

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA)	
)	
and)	
)	
THE STATE OF MISSOURI,)	
)	Civil Action No. 4:07-cv-01120
Plaintiffs,)	
)	
v.)	
)	
METROPOLITAN ST. LOUIS)	
SEWER DISTRICT,)	
)	
Defendant.)	
)	

**DEFENDANT METROPOLITAN ST. LOUIS SEWER DISTRICT'S
ANSWER AND AFFIRMATIVE DEFENSES
TO PLAINTIFFS' COMPLAINT**

Defendant Metropolitan St. Louis Sewer District ("MSD") files the following Answer and Affirmative Defenses to Plaintiffs' Complaint:

PRELIMINARY STATEMENT

MSD is responsible for wastewater collection and treatment, and stormwater management, throughout all of St. Louis City and 90 percent of St. Louis County-- a service area covering approximately 525 square miles and a population of approximately 1.4 million. With over 6,600 miles of wastewater sewer line, MSD manages the fourth largest wastewater collection and treatment system in the United States. MSD operations are substantially funded through sewer user rates, although the system has significantly fewer ratepayers than other systems of similar geographic size.

MSD was created by operation of the Missouri Constitution and by area voters in 1954 to coordinate regional, watershed-based management of the area's mounting sewer and stormwater handling and treatment demands. Since MSD's formation, it has consolidated over 79 different public and private sewer collection systems, and assumed control of over 35 overloaded and inadequate treatment facilities. MSD consolidated the operations of these treatment facilities into the eight treatment plants that it operates today. MSD operates these facilities under authorization of Missouri State Operating Permits issued by the Missouri Department of Natural Resources ("MDNR") pursuant to the Missouri Clean Water Law, Chapter 644, R.S. Mo. MDNR is the state agency delegated and authorized by USEPA to implement the mandates of the Federal Water Pollution Control Act ("Clean Water Act"), 33 U.S.C. §§ 1251-1387.¹

In its first three decades, MSD worked to combine the sewer and treatment systems, eliminate poorly operating treatment plants, upgrade sewage treatment capacity and capability, and bring service to unserved areas within MSD. Currently, MSD's wastewater system includes both a "combined" sewer system that carries both wastewater and stormwater through the same pipes, and a "separate" sanitary sewer system that carries wastewater only. There are 1,928 miles of pipe in the combined sewer system, and 4,741 miles of pipe in the separate sanitary sewer system. Portions of these sewer collection systems are over 150 years old.

The sewer systems that MSD consolidated into one system contained hundreds of overflow points, which were constructed to prevent sewer backups into residences, buildings and other property during heavy rainfall and other stresses on the systems' capacity. To further address sewer backup problems, MSD had to construct additional overflow points in the system.

¹ MSD also holds a ninth Missouri State Operating Permit, for a treatment lagoon at MSD's Baumgartner facility. That treatment lagoon has been removed from service.

Since the 1980's, MSD has worked closely with USEPA and MDNR to bring all aspects of its system into compliance with the mandates of the Clean Water Act, and has reached several separate agreements with these agencies to maintain strict schedules for the completion of improvements. MSD has devoted significant efforts and spending to the elimination of overflow points, which requires substantial engineering and planning effort. In the last 15 years, MSD has spent over \$1.3 billion on the elimination of hundreds of overflow points on its combined and separate sewer systems. MSD's work to eliminate all overflow points is continuing, with funding from \$500 million in revenue bonds in the first phase of a multi-billion dollar capital improvement program approved by voters in 2004.

While MSD, like many other municipal sewerage agencies, has eliminated a significant portion of overflow points in their sewer systems, the implementation of its overflow reduction programs has been and will continue to be hindered by the limited ability of its ratepayers to afford rate increases to fund the improvements, limitations imposed by state law on MSD's ability to generate funding, engineering and planning limitations and shifts in federal and state policies and legal interpretations. The affordability of further increases in MSD's rates, in a district that includes one of the highest percentages of low-income customers in the country, is a constant restriction on MSD's ability to fund its projects. Nonetheless, MSD remains committed to eliminate its overflow sources, on a schedule that recognizes the financial capabilities of its ratepayers as well as the engineering demands required for this substantial capital project.

NATURE OF THE ACTION

1. MSD admits that Plaintiffs purport to bring an action against it pursuant to Sections 309(b), 309(d), and 504(a) of the Clean Water Act ("CWA") and that Plaintiffs seek

injunctive relief and civil penalties but denies that Plaintiffs are entitled to any relief pursuant to those statutes. MSD denies the remaining allegations in paragraph 1 of Plaintiffs' Complaint.

2. MSD admits that the State of Missouri purports to join this action as a plaintiff pursuant to Section 309(e) of the CWA.

JURISDICTION, VENUE, NOTICE, AND AUTHORITY

3. Paragraph 3 calls for a legal conclusion to which no response is necessary. To the extent a response is necessary, MSD denies the allegations of paragraph 3.

4. Paragraph 4 calls for a legal conclusion to which no response is necessary. To the extent a response is necessary, MSD denies the allegations of paragraph 4.

5. Paragraph 5 calls for a legal conclusion to which no response is necessary. To the extent a response is necessary, MSD states that it is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 5 and therefore denies the same.

6. MSD admits that the State of Missouri purports to join this lawsuit as a plaintiff pursuant to Section 309(e) of the CWA. MSD further states that the statutes referenced in paragraph 6 speak for themselves. MSD denies the allegations of paragraph 6 to the extent they are inconsistent with the referenced statutes.

DEFENDANT

7. MSD admits the allegations in paragraph 7 of the Complaint.

8. Paragraph 8 calls for a legal conclusion to which no response is necessary. To the extent a response is necessary, MSD denies the allegations of paragraph 8.

9. MSD admits the allegations of paragraph 9, except MDNR denies the allegation that it is responsible for the operation and maintenance of nine wastewater treatment facilities.

STATUTORY BACKGROUND

10. MSD states that the statutes referenced in paragraph 10 speak for themselves. MSD denies the allegations of paragraph 10 to the extent they are inconsistent with the referenced statutes.

11. MSD states that the statutes referenced in paragraph 11 speak for themselves. MSD denies the allegations of paragraph 11 to the extent they are inconsistent with the referenced statutes.

12. MSD states that the statute referenced in paragraph 12 speaks for itself. MSD denies the allegations of paragraph 12 to the extent they are inconsistent with the referenced statute.

13. MSD states that the regulation referenced in paragraph 13 speaks for itself. MSD denies the allegations of paragraph 13 to the extent they are inconsistent with the referenced regulation.

14. MSD states that the statute referenced in paragraph 14 speaks for itself. MSD denies the allegations of paragraph 14 to the extent they are inconsistent with the referenced statute.

15. MSD states that the statute referenced in paragraph 15 speaks for itself. MSD denies the allegations of paragraph 15 to the extent they are inconsistent with the referenced statute.

16. MSD states that the statutes referenced in paragraph 16 speak for themselves. MSD denies the allegations of paragraph 16 to the extent they are inconsistent with the referenced statutes.

17. MSD admits that the State of Missouri has been authorized by the Administrator of the USEPA to implement the NPDES permitting program within the state. MSD denies the remaining allegations of paragraph 17.

18. MSD states that the statute referenced in paragraph 18 speaks for itself. MSD denies the allegations of paragraph 18 to the extent they are inconsistent with the referenced statute.

19. MSD states that the statutes referenced in paragraph 19 speak for themselves. MSD denies the allegations of paragraph 19 to the extent they are inconsistent with the referenced statutes.

20. MSD states that the statutes referenced in paragraph 20 speak for themselves. MSD denies the allegations of paragraph 20 to the extent they are inconsistent with the referenced statutes.

21. MSD states that the statute referenced in paragraph 21 speaks for itself. MSD denies the allegations of paragraph 21 to the extent they are inconsistent with the referenced statute.

GENERAL ALLEGATIONS

22. MSD admits only the allegation of paragraph 22 that it has owned and operated wastewater treatment facilities and their associated separate sanitary and combined sewer and stormwater collection and transmission systems, which receive and treat wastewater and stormwater runoff from residential, commercial, industrial and combined sewage sources within the City of St. Louis and nearly all St. Louis County, Missouri. MSD denies the Plaintiffs' characterization of these systems as "publicly owned treatment works" or "POTW" and denies all other allegations in paragraph 22.

23. MSD denies the allegations of paragraph 23, except MSD admits only that its separate sanitary and combined sewer and stormwater collection and transmission systems include over 6,600 miles of sewers and thousands of maintenance/manhole covers.

24. Paragraph 24 calls for a legal conclusion to which no response is necessary. To the extent a response is necessary, MSD denies the allegations of paragraph 24.

25. MSD denies the allegations of paragraph 25.

26. MSD admits the allegations of paragraph 26, subparagraphs a. through e. and g. through i. MSD denies subparagraph 26.f. because subparagraph 26.f. does not accurately describe the current status of the permit for the Lemay facility.

27. MSD states that the permits referenced in paragraph 27 speak for themselves. MSD denies the allegations of paragraph 27.

28. MSD states that the permits referenced in paragraph 28 speak for themselves. MSD denies the allegations of paragraph 28.

29. MSD denies the allegations in paragraph 29.

30. MSD denies the allegations in paragraph 30.

FIRST CLAIM FOR RELIEF

Unpermitted Discharges from Sanitary Sewer System

31. MSD incorporates by reference its responses to paragraphs 1-30 of the Complaint.

32. MSD denies the allegations of paragraph 32.

33. MSD denies the allegations of paragraph 33.

34. MSD denies the allegations of paragraph 34.

35. MSD denies the allegations of paragraph 35.

36. MSD denies the allegations of paragraph 36.

SECOND CLAIM FOR RELIEF

Unpermitted Discharges from Combined Sewer System

- 37. MSD incorporates by reference its responses to paragraphs 1-36 of the Complaint.
- 38. MSD denies the allegations of paragraph 38.
- 39. MSD denies the allegations of paragraph 39.
- 40. MSD denies the allegations of paragraph 40.
- 41. MSD denies the allegations of paragraph 41.

THIRD CLAIM FOR RELIEF

Emergency Powers of Section 504 of CWA

- 42. MSD incorporates by reference its responses to paragraphs 1-41 of the Complaint.
- 43. MSD denies the allegations of paragraph 43.
- 44. Paragraph 44 calls for a legal conclusion to which no response is necessary. To the extent a response is necessary, MSD denies the allegations of paragraph 44.
- 45. MSD denies the allegations of paragraph 45.
- 46. MSD denies the allegations of paragraph 46.
- 47. MSD denies the allegations of paragraph 47.
- 48. No response is necessary to paragraph 48. To the extent a response is necessary, MSD denies that the United States is entitled to the requested order.

FOURTH CLAIM FOR RELIEF

**Violation of the Proper Operation and Maintenance Condition
(Standard Condition I.B.3&4) in MSD's NPDES Permits**

- 49. MSD incorporates by reference its responses to paragraphs 1-48 of the Complaint.
- 50. MSD states that the permits referenced in paragraph 50 speak for themselves. MSD denies the allegations of paragraph 50.

51. MSD denies the allegations of paragraph 51.
52. MSD denies the allegations of paragraph 52.
53. MSD denies the allegations of paragraph 53.
54. MSD denies the allegations of paragraph 54.

FIFTH CLAIM FOR RELIEF

**Violation of the Backup Power Condition (Standard Condition I.B.7)
in MSD's NPDES Permits**

55. MSD incorporates by reference its responses to paragraphs 1-54 of the Complaint.
56. MSD states that the permits referenced in paragraph 56 speak for themselves.
MSD denies the allegations of paragraph 56.

57. MSD denies the allegations of paragraph 57.
58. MSD denies the allegations of paragraph 58.
59. MSD denies the allegations of paragraph 59.
60. MSD denies the allegations of paragraph 60.

SIXTH CLAIM FOR RELIEF

**Violation of the Bypass Prohibition Condition
(Standard Condition I.B.5) in MSD's NPDES Permits**

61. MSD incorporates by reference its responses to paragraphs 1-60 of the Complaint.
62. MSD states that the permits referenced in paragraph 62 speak for themselves.
MSD denies the allegations of paragraph 62.

63. MSD denies the allegations of paragraph 63.
64. MSD denies the allegations of paragraph 64.
65. MSD denies the allegations of paragraph 65.
66. MSD denies the allegations of paragraph 66.

SEVENTH CLAIM FOR RELIEF

**Violation of the Noncompliance Reporting Condition (Standard Condition I.B.2.b)
in MSD's NPDES Permits**

67. MSD incorporates by reference its responses to paragraphs 1-66 of the Complaint.

68. MSD states that the permits referenced in paragraph 68 speak for themselves.

MSD denies the allegations of paragraph 68.

69. MSD denies the allegations of paragraph 69.

70. MSD denies the allegations of paragraph 70.

71. MSD denies the allegations of paragraph 71.

EIGHTH CLAIM FOR RELIEF

**Failure to Submit Long Term CSO Control Plan
Pursuant to Part D.1 of MSD's NPDES Permits and CWA § 308 Request**

72. MSD incorporates by reference its responses to paragraphs 1-71 of the Complaint.

73. MSD states that the permits referenced in paragraph 73 speak for themselves.

MSD denies the allegations of paragraph 73.

74. MSD admits that the Environmental Protection Agency issued an Information Request to MSD on August 17, 2004, pursuant to Section 308(a) of the CWA and states that the referenced Information Request speaks for itself. MSD denies the remaining allegations in paragraph 74.

75. MSD denies the allegations of paragraph 75.

76. MSD denies the allegations of paragraph 76.

77. MSD denies the allegations of paragraph 77.

78. MSD denies the allegations of paragraph 78.

NINTH CLAIM FOR RELIEF

Violation of the General Criteria Special Condition in MSD's NPDES Permits

79. MSD incorporates by reference its responses to paragraphs 1-78 of the Complaint.

80. MSD states that the permits referenced in paragraph 80 speak for themselves.

MSD denies the allegations of paragraph 80.

81. MSD states that the permit referenced in paragraph 80 speaks for itself. MSD denies the allegations of paragraph 80.

82. MSD denies the allegations of paragraph 82.

83. MSD denies the allegations of paragraph 83.

84. MSD denies the allegations of paragraph 84.

85. MSD denies the allegations of paragraph 85.

86. MSD denies the allegations of paragraph 86.

PLAINTIFFS' PRAYER FOR RELIEF

No response is necessary to Plaintiffs' prayer for relief. To the extent a response is necessary, MSD denies that Plaintiffs are entitled to any relief whatsoever.

MSD further denies any allegation in Plaintiffs' Complaint not heretofore specifically admitted or denied.

AFFIRMATIVE DEFENSES

For its defenses, MSD alleges:

1. Plaintiffs' Complaint fails to state claims upon which relief can be granted.
2. It was and will be impossible or impracticable for MSD to prevent the violations alleged in Plaintiffs' Complaint.

3. MSD does not have the financial capability to prevent the violations alleged in Plaintiffs' Complaint or to comply with any judgment that may be entered against it.

4. The alleged violations were due to circumstances beyond the control of MSD.

5. MSD has negotiated in good faith over a period of years with each plaintiff in an effort to reach agreement for a schedule which complies with the requirements of the Federal Clean Water Act and the Missouri Clean Water Law.

6. MSD's inability to comply with the requirements of the Clean Water Act is due, in whole or in part, to Plaintiffs' own actions or inactions, including but not limited to the failure to promulgate water quality standards for the waters into which MSD discharges under authorization of its operating permits.

7. Some or all of the claims asserted in the Complaint are not violations pursuant to the permit shield defense of the Clean Water Act.

8. Some or all of the claims asserted in the Complaint are not violations pursuant to the upset defense of the Clean Water Act.

9. Due to Article X, Section 22(a) of the Missouri Constitution, MSD has been unable to raise revenues necessary to prevent the violations alleged in Plaintiffs' Complaint.

10. Due to Article VI, Section 26(b) and Article X, Section 22(a) of the Missouri Constitution, MSD will be unable to raise revenues necessary to comply with any judgment that may be entered against it.

11. The relief sought by Plaintiffs constitutes in whole or in part an unfunded mandate prohibited by Article X, Section 16 of the Missouri Constitution.

12. Pursuant to Section 309(e) of the Clean Water Act, 33 U.S.C. § 1319(e), the State of Missouri is liable for the payment of any judgment that may be entered against MSD and for

the payment of any past or future expenses incurred as a result of complying with any judgment that may be entered against MSD.

13. The Complaint raises claims that are barred in whole or in part by the applicable statute of limitations.

14. Plaintiffs' claims are barred in whole or in part by the doctrine of waiver and/or the doctrine of estoppel.

15. Some or all of the claims asserted in the Complaint are not violations because MSD has complied with the State of Missouri's requirements pertaining to Long Term Control Plans.

16. Some or all of the claims asserted in the Complaint are not violations as they were caused by Acts of God beyond MSD's control.

17. With respect to some or all of the alleged violations of the Clean Water Act, at all relevant times, MSD acted with due care, complied with statutory and regulatory requirements concerning discharges, and otherwise conducted itself reasonably and within applicable law.

18. Some or all of the violations alleged in Plaintiffs' Complaint relate to releases that did not reach "waters of the United States" and therefore are not violations of the Clean Water Act.

19. The Court lacks jurisdiction over some or all of the alleged violations in Plaintiffs' Complaint because sewer overflows that did not reach navigable waters of the United States are not subject to the control, regulation, or penalties of the Clean Water Act.

20. The United States Environmental Protection Agency's enforcement of the claims alleged in the Complaint violates the procedural and substantive due process rights of MSD guaranteed by the United States Constitution.

21. MSD has substantively complied with the Clean Water Act because it has complied with the requirements of the Missouri Clean Water Law.

22. No threat of immediate harm exists sufficient to support a grant of injunctive relief.

**COUNTERCLAIMS AGAINST
PLAINTIFF STATE OF MISSOURI**

Counterclaim I: Liability Under Clean Water Act §309(e)

1. Pursuant to Section 309(e) of the CWA, 33 U.S.C. § 1319(e), “[w]henver a municipality is a party to a civil action brought by the United States under this section, the State in which such municipality is located shall be joined as a party” and “shall be liable for payment of any judgment, or any expenses incurred as a result of complying with any judgment, entered against the municipality in such action to the extent that the laws of that State prevent the municipality from raising revenues needed to comply with such judgment.”

2. MSD is a “municipality” as that term is used in Section 309(e) of the CWA, 33 U.S.C. § 1319(e), and as that term is defined in Section 502(4) of the CWA, 33 U.S.C. § 1362(4).

3. Article X, Sections 16-24 of the Missouri Constitution, known as the “Hancock Amendment,” sets limitations on the taxing and revenue raising authority of municipalities and political subdivisions. Specifically, Section 16 provides: “The state is prohibited from requiring any new or expanded activities by counties and other political subdivisions without full state financing, or from shifting the tax burden to counties and other political subdivisions.”

4. Article X, Section 22 of the Missouri Constitution prohibits political subdivisions “from levying any tax, license or fees, not authorized by law, charter or self-enforcing provisions of the constitution when this section is adopted or from increasing the current levy of an existing

tax, license or fees, above that current levy authorized by law or charter when this section is adopted without the approval of the required majority of the qualified voters of that county or other political subdivision voting thereon.”

5. MSD is a political subdivision of the State of Missouri and is therefore subject to the provisions of the Hancock Amendment. Mo. Const. art X, § 15.

6. Article VI of the Missouri Constitution further limits MSD’s ability to raise funding for projects that may be required by judgment. Article VI, Section 26(b), limits the ability of a political subdivision of the state to become indebted, “by vote of the qualified electors thereof voting thereon,... in an amount not to exceed five percent of the value of taxable tangible property therein as shown by the last completed assessment for state or county purposes.... For elections referred to in this section the vote required shall be four-sevenths at the general municipal election day, primary or general elections and two-thirds at all other elections.” Mo. Const. art. VI, § 22(b).

7. MSD’s ability to maintain and improve its sewage collection and treatment facilities to meet state and federal regulations depends on MSD’s ability to provide a revenue stream sufficient for those purposes.

8. MSD’s only revenue stream to fund its maintenance and improvement of its collection and treatment systems is from the user charges or user fees charged to those who use the system.

9. MSD does not have sufficient funds to prevent the non-compliance alleged in Plaintiffs’ Complaint or to satisfy any judgment that may be entered against it in this lawsuit, without raising its wastewater user charges or user fees.

10. The Hancock Amendment, Mo. Const. art. X, § 22(a), has at times in the past prevented MSD from raising revenues sufficient to complete projects and improvements to prevent the violations of the Clean Water Act alleged in Plaintiffs' Complaint.

11. The Hancock Amendment, Mo. Const. art. X, § 22(a), is a law of the State of Missouri that will prevent MSD from complying with any judgment that may be entered against it in this lawsuit.

12. Missouri Constitution Article VI, Section 26(b) is a law of the State of Missouri that will prevent MSD from complying with any judgment that may be entered against it in this lawsuit.

13. Therefore, pursuant to Section 309(e) of the Clean Water Act, 33 U.S.C. § 1319(e), the State of Missouri is liable for the payment of any judgment that may be entered against MSD and for the payment of any expenses incurred as a result of complying with any judgment that may be entered against MSD.

Counterclaim II: Indemnity

14. Plaintiff repeats and realleges Counterclaim Paragraphs 1 through 13 as if expressly set forth herein.

15. If it should be found that MSD was in any way liable for civil penalties and injunctive relief sought by Plaintiffs in the Complaint, that liability could only be concurrent with the liability of Plaintiff State of Missouri due to the application of the Missouri Constitution, Article VI § 26(b), and Article X §§ 16 and 22, which at times in the past prevented MSD from raising necessary funding to maintain and improve its treatment and collection systems and may prevent MSD from obtaining funding necessary to comply with any judgment arising from this action.

16. Plaintiff State of Missouri has an equitable duty to indemnify MSD for the costs that MSD may incur in defending this action and in complying with any judgment arising from this action, including payment of any fines or penalties.

PRAYER FOR RELIEF

WHEREFORE, MSD prays for judgment:

- (1) declaring MSD's right to indemnity and contribution from the State Missouri;
- (2) awarding MSD the costs of defending Plaintiffs' claims, including but not limited to attorney fees; and
- (3) ordering Plaintiff State of Missouri to pay the cost of any judgment that may be entered against MSD and to pay any past or future expenses incurred as a result of complying with any judgment that may be entered against MSD.

REQUEST FOR JURY TRIAL

MSD hereby requests a jury trial for any and all claims.

Respectfully submitted,

Dated: September 21, 2007

SHOOK, HARDY & BACON L.L.P.

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CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the following:

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