

Exhibit No.:

Issue(s):

Witness/Type of Exhibit:

Sponsoring Party:

Case No.:

Federal Prosecution/

EPA Regulations

Muschler/Surrebuttal

Public Counsel

WC-2002-155

## **SURREBUTTAL TESTIMONY**

**OF**

**VIC E. MUSCHLER**

Submitted on Behalf of the Office of the Public Counsel

**OFFICE OF THE PUBLIC COUNSEL**

v.

**WARREN COUNTY WATER & SEWER COMPANY  
AND GARY L. SMITH**

**Case No. WC-2002-155  
(Consolidated with SC-2002-160)**

April 24 , 2002

**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI**

Office of the Public Counsel, )  
Complainant, )  
v. )  
Warren County Water and Sewer )  
Company and Gary L. Smith, )  
Respondents. )

Case No. WC-2002-155

**AFFIDAVIT OF VIC E. MUSCHLER**

STATE OF MISSOURI )

County of St. Charles )  
(COUNTY) OF St. Charles )  
SS

Vic E. Muschler, of lawful age and being first duly sworn, deposes and states:

1. My name is Vic E. Muschler. I am employed as a Special Agent with the Criminal Investigation Division of the Environmental Protection Agency.
2. Attached hereto and made a part hereof for all purposes is my surrebuttal testimony consisting of pages 1 through 22.
3. I hereby swear and affirm that my statements contained in the attached testimony are true and correct to the best of my knowledge and belief.

Vic E. Muschler  
Vic E. Muschler

Subscribed and sworn to me this 23rd day of April 2002.

Lisa R. Keiser  
Notary Public

My commission expires 4/3/05.

**"NOTARY SEAL"**  
Lisa R. Keiser, Notary Public  
St. Charles County, State of Missouri  
My Commission Expires 4/3/05

STATE OF MISSOURI

PUBLIC SERVICE COMMISSION

OFFICE OF THE PUBLIC COUNSEL )  
 )  
vs. ) No. WC-2002155  
 )  
WARREN COUNTY WATER & SEWER COMPANY )  
and GARY L. SMITH )

SURREBUTTAL DEPOSITION OF VIC E. MUSCHLER,  
produced, sworn and examined on behalf of the Office of  
the Public Counsel on April 3, 2002, between the hours of  
eight o'clock in the forenoon and six o'clock in the  
afternoon of that day at the Department of Natural  
Resources, 9200 Watson Road, St. Louis, Missouri, before  
JANINA A. JAEGER, a Registered Professional Reporter and a  
Notary Public.

A P P E A R A N C E S

The Office of the Public Counsel was  
represented by M. RUTH O'NEILL, Assistant Public Counsel,  
Office of the Public Counsel, Department of Economic  
Development, State of Missouri, 200 Madison Street, Suite  
650, Jefferson City, Missouri 65102.

I N D E X

WITNESS:	PAGE
Vic E. Muschler.....	4

E X H I B I T S

Exhibit No. 1.....	9
Exhibit No. 2.....	11

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VIC E. MUSCHLER,

being produced, sworn, examined on behalf of the Office of  
the Public Counsel, deposes and says:

DIRECT EXAMINATION

QUESTIONS BY MS. O'NEILL:

Q. Could you state your name, please?

A. Vic Ernest Muschler.

Q. Where are you employed?

A. Special Agent, United States Environmental  
Protection Agency, Criminal Investigation Division, St.  
Louis Area Office.

Q. How long have you been with that office?

A. Approximately ten years.

Q. And can you describe your position as special  
agent, what your duties are for that?

A. Yes. I conduct investigations involving  
environmental crimes in reference to the laws of the  
United States.

Q. And what training do you have that assist you  
in your duties as a special agent?

A. I attended the Criminal Investigations course  
down at the Federal Law Enforcement Training Center in  
Glenco, Georgia. In addition I attended the Environmental  
Investigations Training course also at FLETC, Federal Law  
Enforcement Training Center.

1 Q. What is your educational background?

2 A. I have a bachelor's degree in management.

3 Q. Can you describe your employment prior to  
4 your employment with the EPA?

5 A. Yes. I was a police officer with the City of  
6 St. Charles, St. Charles, Missouri for approximately ten  
7 years.

8 Q. And did you also have law enforcement  
9 training to assist you in your duties with that job?

10 A. Yes. I attended numerous law enforcement  
11 training courses.

12 Q. Have you investigated cases involving waste  
13 water treatment plants?

14 A. Yes, I have.

15 Q. Did you do that prior to coming to the EPA,  
16 or just subsequent to working for them?

17 A. Just since being with the EPA.

18 Q. How long have you been with the EPA?

19 A. Approximately ten years.

20 Q. About how many, approximately, waste water  
21 plants have you investigated?

22 A. I have probably conducted approximately  
23 thirty investigations involving waste water treatment  
24 plants directly.

25 Q. When you do those investigations, what does

1           that entail?

2           A.       Normally we receive a complaint that a waste  
3           water treatment facility for one reason or another may or  
4           may not be out of compliance.

5                       We first attempt to determine who is the  
6           responsible party for that waste water treatment facility.

7                       We contact the regulatory agencies involved  
8           with waste water treatment plants for the area that the  
9           plant is located in.  If it's in the State of Missouri, we  
10          work with the Missouri Department of Natural Resources.

11                      We would attempt to find out the history of  
12          the plant.  If necessary, we may request some analysis to  
13          be conducted on the effluent or the discharge of the  
14          facility, and we may also review the inspections of those  
15          facilities.

16                      Q.       In the course of your employment with the  
17          EPA, did you have occasion to be involved with an  
18          investigation of Gary Smith and the Warren County Water  
19          and Sewer Company?

20                      A.       Yes, I have.

21                      Q.       Can you describe the reason for your initial  
22          contact with that company?

23                      A.       In June of 2000 we received a complaint that  
24          the waste water treatment facility at Incline Village may  
25          not be operating properly, discharging in exceedance of

1 the permit limit.

2 Q. Was that a customer complaint, or was that  
3 from another agency, if you recall?

4 A. That was a customer complaint.

5 Q. And do you remember when that complaint was?

6 A. We received it in June of 2000.

7 Q. What did you do in response to that customer  
8 complaint?

9 A. I obtained the -- or reviewed the document,  
10 the records from the Missouri Department of Natural  
11 Resources in reference to that. I conducted some  
12 surveillance of the facilities. I did some background  
13 checks on the operator/owner, Gary Smith, of the facility.

14 Q. What did your investigation reveal?

15 A. It was my opinion that the plants were  
16 exceeding the limits on their waste water treatment  
17 discharges, and in April of 2001 I received additional  
18 information that a discharge was occurring from a waste  
19 water sewer manhole directly into the Incline Village  
20 Lake, which had been previously determined to be waters of  
21 the United States which, in my opinion at that time, would  
22 have been a violation of the Clean Water Act.

23 Q. And do your duties involve enforcement of the  
24 Clean Water Act?

25 A. Yes, they do.

1 Q. What contacts did you have with Mr. Smith and  
2 his company regarding the results of your investigation?

3 A. During the investigation in April of 2001 we  
4 did determine that there was possibly a discharge of  
5 untreated waste water into Incline Village Lake. At the  
6 request of the United States Attorney's Office we  
7 contacted Gary Smith.

8 Q. And can you describe what happened in that  
9 contact?

10 A. We contacted Gary Smith and asked him if he  
11 was aware of the discharge. At the time he said he was.  
12 We asked him -- we told him that the U.S. Attorney's  
13 Office was considering filing criminal charges against him  
14 if -- that they were going to file the criminal charges  
15 and that he needed to cease the discharge as soon as  
16 possible.

17 Q. Did Mr. Smith respond to your concerns?

18 A. Yes. He requested that we send him a letter  
19 stating that. I advised him that that wasn't going to  
20 occur, that he had been verbally told about the discharge.

21 Q. What did you do next?

22 A. After receiving the sample analysis results  
23 that were obtained by the National Enforcement  
24 Investigation Center, the regional technical coordinator  
25 that we have in our office had taken some samples of those

1 discharges, we presented the facts of the investigation to  
2 the U.S. Attorney's Office for prosecution.

3 Q. Why did you refer this matter to the U.S.  
4 Attorney's Office for prosecution?

5 A. My job entails obtaining the facts of an  
6 investigation. It attempts to take all of those and  
7 present it to the U.S. Attorney's Office for their  
8 consideration and prosecution. It's their job to make  
9 that decision.

10 Q. After your referral of this matter to the U.  
11 S. Attorney's Office, was an indictment returned by the  
12 grand jury?

13 A. Yes.

14 Q. Do you know when that was?

15 A. Yes. The indictment was returned on April  
16 26, 2001.

17 Q. And what did the grand jury find?

18 A. The indictment returned, or the grand jury  
19 returned a true bill indicting Gary Smith for violations  
20 of the Clean Water Act.

21 (Whereupon, Office of the Public Counsel's  
22 Exhibit No. 1 was marked.)

23 BY MS. O'NEILL:

24 Q. I'm showing you what has been marked for  
25 purposes of this proceeding as Exhibit 1.

- 1 Do you recognize that?
- 2 A. Yes, I do.
- 3 Q. What is that document?
- 4 A. It's a copy of the indictment against Gary  
5 Smith.
- 6 Q. And does that appear to be a true and correct  
7 copy of the indictment?
- 8 A. Yes, it does.
- 9 Q. And the charges that the grand jury true  
10 billed on, was that a felony?
- 11 A. Yes, it was.
- 12 Q. Are you aware of what the ultimate outcome  
13 was regarding that charge?
- 14 A. Yes. Mr. Smith entered a guilty plea in  
15 August of 2001.
- 16 Q. I'm going to show you what has been  
17 previously marked and attached to the direct testimony of  
18 Kimberly Bolin as Schedule KKB-2 and ask if you recognize  
19 that?
- 20 A. Yes. It's a copy of the plea agreement and  
21 stipulation of facts in reference to the Gary Lett Smith  
22 case.
- 23 Q. Does that appear to be a true and accurate  
24 copy of that document?
- 25 A. Yes, it does.

1 Q. And what is the name of that document?

2 A. It is the Plea Agreement and Stipulation of  
3 Facts Relative to Sentencing.

4 Q. What did Gary Smith stipulate or plead guilty  
5 to?

6 A. A felony violation of the Clean Water Act.

7 Q. And have there been any subsequent legal  
8 proceedings in this case since that plea of guilty?

9 A. Yes.

10 Q. And can you tell me what those subsequent  
11 proceedings were?

12 A. Yes. We were notified that a lift station  
13 operated and maintained by Gary Smith, Warren County Water  
14 and Sewer District, had failed and was discharging into a  
15 unnamed tributary.

16 (Whereupon, Office of the Public Counsel's  
17 Exhibit No. 2 was marked.)

18 BY MS. O'NEILL:

19 Q. I'm showing you what has been marked as  
20 Exhibit No. 2. Could you tell me whether you recognize  
21 that document?

22 A. Yes. This is a copy of a certified -- I'm  
23 sorry.

24 It's a copy of a letter that was sent by the  
25 Missouri Department of Natural Resources dated January 15,

1 2002 to Mr. Gary Smith via certified mail. Attached to it  
2 appears to be the notices of violations that are  
3 referenced in the January 15th letter.

4 Q. Is that the information that you received  
5 about the probation violation?

6 A. Yes, it is.

7 Q. And what did you do with that information?

8 A. I presented the information in reference to  
9 the additional violations to the United State's Attorney's  
10 Office for consideration of a probation revocation, or  
11 probation violation by Gary Smith, because he had  
12 originally been sentenced in September to one year, or  
13 twelve months probation, which included home confinement.

14 I felt that the discharge of the Shady Oak's  
15 lift station, which is what we were talking about on the  
16 January 15th letter here with the notices of violation,  
17 would be a violation of his conditions of probation.

18 Q. Can you describe for me the incident which  
19 resulted in this January 15th letter?

20 A. Yes. From my investigation it was determined  
21 that a lift station that services a mobile home park,  
22 which is within the jurisdiction of the Warren County  
23 Water and Sewer District and maintained by Gary Smith, was  
24 failing. In other words, it wasn't working. It was  
25 allowing the discharge of untreated sanitary sewage, which

1 is a violation of the Clean Water Act. That discharge was  
2 reaching an unnamed tributary which is in the waters of  
3 the United States which, again, is a violation of the  
4 Clean Water Act.

5 Subsequently we took that information and  
6 presented it to the Probation Office who filed a probation  
7 violation complaint, and a warrant was issued for Mr.  
8 Smith's arrest.

9 I arrested Mr. Smith, at which time he was  
10 transported to the U.S. Marshal's office where he later  
11 that day was in front of a judge for his initial  
12 appearance. The judge set a bond. I don't know at what  
13 time Mr. Smith made the bond or when he was released.

14 Later on there was a preliminary hearing in  
15 reference to those violations of his probation. I  
16 testified before a judge for that, Judge Adleman. He  
17 found that there was enough evidence to move the case  
18 forward to the original sentencing judge, which was Judge  
19 Webber.

20 Q. And did Judge Webber hold a hearing, as well?

21 A. Yes. Judge Webber held a hearing on the  
22 probation violation. Evidence was presented by the United  
23 States Attorney's Office. Judge Webber ruled that enough  
24 evidence had been presented to show a violation of Mr.  
25 Smith's probation had occurred, although he did not

1 sentence Mr. Smith at that time. He was withholding his  
2 sentence for an additional sixty days.

3 Q. Were you present at that violation hearing?

4 A. Yes, I was.

5 Q. Were you one of the witnesses at that  
6 hearing?

7 A. No, I wasn't.

8 Q. When Judge Webber indicated that he was  
9 withholding sentencing for sixty days, did he indicate  
10 why, that you can recall?

11 A. Mr. Smith -- or Judge Webber stated that he  
12 would like to allow Mr. Smith an additional sixty days to  
13 attempt to get the waste water treatment facility and the  
14 plant operating. Judge Webber did state that if there is  
15 additional violations brought to his attention, the  
16 judge's attention, by Gary Smith, he may be, Judge Webber  
17 would be derelict in his duties not to sentence Mr. Smith  
18 to jail time.

19 Q. So is Mr. Smith still under supervision?

20 A. Yes, he is.

21 Q. And you indicated previously he was on  
22 probation for a period of twelve months total; is that  
23 correct?

24 A. That is correct.

25 Q. Would that be from his sentencing date, or

1 from his plea date?

2 A. From his sentencing date, which was in  
3 September.

4 Q. Are you aware of what the possible outcomes  
5 would be if Mr. Smith continues to violate probation?

6 A. Yes. Mr. Smith could be sentenced to jail on  
7 the federal charges.

8 Q. Mr. Muschler, during the course of your  
9 investigation did you have occasion to work with Technical  
10 Support and the State of Missouri?

11 A. Yes.

12 Q. What is the reason for their involvement?

13 A. The Environmental Protection Agency, Criminal  
14 Investigation Division agents are not, do not take  
15 samples, and those samples in this case would be waste  
16 water treatment samples or any samples in reference to our  
17 investigation.

18 We have regional technical coordinators,  
19 scientists, which obtain those samples, transfer those  
20 samples, or make arrangements for transportation of those  
21 samples to laboratories for analysis, and then based upon  
22 the analysis, or the results of those, that testing, that  
23 is all then added into our investigation and presented to  
24 the U. S. Attorney's Office.

25 Q. Are you aware of who took samples related to

1 your investigation of Mr. Smith and Warren County Water  
2 and Sewer Company?

3 A. Yes. Fred Niermann, the Regional Technical  
4 Coordinator, that is assigned to the St. Louis Area  
5 Office obtained samples and, in addition to that, the  
6 Missouri Department of Natural Resources also obtained  
7 their own samples which we did use in reference to our  
8 investigation.

9 Q. And is it common for the EPA to rely to some  
10 extent on samples gathered by state agencies in their  
11 investigations?

12 A. Yes.

13 Q. And, to your knowledge, was an analysis done  
14 on all of the samples gathered by either DNR, or by the  
15 scientists that you were describing earlier?

16 A. I wouldn't have knowledge of that. I don't  
17 know.

18 Q. Did you receive results of any analysis  
19 performed on any samples?

20 A. Yes, I did.

21 Q. And who did you receive results from?

22 A. All the analyses in this investigation was  
23 conducted by the Missouri Department of Natural Resources  
24 laboratory located in Jefferson City, Missouri. So we  
25 received lab results from them, or through the Missouri

1 Department of Natural Resources employees.

2 Q. Are you aware of notices of violation issued  
3 to Warren County Water and Sewer Company as a result of  
4 those testing results?

5 A. Yes. There has been numerous NOV's issued to  
6 Gary Lett Smith and Warren County Water and Sewer  
7 District.

8 Q. And those notices of violation, those are  
9 from the Missouri Department of Natural Resources  
10 primarily; is that your understanding?

11 A. Yes, that is correct. We do not issue  
12 notices of violations. The Missouri Department of Natural  
13 Resources, the regulating agency issues that.

14 Q. And you have described Warren County Water  
15 and Sewer District. Do you know whether or not the name  
16 of the company is Warren County Water and Sewer Company or  
17 District?

18 A. I believe it's Warren County Water and Sewer  
19 Company.

20 Q. But that is the same entity that you were  
21 describing in your testimony?

22 A. Yes, it is.

23 Q. As investigator in the original case, have  
24 further incidences of possible violation come to your  
25 attention? Are you still pursuing that?

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A. Yes, we are.

Q. And those would be things that may come to you from the Department of Natural Resources?

A. Yes, if we are made aware of those situations, that's correct.

Q. Do you have any other information that you would like to add to your testimony at this time?

A. No.

MS. O'NEILL: Thank you.

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SIGNATURE PAGE

(This is the signature page to the deposition  
of Vic E. Muschler, taken on April 3, 2002, Office of the  
Public Counsel vs. Warren County Water and Sewer Company.)

\_\_\_\_\_

Vic E. Muschler

Subscribed and sworn to before me this \_\_\_\_\_ day  
of \_\_\_\_\_, A.D., 2002.

My commission expires \_\_\_\_\_.

\_\_\_\_\_

Notary Public, within and  
for the State of Missouri

Please return original transcript to:

M. Ruth O'Neill  
Assistant Public Counsel  
Office of the Public Counsel  
Department of Economic Development  
200 Madison Street, Suite 650  
Jefferson City, Missouri 65102



WITNESS: VIC E. MUSCHLER

In Re: Office of the Public Counsel vs.  
Warren County Water and Sewer Company  
and Gary L. Smith  
April 3, 2002

DEPOSITION CORRECTION SHEET

UPON READING THE DEPOSITION AND BEFORE SUBSCRIBING  
THERE TO, THE DEPONENT INDICATED THE FOLLOWING CHANGES  
SHOULD BE MADE:

Page      Line      Should read:

Reason assigned for change:

---

Deponent

CONCANNON & JAEGER

705 Olive Street  
Suite 604  
St. Louis, Missouri 63101  
(314) 421-1000

April 10, 2002

Re: Office of the Public Counsel  
vs.  
Warren County Water and Sewer Company  
and Gary L. Smith

Mr. Vic E. Muschler  
Criminal Investigation Division  
U.S. Environmental Protection Agency  
1222 Spruce Street  
St. Louis, Missouri 63103

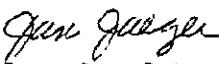
Dear Mr. Muschler:

Enclosed please find the original copy of your deposition, given on April 3, 2002, along with the original Signature Page and Deposition Correction Sheet.

Please read your deposition at your earliest possible convenience, making any changes you feel necessary. Please reflect each change on the DEPOSITION CORRECTION SHEET, together with your reason for changing it. After you have finished reading your deposition, sign the Deposition Correction Sheet and the original SIGNATURE PAGE in the presence of a notary public, have the notary notarize the SIGNATURE PAGE, and mail the transcript to M. Ruth O'Neill, Assistant Public Counsel, Office of the Public Counsel, Department of Economic Development, 200 Madison Street, Suite 650, Jefferson City, Missouri 65102.

I hope that you will find this method of reading your deposition more convenient than coming to my office to read the original transcript. If you have any questions, please call me at the above phone number.

Yours truly,

  
Shorthand Reporter