EXHIBIT B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
OWENSBORO DIVISION

THE CITY OF EARLINGTON, KENTUCKY
PLAINTIFF.

vs.

CONSOLIDATED
CIVIL ACTION NOS.: 88-0069-O(R)
AND
86-0203-O(R)

THE CITY OF MADISONVILLE, KENTUCKY
DEFENDANT.

MEMORANDUM OPINION

The court, after having dismissed the Administrator of the Environmental Protection Agency as a party defendant, requested that the parties submit briefs on the issue of the continuing jurisdiction of this court over the subject matter of this controversy. After reviewing the briefs and the applicable law, the court finds that it lacks subject matter jurisdiction and is therefore compelled to dismiss the case.

FACTS

This case concerns a controversy between the City of Earlington and the City of Madisonville regarding the rate to be charged under a "Sewer Contract." The terms of this contract in some respects were required to conform to the demands of the Federal Water Pollution Control Act ("FWPCA")(hereinafter referred to as the Clean Water Act, or "CWA"), 33 U.S.C. § 1251 *et seq.* (1988) and its implementing regulations.

The contract was entered into on February 9, 1978, and provided that Madisonville would accept and treat wastewater from Earlington. The rate to be paid by Earlington was specified in the contract, and was based on the "actual" metering of wastewater produced. In addition, a "user fee agreement" was executed between the parties in order to satisfy an EPA requirement as a precondition to receiving a 1976 grant for the construction of the wastewater treatment facility.[1] The Sewer Contract provided that each city would be entirely responsible for the operation and maintenance of their own collector lines.

[1] Title II of the CWA allows the EPA to grant funds to municipalities to assist them in the construction of wastewater treatment facilities and to otherwise aid municipalities with the financial burdens associated with compliance with the CWA. Before the Administrator of the EPA may approve a grant, he or she must be satisfied that a "user charge system" is or will be enacted to cover the operation of the facility. 40 C.F.R. § 35.925-11 (1977). The regulations require that the user charge be based either upon "actual" or "estimated" use of the system. They further require that all users bear the costs of operation and maintenance of the facility attributable to sources other than wastewater, such as "inflow" and "infiltration." 40 C.F.R. § 35.935-13 (1977).

Under the billing practices of Madisonville, the City of Earlington's wastewater costs are based on "actual" use of services, whereas other customers of the Madisonville facility are billed based on "estimated" use. In addition, the "user fee" charged to all customers of the Madisonville facility pursuant to Madisonville's sewer use ordinance, including Earlington, includes amounts for debt service on Madisonville's old facility, costs of operation of the new facility, and costs for operation and maintenance of collector lines located solely in Madisonville.

Earlington now argues that the billing practices of Madisonville violate the terms of the Sewer Contract. Earlington also claims that the billing arrangement is in violation of the CWA and its implementing regulations. Finally, Earlington asserts that the billing violates its substantive due process and equal protection rights, and is thus suing under 42 U.S.C. § 1983.

DISCUSSION

Federal courts are courts of limited jurisdiction, and there is a presumption that jurisdiction does not exist. The party seeking to invoke the jurisdiction has the burden of establishing jurisdiction.[2] Plaintiff seeks to establish federal question jurisdiction[3] under a variety of theories.

As an initial matter it must be noted that in order to establish federal question jurisdiction, the federal issues must be essential to the controversy and not merely collateral allegations made solely for the purpose of obtaining jurisdiction.[4] "[T]here must be a federal question not in mere form but in substance, not a mere assertion but in essence and effect to give the court jurisdiction." Hudson Motor Car Co. v. City of Detroit, 136 F.2d 574, 576 (6th Cir. 1943) (citations omitted).

Plaintiff's first argument is that the resolution of this contract dispute will turn on an interpretation of either the Clean Water Act or the Administrative Procedure Act ("APA").

CWA § 204(b)(1) requires that a party receiving funds from the EPA for the construction of a wastewater treatment facility must adopt a user charge system so that the costs of operation and maintenance of the facility are shared proportionately. However, the calculation of that user charge is not established by statute or regulation. This is left to the parties to establish by contract.

Plaintiff's claim appears to be that § 204(b)(1) requires a specific kind of user charge, and that all customers must be charged on the same basis, either "actual" or "estimated" use.

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[2] McNott v. General Motors Acceptance Corp., 298 U.S. 178, 188-89 (1936).

[3] 28 U.S.C. § 1331 (1988) provides "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

[4] Screven County v. Brier Creek Hunting and Fishing Club, 202 F.2d 369, 370 (5th Cir. 1953) (citations omitted).

Essentially, this requires the interpretation of the CWA. This alone, however, is an insufficient basis to invoke the federal question jurisdiction of this court.[5] The interpretation of the Constitution or federal law must be central to the dispute, it is not enough that federal law merely informs the outcome.[6]

In deciding whether a federal question exists, courts look to see whether the remedy sought derives from state or federal law and whether the outcome of the case will turn upon an interpretation of federal law.[7] First, plaintiff's claim sounds in the state law of contract, and thus his remedy is a creature of state law. Second, while the interpretation of the CWA will doubtless play some role in the litigation, it will not determine the outcome of this case. In this contract action the intent of the parties in forming the contract and each party's performance thereunder will be the critical elements. For these reasons, the interpretation of the CWA is an insufficient basis to afford jurisdiction.

As an alternative basis for jurisdiction, plaintiff claims due process, equal protection, and §1983 violations.[8] While the plaintiff has not offered any case law to support the claim that an equal protection or due process violation has occurred, nor articulated with any particularity the right alleged to have been violated, this court will nonetheless address this issue. However, for the reasons below, the court concludes that the constitutional claims are incapable of establishing jurisdiction.

In Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1 (1981), the Supreme Court held that the exhaustive enforcement mechanisms available

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[5] "A cause of action does not have the necessary jurisdictional elements unless it presents a basic dispute as to the interpretation or construction of the Constitution or laws of the United States of such serious import that jurisdiction will be supported if the laws or constitutional provision be given one interpretation and defeated if given another." Screven County v. Brier Creek Hunting and Fishing Club, 202 F.2d 369, 370 (5th Cir. 1953) (citations omitted).

[6] Chicago and North Western Railway Company v. Toledo, Peoria & Western Railroad Company, 324 F.2d 936 (7th Cir. 1963) held that mere fact that joint trackage contract required Interstate Commerce Commission approval insufficient to confer jurisdiction on federal court. *See also* Jemo Associates, Inc. v. Greene Metropolitan Housing Authority, 523 F.Supp. 186, 188 (1981): "the resolution of these disputes *may* involve interpretations of federal regulations and a HUD handbook. ... These elements, however, form too tenuous a relationship to federal law upon which to ground federal jurisdiction."

[7] 523 F.Supp at 188.

[8] It should be noted that it is inappropriate to speak of a § 1983 "violation." § 1983 creates no substantive rights, and thus cannot itself be violated. Rather, it provides a mechanism for the vindication of constitutional rights. Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 617-18 (1979). In addition, § 1983 does not provide an independent jurisdictional basis for the federal courts.

under the CWA were intended to be exclusive of other remedies.[9] In City of Las Vegas v. Clark County, 755 F.2d 697 (9th Cir. 1985), the Ninth Circuit indicated that this precluded suits brought under both § 1331 or § 1983.[10]

Because of the exhaustive nature of the remedies afforded by the CWA, a plaintiff may not bring an action under the Due Process clause or the Equal Protection clause under §1983 for what are essentially claims relating to the CWA. The sole remedy afforded is provided by 33 U.S.C. § 1365(a) (1988), the so called "citizen-suit" provision. This the plaintiff failed to do. The language of the Supreme Court in *National Sea Clammers Ass'n* was sufficiently broad that the conclusion is inescapable that the Court intended that this result should obtain not only for direct suit against the Administrator of the EPA seeking to compel enforcement, but to constitutional torts and any claim against a party premised on a particular reading of the statute.

Even were the court to conclude that the enforcement provisions of the CWA do not bar plaintiff's § 1983 claim, plaintiff cannot state a claim under § 1983. Plaintiff is the City of Earlington, a municipal corporation organized under the laws of Kentucky. It is well established that a municipality is not a "person" who can invoke the protection of either §1983 or the Due Process clause. City of Newark v. State of New Jersey, 262 U.S. 192, 196 (1923) ("A city cannot invoke the protection of the Fourteenth Amendment against the State.") Further, the Seventh Circuit has held in Village of Arlington Heights v. Regional Transportation Authority, 653 F.2d 1149, 1152-53 (7th Cir. 1981) that "the principle that a municipality may not challenge acts under the Fourteenth Amendment applies 'whether the defendant is the state itself or another of the state's political subdivisions.'" (quoting City of South Lake Tahoe v. California Tahoe, 625 F.2d 231, 233 (1980) (citations omitted).[11]

While a municipality does qualify as "person" subject to suit under §1983 and the Due Process clause when the plaintiff demonstrates that a constitutional deprivation was proximately

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[9] "[T]he FWPCA and MPRSA do provide quite comprehensive enforcement mechanisms. It is hard to believe that Congress intended to preserve the §1983 right of action when it created so many specific statutory remedies, including the two citizen-suit provisions. ... We therefore conclude that the existence of these express remedies demonstrates not only that Congress intended to foreclose implied private actions but also that it intended to supplant any remedy that otherwise would be available under § 1983." 453 U.S. at 20-21 (citations omitted).

[10] "The Supreme Court in [National Sea Clammers Ass'n] concluded that Congress intended to limit access to federal court to enforce the CWA to the express enforcement provisions of the Act. This precludes suits brought under 28 U.S.C. § 1331 and 42 U.S.C. § 1983." *Id.* at 703.

[11] The court in *Arlington Heights* heard and rejected an argument that because the city was a "home rule" municipality under the Illinois Constitution that a different result should obtain because it was no longer part of the state. While the conclusion as to whether a municipality is an organ of the state might theoretically hinge upon the source of that municipality's power, the result should generally be the same. As the court noted, the purpose of the Fourteenth Amendment is to protect the liberty and property of natural persons and corporations. 653 F.2d at 1153.

caused by the established "policy" or "custom" of the municipality,[12] the court in Appling County v. Municipal Electric Authority of Georgia, 621 F.2d 1301, 1308 (1980) held that "[t]he *Monell* decision does not call into question the principle that a city or county cannot challenge a state statute on federal Constitutional grounds."

In any event, practitioners must carefully distinguish, both conceptually and in their citation to case law, between those *plaintiffs* who may qualify as a "person" in order to invoke the *protections* of the due process clause and § 1983, and those *defendants* who may qualify as a "person" *liable* for a constitutional deprivation as a defendant under the same provisions.

Plaintiff's claim regarding the interpretation of the APA is likewise foreclosed by *National Sea Clammers Ass'n*. Although the APA does authorize judicial review of final agency action at 5 U.S.C. § 704 (1988), the Supreme Court's reading of the enforcement provisions of the CWA precludes independent review under the APA.

This is not the first time disputes have arisen between parties to contracts subject to regulation under the CWA. But as the court in City of Detroit v. State of Michigan, 538 F.Supp 1169, 1172 n.1 (E.D. Mich. 1982) put it: "From a fair reading of the section it would appear that Congress intended only to require the service agencies to institute a user charge and leave to state law, presumably the law of contracts, the method of enforcement."

At issue is a contract dispute between the two cities, and it presents no substantial federal question sufficient to justify the jurisdiction of this court.

12-27-94

Thomas B. Russell, District Judge
United States District Court

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DEC 29 1994
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[12] Monell v. Department of Social Services, 436 U.S. 658 (1978).

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THE CITY OF MADISONVILLE, KENTUCKY
DEFENDANT.

ORDER

Defendant having filed a Motion for Dismiss and the Court being sufficiently advised,

IT IS HEREBY ORDERED that said motion is GRANTED.

This the 28 day of December 1994.

Thomas B. Russell, District Judge
United States District Court

Copies to:

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J. Scott McGaw

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