UNITED STATES DISTRICT COURT
for the
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA, Plaintiff, v. METROPOLITAN DISTRICT COMMISSION, et al., Defendants.	CIVIL ACTION No. 85-0489-RGS
CONSERVATION LAW FOUNDATION OF NEW ENGLAND, INC., Plaintiff, v. METROPOLITAN DISTRICT COMMISSION, Defendants.	CIVIL ACTION No. 83-1614-RGS

MWRA'S MEMORANDUM IN RESPONSE TO
UNITED STATES' MOTION FOR LEAVE TO SERVE
SUPPLEMENTAL COMPLAINT

I. Introduction

The Massachusetts Water Resources Authority (the "MWRA" or the "Authority") submits this memorandum in support of the United States' Motion for Leave To Serve Supplemental Complaint. The Authority supports the motion because the supplemental complaint is apparently a necessary means

of implementing the settlement of a burdensome civil enforcement action commenced by the United States in May 2005. However, the Authority cannot allow the allegations of the supplemental complaint to stand unrebutted, lest they obscure an environmental success story evidenced by a remarkable and continuing degree of restoration of the waters of Boston Harbor and its tributaries for almost two decades. The staff of the Deer Island Treatment Plant deserve praise, not penalties, for their operation of the Plant.

It is important to keep in mind that none of the practices alleged in the supplemental complaint resulted in any exceedances of the numerical secondary treatment limits in the Authority's NPDES permit. From the outset, the Authority operated the Treatment Plant so as to ensure that it would meet and better those limits. On a regular basis, the Authority reported to EPA exactly how it was operating the Plant and, in particular, how much flow was reaching the Plant and how much of that flow was receiving secondary treatment. For five years, the United States never claimed, as it now does in Count I of the supplemental complaint, that the Authority's operating protocols constituted a bypass of the secondary treatment facilities at Deer Island. As to the other counts of the supplemental complaint, the United States never seriously suggested that the conduct alleged therein caused any environmental impact, produced any savings to the Authority or -- under EPA's settlement guidelines -- should give rise to a penny in penalties.

The MWRA is settling the claims set forth in the supplemental complaint not because of a reluctance to defend its performance under its permit and the

Act but to bring to an end and put behind it a process that, with unending information requests, had become both burdensome and distracting. It has therefore agreed to the terms of the Stipulation filed by the United States with its motion without making any concession or any admission of any fault or liability. The Stipulation provides for payment of an agreed-upon penalty of $305,000, coupled with the performance of three supplemental environmental projects valued in total at another $305,000. Each of these projects has direct environmental benefits to Boston Harbor or to the MWRA's member communities.

The Authority has concluded that it best serves its ratepayers by entering into the Stipulation and by continuing to focus its efforts on an ever-cleaner harbor. The payment to be made to EPA and the cost of the projects to be performed under the Stipulation are a tiny fraction of the potential tens of millions of dollars in penalties alleged in the supplemental complaint. The cost of a successful defense of the claims alleged in the supplemental complaint would substantially exceed the cost of settlement.

II. General Responses

A. No Environmental Damage

During the entire period covered by the allegations in the supplemental complaint, no discharge of untreated wastewater occurred. The Authority's discharge was continuously better than EPA's own established NPDES permit numerical limits allowable for secondary treatment, averaging one half the limits for Total Suspended Solids (TSS) and Biochemical Oxygen Demand

(BOD) allowed. There was no violation of water quality standards, and Boston Harbor's water quality continued to improve. Teams of scientists monitored the MWRA's outfall discharges, generating massive amounts of data establishing that discharges were better than predicted to occur prior to operation of the new Deer Island Wastewater Treatment Plant. More than 300 technical reports and 1000 scientific papers on the subject of Boston Harbor and Massachusetts Bay environmental conditions have been made public. The MWRA has invested more than $30 million in specialized discharge monitoring. The results of all of these studies indicate that Boston Harbor is recovering quickly and Massachusetts Bay remains healthy.

The Authority disagrees with a fundamental contention of EPA's concerning the maintenance and operation of the Deer Island Treatment Facility. The MWRA operated its treatment facilities in an environmentally sound manner to produce the best possible discharge quality. Improvements to the Deer Island Treatment Facility (upgrades to the secondary reactor oxygen feed, physical modifications to secondary batteries A&B, the Braintree-Weymouth project resulting in piping of sludge to the pellet plant and decommissioning of the DSL centrifuges) initiated and completed by the MWRA in 2005 independent of any EPA enforcement action has improved discharge quality and increased secondary capacity. The Authority believes that any increase in flows through the treatment process prior to these improvements would have increased, not decreased, the quantity of pollutants discharged.

B. EPA Knew of the Practices Now Challenged

During the period covered by the United States' supplemental complaint, the Authority provided monthly reports to EPA indicating the MWRA's operational practices and the results of those practices. The Authority assumed that EPA was reading these reports. During this period, EPA and DEP staff also inspected Deer Island and were informed of the MWRA's operational practices.

Until the spring of 2005, the MWRA received no indication whatsoever that EPA considered the Authority's reported operational practices to be inconsistent with its permit. Had EPA reviewed the Authority's reports as they were submitted and brought to the Authority's attention at that time what it now claims to be permit violations, this matter easily could have been resolved by discussion rather than accusation.

C. No Numerical Limit in the Permit For Blending Operations

The issues raised in the supplemental complaint grow out of the NPDES permit issued to the MWRA eight years ago. That permit expired in 2005. The MWRA submitted a timely application for a new permit on February 10, 2005 but has yet to receive a new permit and thus continues to operate under the expired permit.

EPA did not include in the MWRA's 2000 permit any numerical limit at which blending of secondary and primary flows could occur. EPA's CSO policy (adopted in November 2000) states that an NPDES permit must define under what specific conditions blending will be allowed. The Authority's NPDES

permit was never modified by EPA to include such specific requirements. This lack of specific blending standards in the original Permit, the lack of any amendment to the Permit, and the lack of response to the MWRA's monthly reports contributed to the Authority's understanding that it was in compliance with the Permit.

D. Secondary Treatment Upgrades and Enhancements

At all times, the MWRA operated its treatment facilities to maximize secondary treatment levels while protecting the biological treatment process. During that period, the MWRA has, on its own accord and without any prompting by its regulators, spent millions of dollars annually on Deer Island maintenance. The Authority has spent tens of millions of dollars upon capital expenditures to optimize the treatment process with the sole intent of continuing environmental improvements, all without state or federal mandates.

III. Specific Responses

A. Count I – Bypasses and Bypass Notices

The supplemental complaint in Count I alleges permit violations for bypasses of secondary treatment and for failures to give EPA notices of such bypasses. At most, the allegations represent honest differences of opinion as to what constitutes a bypass under the permit.

While the regulators regarded MWRA's treatment practices as bypasses, the Authority viewed the same practices as permissible and appropriate "blending" events. Because DITP serves combined sewer communities, the

treatment plant was purposely designed and permitted with the understanding that, at times, wastewater which had received only primary treatment and had been disinfected would have to be blended with flows that had received both primary and secondary treatment, provided that the final blended effluent met secondary permit limits. Neither water quality standards nor numerical permit limits were ever exceeded during periods of blending.

Consistent with long-standing practice, the MWRA regularly notified EPA of bypasses in secondary treatment when it was conducting maintenance operations. However, since the Authority did not consider instances of "blending" to be "bypasses," it did not report them as such. The Authority made no secret of its operating practices. It informed EPA through its monthly Discharge Monitoring Reports and other formal and informal correspondence as to the details of the Plant's operations. Until May 2005, EPA accepted these reports without any indication that it believed plant operations were other than in full compliance with the permit. What now are alleged as violations, the Authority reasonably believed for years to be practices which were in complete conformance with EPA's expectations and the terms of the permit.

B. Count II – Bypass Gates; Use of Polymer

Contrary to the vague and general allegations that the MWRA failed to maintain its treatment facilities properly, the Authority not only conducted regular maintenance of the plant but spent millions of dollars, without any prodding from the regulators, upon facilities and equipment that produced major improvements in the plant's capacity for secondary treatment.

1. Bypass Gates

Upon discovery by the MWRA, during on-going monitoring, of the leaking seals on the bypass gates, the Authority took both short-term measures to minimize the leakage and prompt steps toward a long-term solution by placing an order for specially made custom gaskets and by installing them as soon as possible. There was no failure to maintain the facility properly, and the Authority continuously met water quality standards and secondary permit numerical limits while it performed this maintenance.

2. Polymer Use

As the United States is well aware, polymer was not used at Deer Island for three reasons: (i) environmental concerns regarding the toxicity of polymer to fish habitats, (ii) DITP's consistent and proven ability to meet permit limits without polymer use; and (iii) operational issues with the polymer system that actually worsened discharge quality when the system was employed and tested.

The Outfall Monitoring Task Force, consisting of state and federal regulatory agencies, independent scientists, and environmental advocacy groups and the National Marine Fisheries Service all expressed their concerns regarding polymer use and urged the MWRA to use it sparingly, if at all. The Authority was able to achieve secondary permit limits and water quality standards at all times without the use of polymers and was therefore able to avoid its potential negative impacts. Between 2001 and 2004, annual reports submitted to EPA stated that the polymer system was not in use.

C. Count III – Composite Sampling

Count III of the supplemental complaint resurrects an issue regarding the frequency and methods required by the Authority's permit for obtaining samples of treated effluent This matter was resolved, as evidenced by EPA's ECHO website, by approximately May 2006. Placed at issue in Count III is whether the Authority's sampling methodology constituted composite sampling consistent with the terms of the Permit. As with the blending/bypass issue, EPA did not suggest that the Authority's practices were in any way deficient for at least five years.

The Authority still believes that its composite sampling methodology was consistent with the NPDES permit requirements and, more importantly, that it was the most accurate and reliable method for sampling the wide range of flows at Deer Island. Under that methodology, the Authority collected samples every 15 minutes over a 24-hour period for a total of 96 samples per day. In May 2006, EPA required that 8 combined proportional-flow grab samples be taken daily to correspond to periods of higher daily flows. Results of side by side sampling of the two methods -- MWRA's time proportional composite sampling vs. EPA's flow proportional composite sampling -- show no statistically significant differences between time and flow based sampling. The Authority remains certain that its testing was both no less accurate and more reliable than the method now mandated by EPA. Nonetheless, the MWRA acceded to EPA's mandate to switch to the alternate methodology.

V. Conclusion

In conclusion, the Authority requests that the Court approve the Stipulation submitted by the United States and enter it as an Order herein. To that end, the Authority requests that the Court grant the United States' Motion for Leave To File a Supplemental Complaint.

By its attorneys,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of this document, which was filed via the Court's ECF system, will be sent electronically by the ECF system to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on July 1, 2008.

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Dated: July 1, 2008

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