

3. Pursuant to section 505(b) of the CWA, 33 U.S.C. § 1365(b), and the CSL, 35 P.S. § 691.601(e), Plaintiffs gave notice of the violations alleged in this complaint, and their intent to file suit, on March 10, 2011, prior to commencement of this lawsuit to the Defendant, the United States Environmental Protection Agency (“EPA”), and the Pennsylvania Department of Environmental Protection (“DEP”). A copy of the notice letter is attached as Exhibit A and incorporated herein.

4. More than 60 days have passed since notice was served. The violations complained of therein have not ceased. Neither EPA nor the DEP has commenced and diligently prosecuted a court action to redress the violations.

5. Venue is proper in the Western District of Pennsylvania pursuant to section 505(c)(1) of the CWA, 33 U.S.C. § 1365(c)(1), because the source of the violations complained of is located within this District.

Parties

6. Plaintiff Clean Water Action is a non-profit, member-based organization incorporated and organized under the laws of Washington, D.C. Clean Water Action is a national organization with a member base of over one million. Clean Water Action has 120,000 members in Pennsylvania and maintains four offices in the Commonwealth: Pittsburgh, Harrisburg, Lehigh Valley and Philadelphia. Clean Water Action’s purposes are to empower people to take action to protect America’s waters, to build healthy communities, and to make democracy work for the community through advocacy and litigation.

7. Plaintiff Three Rivers Waterkeeper is a non-profit organization based in Pennsylvania, with an office in Homestead, Pennsylvania. Three Rivers Waterkeeper serves as a voice for the waterways of Southwestern Pennsylvania. Three Rivers Waterkeeper seeks to

protect the water quality of the Monongahela, Allegheny, and Ohio Rivers along with their respective watersheds through water sampling, review of discharge and use permits, community engagement, and active investigation of all potential threats to water quality in the Three Rivers region. Three Rivers Waterkeeper has 89 members located across Pennsylvania.

8. Both Clean Water Action and Three Rivers Waterkeeper (collectively, the “Plaintiffs”) have members who receive their drinking water from a point directly downstream of the Defendant’s discharge, or who participate in recreational activities in or around the Monongahela River. Consequently, the Plaintiffs’ members suffer from and are at an increased risk of adverse health effects from exposure to oil and gas wastewaters.

9. The Plaintiffs have members who have suffered, and will continue to suffer, actual and threatened injury to their health and welfare due to the violations of the CWA, CSL, and the permit, as described herein. The Plaintiffs’ members are exposed to, and threatened with exposure to, or ingestion of, pollutants discharged from the Defendant’s sewage treatment plant.

10. The Plaintiffs’ members have suffered, and will continue to suffer, actual and threatened interference with their use and enjoyment of property and surrounding areas from the violations alleged in this Complaint.

11. Clean Water Action member Alan Demsey has lived in the Brookline neighborhood of Pittsburgh for the past 20 years. Mr. Demsey has been a member of Clean Water Action for 23 years. Mr. Demsey lives approximately ten miles northwest of the Defendant’s sewage treatment facility and receives his water from the Pennsylvania-American Water Company, which has its intake downstream of the Defendant’s discharge. Mr. Demsey has

a specific, personal health interest in the quality of the water in the Monongahela River. In 1999, Mr. Demsey has suffered a heart attack and currently is being treated for high blood pressure with several prescription medications. Mr. Demsey drinks, cooks with, bathes in and otherwise uses that water on a regular basis. Based on his use of water that originates from a point downstream of the Defendant's discharge, his health conditions and the potential for other health conditions to arise, Mr. Demsey is concerned for his health when drinking his water. Mr. Demsey's interests are harmed by the Defendant's practice of accepting oil and gas drilling wastewater without the capacity to treat it before discharging the wastewater into the Monongahela River. Mr. Demsey's full declaration of interest and support is attached as Exhibit B to this Complaint.

12. Mr. Steven McAuley lives at 2651 Bethel Crest in Bethel Park, Pennsylvania. He has been a member of Three Rivers Waterkeeper since March 2011. Mr. McAuley worked as a geohydrologist for the United States Geological Survey for 27 years before retiring in 2008. Mr. McAuley's duties included sampling and analyzing both surface and ground waters, including the Monongahela River. He enjoyed this work greatly, and would like to recreate in and along the Monongahela River if it were of a quality to do so. Mr. McAuley is less likely to recreate on the Monongahela River because of Defendant's unauthorized discharges. Mr. McAuley receives his drinking water from Pennsylvania-American Water Company, which obtains its water supply from the Monongahela River downstream of the Defendant's sewage treatment facility. In the summer of 2010, Mr. McAuley began purchasing bottled water for household use due to his concerns over the quality of his drinking water. Mr. McAuley's interests are harmed by the Defendant's practice of accepting oil and gas drilling wastewater without the capacity to treat it before discharging the wastewater into the Monongahela River. Mr. McAuley is concerned that

his health may have been and may continue to be harmed, adversely affected, and irreparably injured by the Defendant's continued contamination of the waters of the Commonwealth in violation of the Clean Water Act and the Clean Streams Law unless the Court grants the Plaintiffs' requested relief. Mr. McAuley full declaration of interest and support is attached as Exhibit C to this Complaint.

13. Mr. David Tucci lives at 257 Sleepy Hollow Road in Mount Lebanon, Pennsylvania. Mr. Tucci has been a member of Three Rivers Waterkeeper since 2010. Mr. Tucci receives his drinking water from Pennsylvania American Water Company, which obtains its water supply from the Monongahela River downstream of the Defendant's facility. Mr. Tucci is concerned about the health impacts of the Defendant's unauthorized wastewater discharges on his drinking water supply. In the past seven years, Mr. Tucci has survived and been treated for congestive heart failure, a heart attack and colon cancer. Due to these conditions, he is disabled and constantly battling health problems. Mr. Tucci is is concerned that Defendant's discharge of oil and gas wastewater negatively affects his health. Mr. Tucci's full declaration of interest and support is attached as Exhibit D to this Complaint.

14. The acts and omissions alleged herein subject Plaintiffs' members to harmful pollution that threatens their health and welfare, interferes with their use and enjoyment of waterways and surrounding areas, denies them protection of their health and well-being guaranteed by the CWA, the CSL and the Defendant's permit, and adversely impacts their aesthetic and recreational interests. The relief requested herein will redress these injuries.

15. Defendant was formed under the Pennsylvania Municipal Authorities Act of May 2, 1945, P.L. 382, *as amended*, 53 P.S. §§ 5601 *et seq.*, as a Pennsylvania Municipal Authority

created in 1949. Defendant is a sewage treatment plant, or publicly owned treatment works (“POTW”) as referenced by the CWA, 33 U.S.C. § 1311(b), and has been discharging oil and gas wastewater without seeking authorization.

Statutory and Regulatory Background

16. The goal of the CWA is to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a).

17. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants from a point source into navigable waters of the United States, unless in compliance with various enumerated sections of the CWA. Among other things, section 301(a) prohibits such discharges not authorized by or in violation of the terms of a NPDES permit issued pursuant to section 402 of the CWA, 33 U.S.C. § 1342.

18. Under section 402(a)-(b) of the CWA, 33 U.S.C. § 1342(a)-(b), the Administrator of EPA has authorized the Pennsylvania DEP to issue NPDES permits. The applicable Pennsylvania law is Title 35 Pennsylvania Statutes § 691.1, *et seq.* Section 691.301 of the CSL, 35 P.S. § 691.301, prohibits the discharge of “industrial wastes” into the waters of the Commonwealth, unless such discharge is in compliance both with the terms and conditions of a permit issued by the Commonwealth, and with the rules, regulations, and orders of the Commonwealth.

19. The Pennsylvania Department of Environmental Protection, pursuant to section 691.5(b) of the CSL, issued NPDES Permit Number PA0026913 to Defendant on April 22, 2008,

authorizing Defendant to discharge treated sewage into the Monongahela River, a water of the Commonwealth and a water of the United States.

20. A NPDES permit authorizes the discharge of only those pollutants contained in a wastestream disclosed in a permit application or specific pollutants disclosed in a permit application. 33 U.S.C. § 1342(k) (2011); 25 Pa. Code § 92a.6 (2011).

21. Sewage is defined as “any substance that contains any of the waste products or excrementitious or other discharge from the bodies of human beings or animals.” 35 P.S. § 691.1.

22. Oil and gas wastewater is an industrial waste. 35 P.S. § 691.1.

23. A change in wastestream, including the introduction of new or increased concentrations of pollutants in a wastestream, requires approval from the permitting agency and public participation in the permitting process before commencement of the discharge. 40 C.F.R. §§ 122.62, 122.63, 123.25(a)(25), 124.5; 25 Pa. Code § 92.7 (2000); 25 Pa. Code §§ 92a.2, 92a.21, 92a.24 (2011) (Pennsylvania regulations use the term “amendment” to refer to the same process known as “modification” under the CWA).

24. Final permit authorizations, including an amendment or modification due to a change in wastestream, require submission of an application to the permitting agency, preparation of a draft permit and fact sheet or statement of basis by the agency, a public notice and comment period, and agency consideration of public comment. 33 U.S.C. § 1342(b)(3); 40 C.F.R. §§ 122.44, 124.6, 124.8, 124.11, 124.56; 25 Pa. Code §§ 92a.2, 92a.21, 92a.24.

25. Any citizen may commence a civil action against a facility alleged to be in violation of “an effluent standard or limitation” enacted pursuant to the CWA. 33 U.S.C. § 1365.

26. “Effluent standard or limitation” is defined to include unlawful acts under section 301(a) of the CWA; an effluent limitation under section 301 or 302 of the CWA; the terms and conditions of a NPDES permit issued pursuant to section 402 of the CWA; and prohibition, effluent standard or pretreatment standards under section 307 of the CWA. 33 U.S.C. § 1365(f)(1), (2), (4), and (6).

General Allegations

27. Defendant operates a sewage treatment plant in McKeesport, Pennsylvania. It discharges wastewater from its operations through a point source into the Monongahela River pursuant to NPDES Permit No. PA0026913. The Monongahela River is a navigable water of the United States and a water of the Commonwealth of Pennsylvania.

28. Defendant has violated the terms of its permit and the CWA and CSL as set forth in Plaintiffs’ notice letter to Defendant entitled “60 Day Notice of Intent to File Citizen Suit for Violations of the Clean Water Act at the Municipal Authority of the City of McKeesport Sewage Treatment Plant in Allegheny County, Pennsylvania” (“60-day Notice”). The 60-day Notice is dated March 10, 2011 and is attached hereto as Exhibit A and incorporated by reference herein.

29. Defendant submitted a NPDES renewal application to the DEP in February 2007.

30. On April 22, 2008, DEP renewed NPDES Permit No. PA0026913, which is attached hereto as Exhibit E and incorporated by reference herein. The permit authorizes the discharge of treated sewage to the Monongahela River and limits the discharge of concentrations

of pollutants in the treated sewage discharge to ensure adequate sewage treatment and to protect water quality of the receiving water body from the impacts of a sewage wastewater discharge.

31. On October 23, 2008, the DEP issued an administrative order (“2008 Order”) to the Defendant that required Defendant to limit its acceptance of oil and gas wastewater and comply with increased monitoring and reporting requirements. The 2008 Order found the Defendant violated the CSL and accompanying regulations by contributing to exceedances of water quality criteria, committing statutory nuisance and unlawful conduct, and failing to report the acceptance of oil and gas wastewater. The 2008 Order is attached hereto as Exhibit F and incorporated by reference herein.

32. The 2008 Order states that the Defendant was “currently accepting wastewater from oil and gas operations” as of the date of the 2008 Order.

33. The 2008 Order did not modify the permit and did not effectively authorize a new discharge because proper procedures for modification, including submission of an application, issuance of a draft permit and fact sheet, and public notice and comment, were not followed.

34. The Allegheny Valley Joint Sewer Authority informed the DEP on March 29, 2011, that it ceased acceptance of oil and gas wastewater. The letter is attached hereto as Exhibit G and incorporated by reference herein.

35. After Plaintiff Clean Water Action sent a letter similar to the 60-day Notice sent to Defendant, the Franklin Township Sewer Authority voted to cease its acceptance of *all* oil and gas wastewater on May 9, 2011. An e-mail containing the Franklin Township Sewer Authority’s decision is attached hereto as Exhibit H and incorporated by reference herein.

36. On April 19, 2011, DEP requested that drilling companies refrain from disposing of oil and gas wastewater in municipal treatment works by May 19, 2011. Press Release, Pa. Dep't of Env'tl. Prot., DEP Calls on Natural Gas Drillers to Stop Giving Treatment Facilities Wastewater (Apr. 19, 2011) (*available at* <http://www.portal.state.pa.us/portal/server.pt/community/newsroom/14287?id=%2017071%20&typeid=1>) (last checked Jul. 19, 2011).

37. To Plaintiff's knowledge, the Defendant has not taken similar actions as the Allegheny Valley Joint Sewer Authority and the Franklin Township Sewer Authority to cease acceptance of oil and gas wastewater without proper authorization.

38. On March 17, 2011, the EPA released guidance in the form of a Memorandum and attached "Frequently Asked Questions" to assist Regional Directors in "outreach concerning wastewater issues resulting from shale gas extraction." Memorandum from James A. Hanlon, Dir., Office of Wastewater Mgmt., U.S. Env'tl. Prot. Agency to the Water Div. Dirs., Regions 1-10 (Mar. 17, 2011), *available at* <http://cfpub.epa.gov/npdes/hydrofracturing.cfm> (last checked Jul. 19, 2011). Question 11 of the Frequently Asked Questions asks "What requirements do POTWs need to meet in order to accept shale gas wastewater?" In response, the guidance states that "POTWs need to comply with their NPDES permit terms and conditions." *Id.* The guidance document also states that POTWs must provide adequate notice to EPA and DEP, fully characterize the wastewater the POTW plans to accept, and report to EPA and DEP on the characterization and potential impact to the POTW *prior to* accepting oil and gas wastewater.

39. Samples of Defendant's effluent and the Monongahela River were collected on October 19, 20, 24, and 25, 2010, by the Center for Healthy Environments and Communities

(“CHEC”) and analyzed by a certified, independent laboratory. CHEC’s sampling results show that the following pollutants were present in Defendant’s effluent: barium, calcium, magnesium, molybdenum, strontium, copper, bromide, chloride, and total dissolved solids.

40. On October 19 and 20, 2010, CHEC collected and analyzed twenty-four effluents samples taken during a twenty-four hour period—one effluent sample per hour.

41. Oil and gas wastewater typically contains heavy metals, radioactive elements, total dissolved solids, chlorides, sulfates, bromides, benzene, toluene, ethylbenzene, and xylene.

42. Upon information and belief, the Defendant’s treatment system is designed to treat sewage, but does not and cannot remove pollutants commonly found in oil and gas wastewater.

43. Defendant has not submitted an application to DEP to amend or modify its NPDES permit to disclose the characteristics of the oil and gas wastewater that it accepts for discharge.

44. Defendant has not received authorization from DEP to discharge oil and gas wastewater from DEP.

45. Defendant has continued to violate the provisions of the CWA and CSL and its NPDES permit since Plaintiffs’ 60-day Notice dated March 10, 2011.

46. Plaintiffs believe and allege that, without the issuance of an injunction, Defendant will continue to violate its NPDES permit to the further injury of Plaintiffs.

Claims for Relief

Count 1: Unauthorized Discharge of Oil and Gas Wastewater

47. Plaintiff realleges and incorporates by reference herein the allegations of paragraphs 2 through 46 and Exhibits A - H to this Complaint.

48. Defendant's wastewater discharges of industrial wastewater are discharges from a point source into navigable waters of the United States within the meaning of 33 U.S.C. § 1311 and into waters of the Commonwealth within the meaning of 35 P.S. § 691.1.

49. Defendant's effluent contains pollutants that were not disclosed in a permit application and are not authorized by NPDES Permit No. PA0026913 to be discharged. Specifically, the pollutants barium, calcium, magnesium, molybdenum, strontium, copper, bromide, chloride, and TDS were not disclosed in the permit application, and were present in levels significantly higher than previously disclosed levels in the sampling results identified in paragraph 39.

50. Defendant failed to disclose the oil and gas-related pollutants and their concentrations in its discharge in its 2008 NPDES permit renewal application.

51. Defendant has not applied for a permit amendment or modification to seek authorization to discharge oil and gas wastewater.

52. DEP has not authorized the Defendant's discharge of oil and gas wastewater through the NPDES permitting procedures applicable to acceptance of a new wastestream. The

DEP's 2008 Order did not modify the permit and did not effectively authorize a new discharge because proper procedures for modification, including notice and comment, were not followed.

53. Each of Defendant's wastewater discharges of industrial wastewater is a separate violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a), for each day on which it occurred since at least October 23, 2008.

54. Upon information and belief, Defendant does not have the ability to treat for pollutants from oil and gas wastewater. Inadequate treatment will result in pass-through of the Defendant's sewage treatment facility and unauthorized discharges into the Monongahela River.

55. CHEC's sampling results show that the following constituents are present in Defendant's effluent: barium, calcium, magnesium, molybdenum, strontium, copper, bromide, chloride, and total dissolved solids.

56. Each of the aforementioned pollutants in Defendant's discharge is not permitted by the NPDES permit and therefore is a violation of both the CWA and the CSL.

Count 2: Pretreatment Violations

57. Plaintiffs reallege and incorporate by reference herein the allegations of paragraphs 2 through 56 and Exhibits A - H to this Complaint.

58. By not developing specific limits to prevent Pass Through, Defendant has violated the CWA's pretreatment standards.

59. 40 C.F.R. Part 403 contains the general pretreatment regulations for existing and new sources of pollution.

60. One of the three principal objectives of Part 403 is “to prevent the introduction of pollutants into POTWs which will pass through the treatment works or otherwise be incompatible with such works.” 40 C.F.R. § 403.2(b).

61. The term Pass Through is defined as a “Discharge which exits the POTW into waters of the United States in quantities or concentrations which, alone or in conjunction with a discharge or discharges from other sources, is a cause of a violation of a POTW’s NPDES permit (including an increase in the magnitude or duration of a violation)[.]” 40 C.F.R. § 403.3(p).

62. “A User may not introduce into a POTW any pollutant(s) which cause Pass Through or Interference.” 40 C.F.R. § 403.5(a)(1).

63. POTWs, including the Defendant, are required to develop specific limits to implement the prohibitions from 40 C.F.R. § 403.5(a), (b), including the prohibition on Pass Through. 40 C.F.R. § 403.5(c)(1), (2).

64. Pass Through requires a violation of a POTW’s NPDES permit. Defendant’s NPDES permit requires that “[a]ll discharges of floating materials, oil, grease, scum *and substances which produce tastes, color, odors, turbidity* or settle to form deposits *shall be controlled at levels which will not be inimical or harmful to the water uses to be protected or to human, animal, plant or aquatic life.*” Permit at Part C.4 (emphasis added).

65. The substances discharged by Defendant’s sewage treatment facility in October, 2010 included substances that “produce tastes, color, odors, [or] turbidity.”

66. The substances discharged by Defendant’s sewage treatment facility were discharged and, unless Defendant creates and enforces the appropriate specific limits, will continue to be discharged at levels that are inimical or harmful to the protected water uses of the Monongahela River and that are inimical or harmful to human, animal, plant or aquatic life.

67. In a letter advising POTWs in Region 2 of the challenges of accepting oil and gas wastewater, Mr. Kevin Bricke, Acting Director of the Division of Environmental Planning & Protection of the EPA warned that “[w]astewater from shale gas extraction operations typically contains high concentrations of total dissolved solids that POTWs are not designed to treat and that therefore may pass through the plant or interfere with operation.” Letter from Kevin Bricke, Acting Director of the EPA’s Division of Environmental Planning & Protection, to POTW representatives in EPA Region 2 (Apr. 7 2011), *available at* http://toxicstargeting.com/sites/default/files/pdfs/pages_from_foil_response.pdf (last checked Jul. 18, 2011).

68. In his April 7, 2011 letter, Mr. Bricke highlights one problem that is particular to accepting oil and gas wastewater, which is that it is introduced to a POTW from hauled waste vehicles. POTWs “should take specific care to ensure that wastewater...is properly characterized prior to acceptance.”

69. With respect to hauled waste, specific limits which POTWs can create and enforce in order to comply with 40 C.F.R. § 403.5(c)(1) and (2) are outlined in US EPA, *Guidance Manual for the Control of Wastes Hauled to Publicly Owned Treatment Works*, EPA-833-B-98-003 (Sept. 1999).

70. Upon information and belief, Defendant had not created or enforced adequate specific limits to implement the prohibition on the actual Pass Through of total dissolved solids and other pollutants that took place in October 2010, as was required by 40 C.F.R. § 403.5(c)(1) and (2).

71. Upon information and belief, Defendant continues to have no adequate specific limits in place to implement the prohibitions on Pass Through, as is required by 40 C.F.R. § 403.5(c)(1) and (2).

Prayer for Relief

Plaintiffs respectfully request that this Court grant the following relief:

- (1) Declare Defendant to have violated and to be in continuing violation of the CWA and the CSL;
- (2) Enjoin Defendant from further violations of the CWA and CSL;
- (3) Order Defendant to take all necessary steps to comply with section 301(a) of the CWA, including submission of a permit application for modification or amendment of the sewage discharge permit prior to acceptance of oil and gas wastewater;
- (4) Order Defendant to pay reasonable attorneys fees and costs (including expert witness fees), as provided by 33 U.S.C. § 1365(d) and 35 P.S. § 691.601(g);
- (5) Retain jurisdiction over this action to ensure compliance with the Court's decree;
and
- (6) Provide such other and further relief that the Court deems just and proper.

Respectfully submitted,

FOR PLAINTIFF CLEAN WATER ACTION

Dated: **7/19/2011**

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