

IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH CAROLINA  
COLUMBIA DIVISION

CONGAREE RIVERKEEPER, INC, )  
)  
Plaintiff, )  
)  
v. )  
)  
CAROLINA WATER SERVICE, INC., )  
)  
Defendant. )  
)  
)  
)  
\_\_\_\_\_ )

**COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF**

C.A. No. 3:15-av-\_\_\_\_\_

1. This is a civil suit brought under the citizen suit enforcement provision of the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.* (“the Clean Water Act” or “CWA”), specifically, under 33 U.S.C. § 1365. Plaintiff Congaree Riverkeeper, Inc. (“Congaree Riverkeeper”) seeks declaratory judgment, injunctive relief, civil penalties, and other relief the Court deems appropriate to correct recurring CWA violations at Defendant Carolina Water Service, Inc.’s (“Carolina Water Service” or “CWS”) I-20 wastewater treatment facility (“I-20 facility”) located in Lexington County, South Carolina.

2. Carolina Water Service’s I-20 facility is a privately-owned wastewater treatment plant that currently discharges into the Lower Saluda River. The Lower Saluda River has been designated as a scenic river under the South Carolina Scenic Rivers Act, S.C. Code Ann. § 49-29-230(3), and attracts tens of thousands of recreational river users each year. It is a popular fishing location renowned for both trout and striped bass, and also features some of the best urban whitewater paddling in the country with stretches of class II to class V rapids.

3. As a result of the scenic river designation and increasing recreational use, a number of management entities, including the Lower Saluda River Advisory Council and the Central Midlands Council of Governments (“CMCOG”), have sought to eliminate domestic wastewater discharges into the Lower Saluda River. Accordingly, the CMCOG, pursuant to Section 208 of the Clean Water Act, 33 U.S.C. § 1288, directed in 1997 that Carolina Water Service connect its I-20 facility to the City of Cayce regional wastewater treatment plant via the Town of Lexington regional sewer system. That requirement, which would eliminate the I-20 facility’s discharge into the Saluda, has been in existence for well over a decade, but the I-20 facility has continued to pollute, even as the River attracts more and more people to recreate in it every year.

4. There are two separate but interrelated CWA violations occurring at CWS’s I-20 facility: 1) CWS’s ongoing discharge of wastewater from the I-20 facility into the Lower Saluda River and failure to connect to the regional system in violation of CWS’s National Pollution Discharge Elimination System (“NPDES”) permit and the applicable 208 Water Quality Management Plan; and 2) repeated violations of effluent limitations and other provisions of CWS’s NPDES permit, set to protect water quality in the Lower Saluda River until connection to the regional sewer system occurs.

5. These violations of the CWA are ongoing and are likely to continue into the foreseeable future. Congaree Riverkeeper seeks relief from this Court that will stop CWS’s recurring CWA violations.

### **JURISDICTION AND VENUE**

6. Congaree Riverkeeper brings this enforcement action under the citizen suit provision of the CWA, 33 U.S.C. § 1365. This Court has jurisdiction over this action pursuant to

33 U.S.C. § 1365 (CWA citizen suit), 28 U.S.C. § 1331 (civil action arising under the laws of the United States), 28 U.S.C. § 2201 (action for declaratory judgment), and 28 U.S.C. § 1355 (action for fine, penalty, or forfeiture incurred under any Act of Congress), and it has jurisdiction over the parties.

7. Congaree Riverkeeper has complied with the statutory notice requirements under Section 505 of the CWA, 33 U.S.C. § 1365(b)(1)(A), and the corresponding regulations at 40 C.F.R. §§ 135.2 and 135.4. On November 4, 2013, Congaree Riverkeeper provided CWS with notice of the violations specified in this complaint and of its intent to file suit after 60 days should those violations continue by sending a 60-day notice letter via certified mail to CWS representative Patrick Flynn. A true and correct copy of the 60-day notice letter with documentation of its receipt is attached hereto as Exhibit 1.

8. Congaree Riverkeeper sent a copy of the 60-day notice letter to the Administrator of the U.S. Environmental Protection Agency (“EPA”), the Acting Regional Administrator for EPA Region 4, and the Director of the South Carolina Department of Health and Environmental Control (“DHEC”). A copy of the 60-day notice letter was also sent to CWS’s registered agent in South Carolina.

9. More than 60 days have passed since the 60-day notice letter was served on CWS and the state and federal agencies.

10. Neither the EPA nor DHEC has commenced or is diligently prosecuting a court action to redress the violations described in the 60-day notice letter and alleged in this complaint. The violations identified in the 60-day notice letter are continuing at this time and are likely to continue in the future.

11. Venue is proper in this Court pursuant to 33 U.S.C. § 1365(c)(1) because the source of the violations – CWS’s I-20 wastewater treatment facility – and the unlawful discharges are located within this judicial district. Plaintiff Congaree Riverkeeper is based in Columbia, South Carolina, within this judicial district. Although Defendant CWS is incorporated in Delaware and its principal office is located in Florida, it regularly conducts business in South Carolina and owns numerous wastewater treatment facilities located within this judicial district, including the I-20 facility. The events and omissions giving rise to the claims alleged in this complaint – that is, the CWA violations – occurred at CWS’s I-20 facility and its discharge point, within this judicial district.

## **PARTIES**

### **Congaree Riverkeeper, Inc.**

12. Plaintiff Congaree Riverkeeper is a § 501(c)(3) not-for-profit organization working to protect and improve water quality, wildlife habitat, and recreation on the Congaree, Lower Saluda, and Lower Broad Rivers through advocacy, education, and enforcement of environmental laws. It was founded in 2009 and has its headquarters in Columbia, South Carolina.

13. Congaree Riverkeeper is an affiliate of the Waterkeeper Alliance, a global movement of on-the-water advocates who patrol and protect rivers and coasts all over the world.

14. Congaree Riverkeeper’s Board, staff, and members live near, recreate on, and regularly visit the Lower Saluda River, and intend to recreate on and visit the River in the future. These individuals are harmed by ongoing discharges of pollutants into the River and their harms fall within the zones of interests protected by the CWA. Among other things, these individuals reasonably believe that the ongoing discharges from the I-20 facility degrade enjoyment of the

River by themselves and others, and pose a threat to their health and safety. The ongoing unlawful discharges of pollution have diminished and continue to diminish their use and enjoyment of the River's environment in and around the area where the discharges are occurring, and they seek to prevent and remedy these ongoing injuries with this action. The CWA violations alleged in this complaint, which harm Congaree Riverkeeper and its Board, staff, and members, have continued for over a decade. Because neither DHEC nor the EPA is actively enforcing the CWA despite the ongoing violations, relief from this Court addressing CWS's non-compliance with the CWA would redress the injuries of Congaree Riverkeeper and its Board, staff, and members by increasing the likelihood, if not ensuring, that CWS will cease its discharges into the River and stop violating its permit parameters.

15. Congaree Riverkeeper and its Board, staff, and members have aesthetic, recreational, conservation, scientific, and health-related interests that have been, are being, and will continue to be adversely affected and harmed by CWS's ongoing violations of the CWA. These injuries have been, are being, and will continue to be caused by the illegal discharges from CWS's I-20 facility into waters of the United States.

16. The relief sought herein – including a finding of liability for unlawful discharges, penalties, and injunctive relief – is likely to reduce and redress the harms to Congaree Riverkeeper and its Board, staff, and members caused by CWS's unlawful activities.

**Carolina Water Service, Inc.**

17. Defendant Carolina Water Service, Inc. owns the I-20 wastewater treatment facility in Lexington County, South Carolina. CWS is a subsidiary of Utilities, Inc.

18. Utilities, Inc. is a national corporation that owns multiple wastewater treatment plants in South Carolina, as well as around the country. Until recently, Utilities, Inc. owned a

wastewater treatment system in Tega Cay, South Carolina that routinely violated the CWA by spilling sewage into the community and nearby lake. Utilities, Inc. recently sold that system to the City of Tega Cay, which intends to improve the system's environmental performance.

### **LEGAL BACKGROUND**

19. Congress enacted the Clean Water Act to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). To accomplish that objective, Congress set as a national goal that “the discharge of pollutants into the navigable waters be eliminated ....” *Id.* Accordingly, Section 301(a) of the CWA provides that the discharge of pollutants into navigable waters of the United States is illegal, unless the discharger complies with the Act’s requirements. *Id.* at § 1311(a). Pursuant to the Act, a point source polluter such as CWS may only discharge pollutants pursuant to a NPDES permit issued by the EPA, or by a state or Tribe that has received approval to issue such a permit pursuant to Section 402(b) of the Act. *See id.* §§ 1311(a), 1342(a)-(b), 1362(12)(A). As explained below, in South Carolina, the entity approved to issue NPDES permits is DHEC.

20. Section 208 of the CWA contains provisions for area-wide wastewater treatment management planning. *See id.* § 1288. Each state is required to have a continuing area-wide planning process approved by the EPA, which specifies the procedures for formulating and revising water quality management plans, referred to as 208 plans. *See id.* §§ 1288(b), 1313(e); *see also* 40 C.F.R. § 130.6(e). Regional operating agencies are designated for each area to develop and implement area-wide 208 plans and revise them as necessary. *See* 33 U.S.C. § 1288(c). The relevant regional operating agency for the area that includes the I-20 facility is the Central Midlands Council of Governments (“CMCOG”), which is authorized to develop the 208 plan for the area encompassing Richland, Lexington, Fairfield, Newberry, and Kershaw counties.

21. Each state must ensure that state and area-wide 208 plans “together include all necessary plan elements and that such plans are consistent with one another.” 40 C.F.R. § 130.6(e). When a 208 plan is updated, the “Governor or the Governor’s designee” must certify to the EPA that the update is consistent with all other parts of the 208 plan. *Id.* DHEC is the Governor’s designee in South Carolina, and must review and certify each element of a 208 plan.

22. DHEC is also the agency authorized to issue NPDES permits in South Carolina pursuant to Section 402(b) of the CWA. *See* 33 U.S.C. § 1342(b). DHEC must ensure consistency between NPDES permits and approved 208 plans, and may not issue an NPDES permit that would conflict with an approved 208 plan. *See id.* at § 1288(e).

23. Each violation of a NPDES permit – and each “discharge of any pollutant” that is not authorized by a permit – is a violation of the CWA. *Id.* at §§ 1311(a), 1342(a), 1365(f).

24. Section 505 of the CWA authorizes any citizen to commence a civil action “against any person ... who is alleged to be in violation of ... an effluent standard or limitation ....” *Id.* at § 1365(a)(1).

25. Enforcement pursuant to Section 505 encompasses actions to remedy discharges in violation of Section 301 of the CWA, *id.* at § 1311, as well as actions to remedy violations of “a permit or condition thereof issued under section 1342 of this title,” that is, NPDES permits issued pursuant to Section 402 of the CWA. *Id.* at § 1365(f).

26. Section 505, *id.* at § 1365(a), also authorizes actions for injunctive relief.

27. Each separate violation of the CWA subjects the violator to a penalty of up to \$37,500 per day per violation for all violations occurring after January 12, 2009, pursuant to Sections 309(d) and 505(a) of the CWA. *Id.* at §§ 1319(d), 1365(a); 40 C.F.R. § 19.4 (2009) (Adjustment of Civil Monetary Penalties for Inflation).

28. Section 505(d), 33 U.S.C. § 1365(d), permits prevailing or substantially prevailing parties to recover litigation costs, including attorney fees and expert witness fees.

### **FACTUAL BACKGROUND**

29. The current Clean Water Act 208 Plan for the Central Midlands, adopted in 1997, calls for the consolidation of wastewater treatment facilities to eliminate discharges into the Lower Saluda River. *See* Exhibit A to 60-day notice letter (attached hereto as Exhibit 1) (208 Water Quality Management Plan for the Central Midlands Region (Feb. 27, 1997)) at 11 (stating Plan goal “[t]o promote the efficient management of water and wastewater distribution and collection systems through the elimination or consolidation of discharges and treatment facilities”), 142 (incorporating the 1990 Lower Saluda River Corridor Plan’s recommendation that “all domestic wastewater discharge be eliminated from the lower Saluda River”). To achieve this, the 208 Plan sets forth the following policy: “[s]mall, public or private domestic wastewater treatment facilities are considered temporary facilities. When a regional wastewater collection system, public or private, becomes available, these facilities will be required to connect to that system.” *Id.* at 44. The Plan incorporates a consolidation and elimination strategy developed by the Town of Lexington, the City of Cayce, and the Lexington County Joint Municipal Water and Sewer Commission whereby wastewater from the I-20 facility and others in the Lower Saluda basin is to “be sewered by the Town of Lexington and the flow sent to Cayce for treatment.” *Id.* at 8.

30. DHEC issued NPDES Permit No. SC0035564 on November 17, 1994 (effective January 1, 1995) (“the Permit”) authorizing CWS to discharge wastewater from the I-20 facility into the Lower Saluda River subject to specified effluent limitations, monitoring requirements, and other conditions. Exhibit B to 60-day notice letter (attached hereto as Exhibit 1) (NPDES

Permit No. SC0035564). Consistent with the 208 Plan, the Permit designates the I-20 facility as “a temporary treatment facility that will be closed out when the regional sewer system is constructed” and requires CWS to connect to the regional sewer system “[w]ithin 90 days after the issuance date of the Permit to Operate for the regional sewer system.” *Id.* at 7. The Town of Lexington received its Permit to Operate the relevant portion of the regional sewer system on April 7, 1999.

31. The Permit also includes effluent limitations for biochemical oxygen demand (“BOD”), total suspended solids, fecal coliform, total residual chlorine, dissolved oxygen, and pH, *id.* at 2-3, and requires that “[t]here shall be no discharge of floating solids or visible foam in other than trace amounts nor shall the effluent cause a visible sheen on the receiving waters.” *Id.* at 4. CWS is currently operating subject to NPDES Permit No. SC0035564.

32. The I-20 plant is routinely violating its effluent limits for fecal coliform and BOD. The EPA uses fecal coliform as an indicator of possible sewage contamination because the presence of fecal coliform in water bodies suggests that pathogenic microorganisms might also be present and that swimming and eating shellfish might be a health risk. BOD measures the amount of oxygen consumed by microorganisms in decomposing organic matter in water, as well as the chemical oxidation of inorganic matter (i.e., the extraction of oxygen from water via chemical reaction). BOD directly affects the amount of dissolved oxygen in rivers and streams: the greater the BOD, the more rapidly oxygen is depleted, meaning that less oxygen is available to higher forms of aquatic life. The consequences of high BOD are that aquatic organisms become stressed, suffocate, and die.

33. As set forth in Exhibit C to the 60-day notice letter (attached hereto as Exhibit 1), at the time of Congaree Riverkeeper’s 60-day notice letter, the I-20 facility’s monthly Discharge

Monitoring Reports (“DMRs”) registered nineteen permit violations between January 2009 and May 2013, including seven violations for fecal coliform and twelve violations for BOD. To date, four additional violations have been reported, including two for BOD and two for flow, *see* Exhibit 2, bringing the total number of violations to twenty-three, *see* Exhibit 3. In the past five years, DHEC has sent eight Notices of Violation to CWS for violations occurring at the I-20 facility.<sup>1</sup> *See* Exhibit 4. However, DHEC has not undertaken and is not diligently prosecuting any enforcement action against CWS for its violations.

34. CWS is also violating the Permit’s requirement that “there shall be no discharge of floating solids or visible foam in other than trace amounts nor shall the effluent cause a visible sheen on the receiving waters.” *See* Exhibit E to 60-day notice letter (attached hereto as Exhibit 1) (photographs from June 25, 2013, March 14, 2013, and September 10, 2012 documenting visible foam on the Lower Saluda River at the I-20 facility discharge site). Given that these violations have occurred routinely over the past six years, the pattern of permit violations is continuing and ongoing, as are the environmental and health risk hazards those violations present.

35. CWS is also violating its NPDES permit and the 208 Plan by continuing to discharge despite construction of a regional sewer treatment plant and a sewer collection line in close proximity to the I-20 facility. The 208 Plan requires the I-20 facility to connect to the regional sewer system as part of a larger effort to consolidate wastewater treatment facilities and eliminate discharges into the Lower Saluda River. The schedule of compliance for NPDES

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<sup>1</sup> According to the EPA’s ECHO website, DHEC sent Notices of Violation to CWS on Dec. 31, 2009; Jan. 25, 2011; May 13, 2011; Nov. 17, 2011; Apr. 20, 2012; Apr. 26, 2013; June 24, 2013; and May 6, 2014. U.S. EPA Enforcement and Compliance History Online (ECHO), Detailed Facility Report, <http://www.epa-echo.gov/cgi-bin/get1cReport.cgi?tool=echo&IDNumber=SC0035564> (last accessed on Jan. 7, 2015).

Permit No. SC0035564 requires CWS to connect to the regional sewer system within ninety days after the regional sewer system is issued its Permit to Operate. Although the Permit to Operate the regional sewer system was issued, and the system has operated, since 1999, CWS has failed for over a decade to connect the facility to the sewer system and continues to discharge into the Lower Saluda River. CWS's ongoing discharges of pollution into the Lower Saluda therefore violate its NPDES permit and the 208 Plan.

### **CLAIMS FOR RELIEF**

#### **Count I: Violation of NPDES Permit Condition Requiring Connection of the I-20 Facility to the Regional System**

36. The allegations of the preceding paragraphs are incorporated by reference as if repeated and set forth herein.

37. The waters of the Lower Saluda River are waters of the United States and are thus navigable waters as defined by the CWA and controlling authority, pursuant to 33 U.S.C. § 1362(7) and 40 C.F.R. § 122.2.

38. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant from any point source to waters of the United States, except in compliance with a NPDES permit issued pursuant to Section 402 of the CWA, *id.* at § 1342.

39. Carolina Water Service's NPDES permit for the I-20 facility designates it as a "temporary treatment facility that will be closed out when the regional sewer system is constructed and available" and requires CWS to connect to the regional sewer system "[w]ithin 90 days after the issuance date of the Permit to Operate for the regional sewer system." Exhibit B to 60-day notice letter (attached hereto as Exhibit 1) (NPDES Permit No. SC0035564) at 7.

40. The Town of Lexington, which owns the above-referenced regional sewer system, received its Permit to Operate the relevant portion of the regional sewer system on April 7, 1999.

Regional sewer system capacity thus became available to CWS at that time, and CWS was required to connect to that system within ninety days of April 7, 1999.

41. The NPDES permit provides that “[a]ll discharges authorized herein shall be consistent with the terms and conditions of this permit.” *Id.* at 13.

42. Federal regulations also provide that among the “conditions applicable to all permits” is the duty to “comply with all conditions of [the] permit,” and “[a]ny permit noncompliance constitutes a violation of the Clean Water Act and is grounds for enforcement action ....” 40 C.F.R. § 122.41(a).

43. To date, CWS has not connected to the regional sewer system, and continues to discharge into the Lower Saluda River in violation of the terms and conditions of its NPDES permit. As owner and operator of the I-20 facility, CWS is responsible for the CWA violations alleged herein that have occurred as a result of this failure to connect to the regional sewer system.

44. Neither the EPA nor DHEC is diligently prosecuting this ongoing violation of the CWA. Because CWS does not have immediate plans to connect the I-20 facility to the regional sewer system, it is likely that its discharges into the Lower Saluda will continue, and thus, that its violation of the terms and conditions of its NPDES permit will continue, presenting environmental and health risk hazards.

45. Continuing commission of the acts and omissions alleged herein irreparably harms the Lower Saluda River, as well as Congaree Riverkeeper and its Board, staff, and members.

**Count II: Violation of Section 208 of the Clean Water Act**

46. The allegations of the preceding paragraphs are incorporated by reference as if repeated and set forth herein.

47. The 208 Plan for the Central Midlands region requires the consolidation of wastewater facilities in order to eliminate discharges into the Lower Saluda River. Specifically, the Plan provides that “[s]mall, public or private domestic wastewater treatment facilities are considered temporary facilities. When a regional wastewater collection system, public or private, becomes available, these facilities will be required to connect to that system.” See Exhibit A to 60-day notice letter (attached hereto as Exhibit 1) (208 Water Quality Management Plan for the Central Midlands Region) at 44. The I-20 facility is one of the wastewater treatment facilities covered under this provision, and according to the Plan, wastewater from the I-20 facility is to “be sewered by the Town of Lexington and the flow sent to Cayce for treatment.” *Id.* at 8.

48. The Town of Lexington’s sewer system has been operational since April 7, 1999. To date, CWS has failed to connect the I-20 facility to that regional sewer system and eliminate its discharges into the Lower Saluda River, as required by the 208 Plan.

49. Neither the EPA nor DHEC is diligently prosecuting this ongoing violation of the CWA. The I-20 facility’s discharges into the Lower Saluda, which constitute an ongoing violation of the 208 Plan presenting environmental and health risk hazards, are likely to continue into the foreseeable future.

50. Continuing commission of the acts and omissions alleged herein irreparably harms the Lower Saluda River, as well as Congaree Riverkeeper and its Board, staff, and members.

**Count III: Violation of NPDES Permit Conditions Regarding Effluent Limitations and Other Standards**

51. The allegations of the preceding paragraphs are incorporated by reference as if repeated and set forth herein.

52. CWS's NPDES permit for the I-20 facility includes effluent limitations for biochemical oxygen demand ("BOD"), total suspended solids, fecal coliform, total residual chlorine, dissolved oxygen, and pH, and requires that "[t]here shall be no discharge of floating solids or visible foam in other than trace amounts nor shall the effluent cause a visible sheen on the receiving waters." Exhibit B to 60-day notice letter (attached hereto as Exhibit 1) (NPDES Permit No. SC0035564) at 2-4. Under the permit, "[a]ll discharges authorized herein shall be consistent with the terms and conditions of this permit." *Id.* at 13. The NPDES permit further provides that "[t]he discharge of any pollutant identified in this permit more frequently than or at a level in excess of that authorized shall constitute a violation of the permit." *Id.*

53. As set forth in Exhibit 3, at the time of Congaree Riverkeeper's 60-day notice letter, nineteen NPDES violations were reported in the I-20 facility's monthly DMRs between January 2009 and May 2013, including seven violations for fecal coliform and twelve violations for BOD. To date, four additional violations have been reported, including two for BOD and two for flow.

54. Although DHEC has sent numerous Notices of Violation to CWS for violations occurring at the I-20 facility, neither the EPA nor DHEC is diligently prosecuting the NPDES permit violations. Given that these violations have occurred routinely over the past six years and CWS appears not to have undertaken action to remedy them, the pattern of permit violations is continuing and ongoing – as are the environmental and health risk hazards those violations present – and this pattern is likely to continue into the future.

55. Continuing commission of the acts and omissions alleged herein irreparably harms the Lower Saluda River, as well as Congaree Riverkeeper and its Board, staff, and members.

### **REQUEST FOR RELIEF**

WHEREFORE, Congaree Riverkeeper respectfully requests that this Court:

A. Issue a declaratory judgment stating that Carolina Water Service has violated and is continuing to violate the Clean Water Act with its ongoing illegal discharges into the Lower Saluda River;

B. Grant appropriate injunctive relief to prompt, incent, and ensure that CWS connects the I-20 facility to the regional system, eliminates its discharge into the Lower Saluda River, and complies with the effluent limitations and other provisions of its NPDES permit until such connection occurs;

C. Assess civil penalties against CWS of up to \$37,500 per violation per day pursuant to 33 U.S.C. §§ 1319(d) & 1365(a), and 40 C.F.R. § 19.4;

D. Award Congaree Riverkeeper the costs of this action, including reasonable attorney and expert witness fees, as authorized by 33 U.S.C. § 1365(d); and

E. Grant Congaree Riverkeeper such further and additional relief as the Court deems just and proper.

Respectfully submitted this 14th day of January, 2015.

/s/ J. Blanding Holman IV

J. Blanding Holman IV

D.S.C. Bar No. 9805

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