venue, Authority, and Notice

1. This Court has jurisdiction over the subject matter of this action pursuant to Section 309(b) of the CWA, 33 U.S.C. § 1319(b), and 28 U.S.C. §§ 1331, 1345, and 1355. The State of Ohio (“State”) is a party to this action pursuant to Section 309(e) of the CWA, 33 U.S.C. § 1319(e).

2. This Court has supplemental jurisdiction over the State law claims alleged herein pursuant to 28 U.S.C. § 1367(a) because the State claims are related to the federal claims and form part of the same case or controversy.

3. Venue is proper in the Southern District of Ohio pursuant to Section 309(b) of the CWA, 33 U.S.C. § 1319(b), and 28 U.S.C. § 1391(b), because Middletown is located in this judicial district and the alleged violations occurred in this district.

4. As a signatory to this Complaint, the State has actual notice of the commencement of this action in accordance with Section 309(b) of the CWA, 33 U.S.C. § 1319(b).

5. The Attorney General of the United States is authorized to appear and represent the United States in this action pursuant to Section 506 of the CWA, 33 U.S.C. § 1366, and 28 U.S.C. §§ 516 and 519.

6. The Ohio Attorney General is authorized to appear and represent the State in this action pursuant to Ohio Rev. Code § 6111.07(B).

The Parties

7. Plaintiff United States is acting on behalf of the Administrator of EPA.

8. Plaintiff State of Ohio is acting at the request and on behalf of the Director of OEPA. Plaintiff State of Ohio is a “State” and “person” within the meaning of Section 502(4)

and (5) of the CWA, 33 U.S.C. § 1362(4) and (5), and a “person” within the meaning of Ohio Rev. Code § 6111.01(I).

9. Section 309(e) of the CWA requires that a state be joined as a party when the United States sues a municipality of the State. The State of Ohio is a co-plaintiff, along with the United States, in this action.

10. Defendant City of Middletown is a political subdivision of the State of Ohio located in Butler and Warren Counties in Ohio. Middletown is a “municipality” and a “person” within the meaning of Sections 502(4) and (5) of the CWA, 33 U.S.C. §§ 1362(4) and (5), and a “person” within the meaning of Ohio Rev. Code § 6111.01(I) and Ohio Admin. Code 3745-33-01(Z).

11. Middletown owns and operates a wastewater treatment plant, a system of interceptors, and other wastewater conveyance and treatment equipment and infrastructure (collectively, the “sewer system”). Middletown’s sewer system includes combined sewers, which convey both sanitary sewage and storm water, and separate sewers, which convey only sanitary sewage.

Statutory Background

Federal Clean Water Act

12. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the “discharge of any pollutant” by any person into navigable waters of the United States except in compliance with that Section, and, where applicable, an NPDES permit issued by U.S. EPA or an authorized state pursuant to Section 402 of the Act, 33 U.S.C. § 1342.

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

14. Section 502(6) of the CWA defines “pollutant” to include sewage. 33 U.S.C. § 1362(6).

15. Section 502(14) of the CWA defines a “point source” as “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel . . . from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14).

16. Section 502(7) of the CWA defines “navigable waters” as “the waters of the United States, including the territorial seas.” 33 U.S.C. § 1362(7). “Waters of the United States” has been further defined to include, among other things: (1) all waters that are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters that are subject to the ebb and flow of the tide; (2) all interstate waters; and (3) tributaries of such waters. 40 C.F.R. § 122.2.

17. Section 402(a) of the CWA, 33 U.S.C. § 1342(a), provides that U.S. EPA may issue NPDES permits to “persons” that authorize the discharge of any pollutant to navigable waters, but only in compliance with Section 301 of the CWA, 33 U.S.C. § 1311, and such terms and conditions as U.S. EPA determines are necessary to carry out the provisions of the CWA.

18. Section 402(b) of the CWA provides that a state may establish and administer its own permit program, and, after U.S. EPA authorizes the program, may issue NPDES permits. 33 U.S.C. § 1342(b). At all times relevant to this Complaint, the Ohio Environmental Protection Agency (“OEPA”) has been authorized by U.S. EPA to administer an NPDES permit program regulating discharges of pollutants into navigable waters within its jurisdiction.

19. U.S. EPA's Combined Sewer Overflow Control Policy, 59 Fed. Reg. 18688, ("U.S. EPA's CSO Control Policy") provides guidance to municipalities on how to meet the Clean Water Act's pollution control requirements.

State Law

20. Ohio Rev. Code § 6111.04 prohibits any person from causing pollution or placing or causing to be placed "any sewage, sludge, sludge materials, industrial waste or other wastes in a location where they cause pollution of any waters of the state" unless that person holds a valid permit to do so.

21. Ohio Rev. Code § 6111.01(H) defines "waters of the state" as "all streams, lakes, ponds, marshes, watercourses, waterways, wells, springs, irrigation systems, drainage systems, and other bodies or accumulations of water, surface and underground, natural or artificial, regardless of the depth of the strata in which underground water is located, that are situated wholly or partly within, or border upon, this state, or are within its jurisdiction, except those private waters that do not combine or effect a junction with natural surface or underground waters."

22. Ohio Rev. Code § 6111.07(A) prohibits any person from violating any duty imposed by Ohio Rev. Code §§ 6111.01 to 6111.08, any rule adopted pursuant to Ohio Rev. Code Chapter 6111, or any term or condition of a permit issued by the Director of Ohio EPA.

Federal and State Enforcement Provisions

23. Section 309(b) of the CWA, 33 U.S.C. § 1319(b), authorizes U.S. EPA to commence a civil action for appropriate relief, including a permanent or temporary injunction, when any person violates, among other things, Section 301 of the CWA, 33 U.S.C. § 1311, or any condition or limitation of an NPDES permit.

24. Section 309(d) of the CWA, 33 U.S.C. § 1319(d), provides that any person who violates, among other things, Section 301 of the CWA, 33 U.S.C. § 1311, or who violates any condition or limitation of an NPDES permit issued pursuant to Section 402 of the CWA, 33 U.S.C. §1342, shall be subject to a civil penalty not to exceed \$25,000 per day of violation, as adjusted over time, with each day in which a violation occurs constituting a separate violation.

25. Under the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996 and the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, 28 U.S.C. § 2461 note: Pub. L.114-74, § 701, CWA statutory penalties have been adjusted for inflation through 40 C.F.R. § 19.4. As adjusted for inflation pursuant to statute, the relevant maximum civil penalties under Section 309(d) of the CWA are:

- \$32,500 per day per violation for violations occurring from March 16, 2004 through January 12, 2009;
- \$37,500 per day per violation for violations occurring from January 13, 2009 through November 2, 2015;
- \$51,570 per day per violation for violations that occurred from November 3, 2015 through January 14, 2017; and
- \$52,414 per day per violation for violations that occurred on or after January 15, 2017.

26. Ohio Rev. Code § 6111.07(B) authorizes the Ohio Attorney General to commence a civil action against any person who violates or is threatening to violate Ohio Rev. Code Chapter 6111 or any rule adopted or permit issued pursuant to that chapter.

27. Ohio Rev. Code § 6111.09(A) provides that any person who violates Ohio Rev. Code Chapter 6111 or any rule adopted or permit issued pursuant to that chapter is subject to a civil penalty of up to \$10,000 per day for each day of violation.

General Allegations

Middletown's Sewer System

28. Middletown owns and operates a “treatment works” and a “publicly owned treatment works (“POTW”)” as those terms are defined in U.S. EPA’s regulations implementing the CWA. CWA § 212(2), 33 U.S.C. § 1292(2); 40 C.F.R. § 122.2 (cross-referencing the definition at 40 C.F.R. § 403.3). Middletown’s POTW consists of a wastewater treatment plant and the sewage collection system for the plant.

29. Middletown’s POTW collects, conveys, treats, and disposes of sanitary sewage from the City of Middletown, covering an area of approximately 10,000 square acres and serving approximately 52,000 people.

30. Middletown’s wastewater treatment plant has an average peak design flow of 40 million gallons per day.

31. Middletown owns and operates a collection system that consists of approximately 342 miles of pipe that convey sewage and other pollutants to the wastewater treatment plant. The collection system includes “combined sewers” (*i.e.*, pipes that carry both sewage and stormwater in the same pipe) and “sanitary sewers” (*i.e.*, pipes that are designed to carry sewage only).

32. Middletown discharges wastewater containing pollutants from Middletown’s wastewater treatment plant to the Great Miami River. Middletown also discharges wastewater containing pollutants through eight CSO outfalls to the Great Miami River.

Middletown’s NPDES Permits

33. At all times relevant to this Complaint, the State has been authorized by U.S. EPA, pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, to administer an NPDES permit program for regulating discharges of pollutants into navigable waters within its jurisdiction.

34. On or about June 30, 2003, OEPA, under the authority of Section 402 of the CWA, 33 U.S.C. § 1342, issued NPDES Permit No. 1PE00003*LD (OH0026522) (the “2003 Permit”) to Middletown. The 2003 Permit became effective on August 1, 2003.

35. On or about June 26, 2009, OEPA, under the authority of Section 402 of the CWA, 33 U.S.C. § 1342, issued NPDES Permit No. 1PE00003*ND (OH0026522) (the “2009 Permit”) to Middletown. The 2009 Permit became effective on August 1, 2009 and superseded the 2003 Permit. The 2009 Permit was scheduled to expire on January 31, 2014 but continues to apply. Pursuant to Ohio Rev. Code § 119.06 and Ohio Admin. Code 3745-33-04(D), the terms and conditions of the 2009 Permit will continue in force until, and then pursuant to, a final administrative disposition of Middletown’s application for permit renewal. The 2003 Permit and the 2009 Permit shall be referred to collectively as “Middletown’s Permits” or “the Permits.”

36. The Permits authorize the discharge of effluent from Middletown’s wastewater treatment plant and collection system only in compliance with the conditions and limitations set forth in those permits.

37. Part I.A of the Permits authorizes Middletown to discharge from a single, designated outfall at the wastewater treatment plant, “Outfall 001,” subject to certain effluent limitations. Outfall 001 discharges to the Great Miami River.

38. Part I.A. of the Permits provides that for Outfall 001, the maximum daily concentration effluent limit for total residual chlorine in the summer (May 1 through October 31 of each year) is 0.037 milligrams/liter (“mg/l”), with samples required to be taken daily.

39. Middletown uses chlorine to disinfect wastewater prior to its discharge to a waterway, but excessive chlorine can be toxic to aquatic life.

40. Part I.A. of the Permits provides that for Outfall 001, the average weekly concentration effluent limit for ammonia as nitrogen in the summer is 3.5 mg/l, with samples required to be taken daily.

41. Part I.A. of the Permits provides that for Outfall 001, the average monthly concentration effluent limit for ammonia as nitrogen in the summer is 2.0 mg/l, with samples required to be taken daily.

42. Part I.A. of the Permits provides that for Outfall 001, the weekly average loading (quantity) effluent limit for ammonia as nitrogen in the summer is 344 kg/day, with samples required to be taken daily.

43. When present in the water, ammonia breaks down into its chemical components, including nitrogen. Excessive nitrogen can cause overstimulation of growth to aquatic plants and algae. Excessive growth of these organisms can lead to eutrophication and dissolved oxygen depletion in water bodies, which occurs when the decomposition of algae and other plants consumes dissolved oxygen in the water. Eutrophication can produce unsightly scums of algae on the water surface and deprivation of oxygen for other organisms like fish and amphibians. Without sufficient light and oxygen, plant and animal populations can experience reduced growth rates, reduced reproductive success, decreased population size, and increased mortality, among other harmful effects.

44. Part I.A. of the Permits provides that for Outfall 001, the average weekly concentration effluent limit for fecal coliform in the summer is 2000 colonies per 100 ml, with samples required to be taken daily.

45. Fecal coliform is a bacterium that indicates the presence of fecal material from warm-blooded animals, including humans. Fecal material from warm-blooded animals can include disease-causing organisms, such as those that cause typhoid, dysentery, and cholera.

46. Part I.A. of the Permits provides that for Outfall 001, the daily minimum effluent limit for pH level is 6.5, with samples required to be taken daily.

47. Part I.A. of the Permits provides that for Outfall 001, the daily maximum effluent limit for pH level is 9.0, with samples required to be taken daily.

48. pH levels outside a certain range can reduce biological diversity in streams, stress the physiological systems of most organisms, and reduce reproduction.

49. The Permits authorize Middletown to discharge pollutants to the Great Miami River from eight combined sewer overflow (“CSO”) locations identified in Part II.E of the Permits. CSO Outfalls 003 – 007 discharge directly to the Great Miami River. CSO Outfalls 008 – 010 discharge to the Great Miami River through the Middletown Hydraulic Canal.

50. Middletown’s CSO discharges are subject to certain limitations and conditions. These limitations and conditions include, but are not limited to, the “General Effluent Limitations” set forth in Part III.2 of the Permits, which provide that:

- “The effluent shall, at all times, be free of substances:
- A. In amounts that will settle to form putrescent, or otherwise objectionable, sludge deposits; or that will adversely affect aquatic life or water fowl;
 - B. Of an oily, greasy, or surface-active nature, and of other floating debris, in amounts that will form noticeable accumulations of scum, foam or sheen;
 - C. In amounts that will alter the natural color or odor of the receiving water to such degree as to create a nuisance;
 - D. In amounts that either singly or in combination with other substances are toxic to human, animal, or aquatic life;
 - E. In amounts that are conducive to the growth of aquatic weeds or algae to the extent that such growths become inimical to more desirable forms of aquatic life, or create conditions that are unsightly, or constitute a nuisance in any other fashion;

F. In amounts that will impair designated instream or downstream water uses.”

51. The State has designated the Great Miami River as a “Class A primary contact recreation” water body during the recreational season, which extends from May 1 to October 31 annually.

52. Under Ohio law, “criteria” are defined as “elements of water quality standards, expressed as constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular designated use.” Ohio Admin. Code 3745-1-02(B)(23). The criteria for supporting Class A primary contact recreational uses is based on the bacterium *Escherichia coli*, commonly referred to as *E. coli*. A water body is not supported for Class A primary contact recreational uses when more than 10% of samples taken during any thirty-day period exceed 298 colonies of *E. coli* per 100 ml of water collected or when the seasonal geometric mean of samples exceeds 126 colonies of *E. coli* per 100 ml of water collected. Ohio Admin. Code 3745-1-07, Table 7-13.

53. *E. coli* is a bacterium that indicates the presence of fecal material from warm-blooded animals, including humans. Fecal material from warm-blooded animals can include disease-causing organisms, such as those that cause typhoid, dysentery, hepatitis A, and cholera.

54. Part II.G of the Permits authorizes Middletown to discharge from the CSO locations identified in the Permits “only during wet weather periods when the flow in the sewer system exceeds the capacity of the sewer system.”

55. Part I.B of the Permits requires Middletown to monitor its CSOs and submit monthly operating reports to OEPA. The Permits require Middletown to monitor and report: the volume and duration of each CSO discharge; total suspended solids in each CSO discharge,

measured once per month; fecal coliform in each CSO discharge, measured once per month; and carbonaceous biochemical oxygen demand in each CSO discharge, measured once per month.

First Claim for Relief

Outfall 001 – Violations of Effluent Limitations for Chlorine, Ammonia, Fecal Coliform, Total Suspended Solids, and pH

56. Paragraphs 1 through 55 are realleged and incorporated herein by reference.

57. At various times since 2008, Middletown has discharged pollutants from Outfall 001 in amounts and quality that violated the conditions and limitations of the Permits, including Part I.A's effluent limitations for chlorine, ammonia as nitrogen, fecal coliform, total suspended solids, and pH.

58. For each instance where discharges from Outfall 001 exceeded Part I.A's effluent limitations for chlorine, ammonia as nitrogen, fecal coliform, total suspended solids, or pH, Middletown is in violation of a condition or limitation in the applicable Permit. Each day of the averaging period for each instance of exceedance constitutes a separate violation.

59. Unless enjoined by the Court, Middletown will continue to violate its Permit.

60. For each violation referred to in this claim, Middletown is subject to injunctive relief and civil penalties pursuant to Section 309(b) and (d) of the CWA, 33 U.S.C. § 1319(b) and (d), and Ohio Rev. Code § 6111.07(B).

61. As described in Paragraph 25, Middletown is liable for civil penalties payable to the United States of up to \$32,500 per day for each violation occurring from March 16, 2004 through January 12, 2009, up to \$37,500 per day for each violation occurring from January 13, 2009, through November 2, 2015, up to \$51,570 per day for each violation occurring from November 3, 2015, through January 14, 2017, and up to \$52,414 per day for each violation occurring on or after January 15, 2017.

62. As described in Paragraph 27, Middletown is liable for civil penalties payable to the State of up to \$10,000 per day for each day of violation.

Second Claim for Relief

CSOs – Violation of General Effluent Limitations

63. Paragraphs 1 through 55 are realleged and incorporated herein by reference.

64. At various times since 2008, Middletown discharged pollutants from designated CSO outfalls specified in the Permits in amounts and quality that violated the conditions and limitations of the Permits, including the General Effluent Limitations set forth in Part III.2, which provide that “effluent shall, at all times, be free of substances . . . [i]n amounts that will impair designated instream or downstream water uses.”

65. Each discharge from a designated CSO outfall that violated a condition or limitation of Part III.2 of the applicable Permit constitutes a separate violation for each discharge on each day from each CSO outfall.

66. Unless enjoined by the Court, Middletown will continue to violate its Permit.

67. For each violation referred to in this claim, Middletown is subject to injunctive relief and civil penalties pursuant to Section 309(b) and (d) of the CWA, 33 U.S.C. § 1319(b) and (d), and Ohio Rev. Code § 6111.07(B).

68. As described in Paragraph 25, Middletown is liable for civil penalties payable to the United States of up to \$32,500 per day for each violation occurring from March 16, 2004 through January 12, 2009, up to \$37,500 per day for each violation occurring from January 13, 2009, through November 2, 2015, up to \$51,570 per day for each violation occurring from November 3, 2015, through January 14, 2017, and up to \$52,414 per day for each violation occurring on or after January 15, 2017.

69. As described in Paragraph 27, Middletown is liable for civil penalties payable to the State of up to \$10,000 per day for each day of violation.

Third Claim for Relief

CSOs – Prohibited Dry Weather Discharges

70. Paragraphs 1 through 55 are realleged and incorporated herein by reference.

71. At various times since 2008, Middletown has discharged pollutants from some or all of the CSO outfalls identified in Part II.E of the Permits during times that were not “wet weather periods,” in violation of Part II.G of the Permits.

72. Each of the foregoing discharges violates a condition or limitation in the applicable Permit and constitutes a separate violation for each day of each discharge from each location.

73. Unless enjoined by the Court, Middletown will continue to violate its Permit.

74. For each violation referred to in this claim, Middletown is subject to injunctive relief and civil penalties pursuant to Section 309(b) and (d) of the CWA, 33 U.S.C. § 1319(b) and (d), and Ohio Rev. Code § 6111.07(B).

75. As described in Paragraph 25, Middletown is liable for civil penalties payable to the United States of up to \$32,500 per day for each violation occurring from March 16, 2004 through January 12, 2009, up to \$37,500 per day for each violation occurring from January 13, 2009, through November 2, 2015, up to \$51,570 per day for each violation occurring from November 3, 2015, through January 14, 2017, and up to \$52,414 per day for each violation occurring on or after January 15, 2017.

76. As described in Paragraph 27, Middletown is liable for civil penalties payable to the State of up to \$10,000 per day for each day of violation.

Fourth Claim for Relief

Failure to Monitor and/or Report the Results for Total Suspended Solids, Fecal Coliform, and Carbonaceous Biochemical Oxygen Demand

77. Paragraphs 1 through 55 are realleged and incorporated herein by reference.

78. At various times since 2008, Middletown failed to monitor and/or report the results for some or all of the CSO outfalls identified in Part II.E of the Permits in the manner required by Part I.B of the Permits.

79. For each instance of failing to monitor and/or report the results for total suspended solids, fecal coliform, and carbonaceous biochemical oxygen demand as prescribed under the Permits, Middletown violated a condition or limitation of Part I.B of the applicable Permit.

80. Unless enjoined by the Court, Middletown will continue to violate its Permit.

81. For each violation referred to in this claim, Middletown is subject to injunctive relief and civil penalties pursuant to Section 309(b) and (d) of the CWA, 33 U.S.C. § 1319(b) and (d), and Ohio Rev. Code § 6111.07(B).

82. As described in Paragraph 25, Middletown is liable for civil penalties payable to the United States of up to \$32,500 per day for each violation occurring from March 16, 2004 through January 12, 2009, up to \$37,500 per day for each violation occurring from January 13, 2009, through November 2, 2015, up to \$51,570 per day for each violation occurring from November 3, 2015, through January 14, 2017, and up to \$52,414 per day for each violation occurring on or after January 15, 2017.

83. As described in Paragraph 27, Middletown is liable for civil penalties payable to the State of up to \$10,000 per day for each day of violation.

Prayer for Relief

WHEREFORE, Plaintiffs the United States of America and the State of Ohio respectfully request that this Court provide the following relief:

1. A permanent injunction directing Middletown to take all steps necessary, including development and implementation of a Long Term Control Plan as provided for in U.S. EPA's CSO Control Policy, to come into permanent and continuous compliance with all conditions and limitations of the Permits, including but not limited to:

- A. the conditions in the Permits prohibiting discharges of pollutants from Outfall 001 except as authorized by the Permits;
- B. the conditions in the Permits prohibiting discharges of pollutants from CSO outfalls except as authorized by the Permits;
- C. the Permits' prohibition of dry weather discharges from CSO outfalls;
- D. the monitoring and reporting requirements set forth in the Permits;

2. A judgment assessing civil penalties against Middletown and in favor of the United States, up to \$32,500 per day for each violation occurring after March 15, 2004 through January 12, 2009; up to \$37,500 per day for each violation occurring after January 12, 2009 through November 2, 2015; \$51,570 per day per violation for each violation occurring after November 3, 2015 through January 14, 2017; and \$52,414 per day for each violation occurring after January 14, 2017.

3. A judgment assessing civil penalties against Middletown and in favor of the State of Ohio, up to \$10,000 per day for each violation;

4. An award to the United States and the State of their respective costs and disbursements in this action; and

5. Such other relief as this Court deems appropriate.

Respectfully submitted,

For the United States of America

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