

IN THE UNITED STATES DISTRICT COURT  
FOR THE **EASTERN** DISTRICT OF PENNSYLVANIA

**FRIENDS OF CONCORD CREEK,**  
Plaintiff

v.

NO. 02-CV-2742

**SPRINGHILL FARM WASTEWATER  
TREATMENT FACILITY ASSOCIATION,**  
Defendant

MEMORANDUM AND ORDER

McLaughlin, J.

February 12, 2003

Plaintiff Friends of Concord Creek ("FOCC") **filed a citizen's** suit against defendant Springhill Farm Wastewater Treatment **Facility** Association ("Springhill") pursuant to the **federal Water** Pollution Control Act ("CleanWater Act"), 35 U.S.C. § 1251 et seq., and **the** Pennsylvania Clean Streams Law ("PCSL"), 35 P.S. § 691.601 et seq. Among other things, FOCC **seeks an order** requiring Springhill to convey the wastewater that it is currently discharging into a local creek to local treatment facilities instead. FOCC alleges that Springhill is violating the terms of its state-issued National Pollutant Discharge Elimination **System** ("NPDES") **permit by** continuing to put wastewater into an unnamed tributary to the West Branch of Chester Creek, locally known as Concord Creek, despite the

availability of local treatment facilities

Springhill's NPDES permit states in relevant part:

This **permit** authorizes the **discharge** of treated **sewage** until such time as facilities for the conveyance and treatment at a more suitable location are installed and are capable of receiving and treating the permittee's **sewage**. . . . When such municipal sewage facilities become available, the permittee shall provide for the conveyance of the sewage to these sewerage facilities, abandon the use of the sewage treatment plant thereby terminating the discharge authorized **by** this permit, and notify the Department accordingly.

NPDES Permit No. PA0052230, Part C, **subsection 2**; quoted in the **Complaint** at ¶31 and Defendant's Motion to Dismiss at 3.

The **defendant** moves to dismiss FOCC's complaint pursuant to Fed. R. Civ. P. 12(b)(7) for failure to join an **indispensable** party, the Pennsylvania Department of Environmental Protection ("PADEP"), arguing that FOCC's requested injunctive relief cannot be provided without PADEP's prior approval. Springhill states that it could not comply with the order requested **by** FOCC without revisions to the local municipality's sewage facilities plan, which are subject to PADEP's approval under the Pennsylvania Sewage Facilities Act, 35 P.S. § 750.1 et seq

Rule 12(b)(7) allows a defendant to seek dismissal of an action when the plaintiff fails to join an indispensable party as defined by Rule 19. Rule 19(a) requires joinder of a non-

party if, in the non-party's absence, complete relief cannot be accorded among the parties to the action. Bank of America Trust and Savings Assoc. v. Hotel Rittenhouse Association et al., 844 F.2d 1050, 1053 (3d Cir. 1988). **Applied** to the case at hand, these rules require dismissal of this case if the Court cannot grant complete relief without joining PADEP.

The relief FOCC seeks, an order for Springhill to comply with the terms **of** its permit, could be granted without joining **PADEP**. The NPDES permit requires Springhill to stop its Concord **Creek** discharge, convey its sewage to the available facilities and notify the DEP once sewage treatment facilities **are available**. The **terms** require **Springhill, not DEP, to take action**.

FOCC alleges in its complaint that local sewage treatment facilities are now in place, specifically the **Concord** Township and Chadds Ford Township sewer authorities. It also alleges that these sewer treatment facilities are available to take the wastewater that Springhill is currently discharging into Concord Creek.

**If** the factfinder determines that FOCC's allegations are true, then Springhill would not be in compliance with its **permit**. The Court **could** then **order** the defendant to comply and afford FOCC complete relief without joining PADEP to this action.

PADEP is not an indispensable party because it might become later involved after Springhill takes the required steps to comply.

Neither would the interests of the state be prejudiced **by** failing to join PADEP. In keeping with the notice requirements of section 505(b) **of** the Clean Water Act and section 691.601(e) **of** the **PCSL**, the plaintiff notified PADEP that it **was** filing this claim against defendant in March 2002. Complaint at ¶6. The agency has not moved to intervene or join the action.

Because this Court finds that **complete relief** can be accorded to FOCC without PADEP's joinder, PADEP is not an indispensable party to this action. The motion to dismiss for **failure** to join **an** indispensable party is denied.

**An** appropriate order follows.

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ORDER

AND NOW, this 12<sup>←</sup> day of February, 2003, upon consideration of the **Defendant's** Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(7) **for** Failure to Join an Indispensable Party (Docket #3), the Plaintiff's Opposition to the motion, and the **Defendant's** Reply to the Opposition, and after oral argument **before** this Court on January 22, 2003, it is hereby Ordered that said motion is Denied for the reasons given in a memorandum of **today's date.**

BY THE COURT:

  
MARY A. MCLAUGHLIN, J.

2/13/03  
forwarded to: J. Stoltz  
D. Stults  
J. May  
L. Welch