IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:19-cv-01464-NYW

CENTER FOR BIOLOGICAL DIVERSITY and
FOOD & WATER WATCH,

Plaintiffs,

v.

SWIFT BEEF COMPANY,

Defendant.

PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS

For the reasons set forth below, Defendant Swift Beef Company's (Swift Beef) Motion to Dismiss, brought under Rule 12(b)(1) and 12(b)(6), should be denied.

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INTRODUCTION

Swift Beef is violating water pollution limits found in its Clean Water Act permit (the "Permit") for the Lone Tree wastewater treatment plant (the "Treatment Plant"). The Treatment Plant—dedicated to treating wastewater from Swift Beef's Greeley slaughterhouse (the "Slaughterhouse")—does not neutralize the salty toxic wastewater that is a byproduct of preserving cowhides. So when Swift Beef pipes this wastewater to the Treatment Plant and discharges it to a tributary of the South Platte River, Swift Beef violates its Permit.

Plaintiffs Center for Biological Diversity and Food & Water Watch have standing to enforce Swift Beef's violations under the Clean Water Act's citizen suit provision. In their Complaint, Plaintiffs have sufficiently alleged that their members' cognizable injuries are "fairly traceable" to Swift Beef's repeated—in every testing period from January 2014 to December 2018—and likely recurring violations of toxicity limits and are redressable by the relief requested. Plaintiffs' members enjoy the areas that are harmed by the salty wastewater discharged from the Treatment Plant: they boat on the South Platte River near the Lone Tree Creek confluence, hunt in nearby State Wildlife Areas, spot and marvel at the area's fish, birds, and wildlife, perform restoration work up and down the South Platte, and enjoy the freshwater environment that characterizes the river and its riparian-vegetation. Swift Beef's ongoing illegal discharges lessen Plaintiffs-members' enjoyment of their recreational and aesthetic pursuits. Plaintiffs' injuries will be redressed if the Court (1) prohibits (directly by way of an injunction or indirectly through the deterrence provided by civil penalties) Swift Beef from sending salty wastewater to the Treatment Plant, and (2) requires Swift Beef to ensure its adopted solution—a "salt recovery system" located at the Slaughterhouse—can effectively and legally manage the wastewater.

Swift Beef argues Plaintiffs lack standing in its Motion to Dismiss. Swift Beef contends that, because it reported compliance with toxicity limits for the very first time ever in March 2019—right after receiving Plaintiffs' Notice Letter and just before the Complaint was filed, its violations are "historic." Using this characterization, the company claims Plaintiffs' injuries are not fairly traceable to the challenged conduct. But the test for whether Swift Beef is "in violation" of the Clean Water Act (CWA), 33 U.S.C. § 1365(a)(1), is not so simplistic.

As the Supreme Court has held, a citizen-plaintiff must "allege a state of either continuous or intermittent violation." *Gwaltney of Smithfield v. Chesapeake Bay Foundation*, 484 U.S. 49, 57 (1989). Violations are ongoing, and enforceable by citizens, if there is "a reasonable likelihood that a past polluter will continue to pollute in the future." *Id*. "When a company has violated an effluent standard or limitation, it remains, for purposes of [the CWA citizen-suit provision], 'in violation' of that standard or limitation so long as it has not put in place remedial measures that clearly eliminate the cause of the violation." *Id*. at 69 (Scalia, J., concurring). As alleged here, under these standards, Swift Beef's Permit violations are ongoing and likely to recur. Compl. ¶¶ 1, 5, 9, 11, 35, 62, 91. When Plaintiffs filed suit, the Treatment Plant could not control the salty wastewater, the salt recovery system was not functioning properly or legally, and there were five continuous years of violations. *Id*. ¶¶ 33-39, 41-63. Swift Beef's Motion ignores the more robust inquiry that the CWA demands and the Complaint's allegations, which must be accepted as true. In short, Swift Beef remains "in violation" of the CWA under Supreme Court precedent and this challenged conduct continues to injure Plaintiffs' members. The Court should deny the Motion to Dismiss.

NATURE OF CASE

I. LEGAL BACKGROUND: THE CLEAN WATER ACT

The Federal Water Pollution Control Act Amendments of 1972 (commonly, Clean Water Act) is "a comprehensive legislative attempt 'to restore and maintain the chemical, physical and biological integrity of the Nation's waters.'" *U.S. v. Riverside Bayview Homes*, 474 U.S. 121, 132 (1985) (quoting 33 U.S.C. § 1251(a)). Whereas earlier iterations of the law focused on maintaining standards in the nation's waters, the 1972 amendments focus on regulating polluters. *EPA v. California*, 426 U.S. 200, 202-04 (1976). This approach provides that "the discharge of any pollutant by any person shall be unlawful," except in compliance with a National Pollutant Discharge Elimination System (NPDES) permit. 33 U.S.C. §§ 1311(a), 1342(a)(1).

"NPDES permits impose limitations on the discharge of pollutants, and establish related monitoring and reporting requirements." *Friends of the Earth v. Laidlaw Environmental Services,* 528 U.S. 167, 174 (2000). A permit's effluent limits curtail discharges from point sources and provide a "restriction...on quantities, rates, and concentrations" of specified pollutants "discharged from point sources into navigable waters." 33 U.S.C. § 1362(11). The Environmental Protection Agency (EPA) administers the NPDES permitting program, *id*. § 1342(a), but can delegate administration of this program to the states, 40 C.F.R. § 123.61, as it did for Colorado. *See U.S. v. City of Colorado Springs*, 352 F.Supp.3d 1086, 1087 (D. Colo. 2018). The Colorado Department of Public Health and Environment, through its Water Quality Control Division (WQCD), issues permits and enforces Colorado's program. Compl. ¶ 16.

The CWA authorizes citizens to enforce permit violations. 33 U.S.C. § 1365(a)(1), (f)(7). *See also* 40 C.F.R. § 122.41(a) ("Any permit noncompliance constitutes a violation of the Clean Water Act and is grounds for enforcement action."). "[C]itizen suits are a proven enforcement

tool [that]…operate as Congress intended—to both spur and supplement government enforcement actions." *Black Warrior Riverkeeper v. Cherokee Mining*, 548 F.3d 986, 992 (11th Cir. 2008); *Sierra Club v. Chevron*, 834 F.2d 1517, 1525 (9th Cir. 1987) ("Citizen suits should be handled liberally because they perform an important public function.").

Citizens may enforce the CWA against any person "who is alleged to be in violation" of "an effluent standard or limitation." 33 U.S.C. § 1365(a)(1). The Supreme Court has interpreted the phrase "to be in violation" as an "ongoing violation," requiring citizens to "allege a state of either continuous or intermittent violation—that is, a reasonable likelihood that a past polluter will continue to pollute in the future." *Gwaltney*, 484 U.S. at 57; *Id*. at 59, 64-67. An "effluent standard or limitation" includes permit terms, conditions, limits and other requirements. 33 U.S.C. § 1365(f)(7). "Liability for a violation of the terms and conditions of an NPDES permit is strict, and the plaintiffs are not required to prove any level of culpability or actual injury." *City of Colorado Springs*, 352 F.Supp.3d at 1089.

Citizen-plaintiffs must provide writtennotice to the alleged violator sixty days before filing suit. 33 U.S.C. § 1365(b)(1)(A).[1] A citizen suit is precluded if EPA or the state has commenced and is diligently prosecuting its own civil action or administrative penalty proceeding for the same violations. *Id*. §§ 1365(b)(1)(B), 1319(g).[2] The citizen-suit provision expressly authorizes injunctive relief and an assessment of civil penalties. *Id*. §§ 1365(a), 1319(d).

[1] Plaintiffs provided Swift Beef with notice on January 31, 2019. Compl. ¶ 4; Ex. 1.

[2] Neither Colorado nor EPA has done so here. Compl. ¶ 5.

II. FACTUAL BACKGROUND

A. The Treatment Plant and Slaughterhouse

JBS is an international meat company based in Brazil, with U.S. headquarters in Greeley, Colorado. Compl. ¶¶ 12, 14. It claims to be the world's largest beef, pork, and chicken producer. *Id*. ¶ 12. In 2007, JBS moved into the American market, buying dozens of facilities, including the Slaughterhouse and Treatment Plant, *id*. ¶ 20, which began operating in 1973, Ex. 2 at 10, and which had been owned previously by the Swift Beef Company.[3]

Swift Beef slaughters up to 6,000 animals per day at the Slaughterhouse, creating multiple sources of wastes. Compl. ¶ 21; Ex. 3 (Permit, Part 1(A)(1)). The company also preserves cattle hides for shipment to markets in a separate building (the "Hides Facility"). Compl. ¶ 21; Ex. 15 at 1. There, the hides are soaked in a saltwater bath and then compressed to remove all liquid. *Id*. This saltwater byproduct, *id*., is combined with other Slaughterhouse wastes and sent to the Treatment Plant via pipeline for disposal. Compl. ¶ 21; Ex. 2 at 24.

The Treatment Plant sits six miles due east of the Slaughterhouse, Compl. ¶ 19, Ex. 2 at 24, about a mile north of the South Platte River and adjacent to Lone Tree Creek. Compl. ¶ 19. The Treatment Plant is dedicated to Slaughterhouse wastes, meaning Swift Beef completely controls the waste stream, both in volume and content. *Id*. ¶ 23; Ex. 5 at 24 ("[T]he wastewater

[3] Plaintiffs are submitting standing declarations, *Gwaltney*, 484 U.S. at 65, and other exhibits to respond to the Motion to Dismiss and Swift Beef's submitted evidence—a declaration (ECF Doc. 20-1). *See Sizona v. Nat'l Inst. of Standards & Tech.*, 282 F.3d 1320, 1326 (10th Cir. 2002) (permitting parties to use and develop evidence for motions to dismiss). Because Swift Beef went beyond the Complaint to support its Motion and contend Plaintiffs lack injury and traceability, Plaintiffs could have sought leave to conduct jurisdictional discovery before responding. *Budde v. Ling-Temco-Vought*, 511 F.2d 1033, 1035 (10th Cir. 1975). But Plaintiffs believe they have sufficient facts to respond to the Motion and demonstrate they have standing. Documents containing those facts are found as exhibits attached to the Declaration of Neil Levine.

treatment plant received wastewater from a single, controlled source.")).[4] The Slaughterhouse sends 3-4 million gallons of wastewater per day to the Treatment Plant. Compl. ¶ 23. At the Treatment Plant, wastewater goes through a multi-step treatment system before being discharged. *Id*.; Ex. 2 at 24; Ex. 5 at 3. But no treatments neutralize the salty wastewater.

The Treatment Plant discharges effluent into Lone Tree Creek though one pipe. Compl. ¶ 25; Ex. 3 (Permit, Part 1(A)(1)). The discharges are continuous. Ex. 2 at 4 (Permit Application stating discharges are not intermittent or seasonal). Lone Tree is a low-flowing tributary of the South Platte River, Compl. ¶ 19, running almost dry before discharged effluent is added. Ex. 5 at 17, 24, 25.

B. The Treatment Plant's 2012 Permit

Swift Beef operates the Treatment Plant under Permit No. CO0027707, which was issued on October 9, 2012 and went into effect on December 1, 2012. Compl. ¶ 24; Ex. 3 at 1.[5] The Permit was based on information Swift Beef provided in an application to the state WQCD, Ex. 2, though Swift Beef did not identify salty wastewater as part of the waste stream. *See id*. at 24; Ex. 5 at 3. The Permit sets pollution limits for multiple "parameters"—a permitting term that refers different pollutants or measuring units. Compl. ¶ 25; Ex. 3 (Permit, Part I(A)(2)).

Whole Effluent Toxicity (WET) is a common permit parameter. WET testing implements both federal and state toxicity provisions. *See* 33 U.S.C. § 1251(a)(3); 5 C.C.R. § 1002.31.11(1)(a)(iv). Conceptually, WET refers to the combined toxic effect of all effluent components on aquatic life. Compl. ¶ 30. Through WET limits, permits help provide "adequate protection for aquatic life when the toxicity of effluent components is not known, effects of

[4] Mountain States Rosen's sheep and lamb slaughterhouse, which was owned by Swift Beef until 2016, also sends wastes to the Treatment Plant. Complaint ¶ 22; Ex. 2 at 24.

[5] The Treatment Plant first obtained the Permit in 1978, but it has been renewed several times. The 2012 version applies today due to an extension. Compl. ¶ 24; Ex. 7.

effluent components are additive, synergistic, or antagonistic, and/or when an effluent has not been chemically characterized." 60 Fed. Reg. 53,529, 53,530 (Oct. 16, 1995). WET testing occurs in a laboratory, where representative aquatic organisms—like water fleas (*ceriodaphnia dubia*) and fathead minnows (*pimephales promelas*)—are placed in different concentrations of sampled effluent and the effects observed and recorded. Compl. ¶ 30.[6] Two effects are measured: acute toxicity measures mortality and chronic toxicity assesses nonlethal impacts to reproduction and growth. *Id.* ¶ 30. *See Sierra Club v Cripple Creek and Victor Gold Mining Co.*, 2006 WL 2882491, *4 n.10 (D. Colo. 2006).[7]

The Permit contains two chronic WET testing procedures and accompanying limits. Compl. ¶ 31. One is known as the 25-percent seven-day inhibition concentration standard (or IC25). *Id.*; Ex. 3 (Permit, Part 1(A)(2)). IC25 identifies the effluent concentration at which no more than 25 percent of the test organisms experience reproduction or growth inhibition after seven days of exposure. Compl. ¶ 31. For this test, the Permit requires using 100 percent effluent—referred to as Instream Waste Concentration or IWC—to reflect Lone Tree Creek's low flows. *Id.*; Ex. 3 (Permit, Part 1(B)(3)(b)). The second test is NOEC, or "no observed effects concentration," and determines the highest effluent concentrations that show no statistically detectable effect on the aquatic organisms. Compl. ¶ 31; Ex. 3 (Permit, Part 1(A)(2)). Again, the

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[6] *See also* U.S. Envtl. Prot. Agency, Clean Water Act Analytical Methods, *Whole Effluent Toxicity Methods*: *Chronic Toxicity to Freshwater Organisms*, https://www.epa.gov/cwa-methods/whole-effluent-toxicity-methods (last visited January 21, 2020); U.S. Envtl. Prot. Agency, *Method Guidance and Recommendations for Whole Effluent Toxicity (WET) Testing*, EPA 821-B-00-004, at 1-2 (July 2000), https://www.epa.gov/sites/production/files/2016-02/documents/method-guidance-recommendations-wet-testing_2000.pdf.

[7] EPA streamlined and standardized WET testing in 1995, 60 Fed. Reg. 53,529 (Oct. 16, 1995), and modified the tests in 2002, 67 Fed. Reg. 69,952 (Nov. 19, 2002). *See Edison Electric v EPA*, 391 F.3d 1267, 1271 (D.C. Cir. 2004) (upholding EPA's WET testing methods and approving EPA's finding that "these WET test methods exhibit a degree of precision compatible with numerous chemical-specific tests already in use").

Permit requires that there are no observed effects when exposing the aquatic organisms to 100 percent effluent—*i.e.*, no dilution. Compl. ¶ 31; Ex. 3 (Permit, Part 1(B)(3)(b)).

Each quarter, Swift Beef must collect three days of samples (and four samples per day) for WET testing purposes. Ex. 3 (Permit, Part 1(A)(2); Part 1(B)(3) and (C)(2)). Though the company can choose the three days that sampling occurs, the Permit mandates that the "samples and measurements taken…shall be representative of the volume and nature of the monitored discharge." *Id*. (Permit, Part 1(D)(2)). Collected samples are sent off-site to a laboratory for testing and Swift Beef must report the results in its monthly Discharge Monitoring Reports (DMRs) that are submitted to the state's WQCD and EPA. Compl. ¶ 26; Ex. 3 (Permit, Part 1(B)(3)(a)). Swift Beef must concurrently provide the agencies with WET testing data from the laboratory, which includes the statistical summary sheets, summaries of the determination of a valid, invalid or inconclusive test, and copies of any chain of custody forms. Compl. ¶ 79; Ex. 3 (Permit, Part I(B)(3)(a)).

Noncompliance with WET limits constitutes a Permit violation. Ex. 3 (Permit, Part I(B)(3)(b)) ("A chronic WET test is considered a violation of a permit limitation when both the NOEC and the IC25 are at any effluent concentration less than the IWC."); *id*. (Permit, Part II(B)(8)) ("Failure to comply with any terms and/or conditions of this permit shall be a violation of this permit. The 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."). When WET-limit violations occur, Swift Beef must identify the cause through additional testing so the problem can be fixed. *Id*. (Permit, Part 1(B)(3)(b)).

C. Swift Beef's WET Violations and Plaintiffs' Three Claims

Swift Beef has been violating three related WET requirements in its Permit. First, the Treatment Plant has repeatedly failed to comply with WET limits. Initially, the state WQCD

gave Swift Beef a year—through the third quarter of 2013—to report WET testing results, during which time noncompliance would not be considered a Permit violation. Compl. ¶ 32; Ex. 3 (Permit, Part I(A)(2)) (requiring testing only for "WET chronic until 09/30/13"); Ex. 5 at 24. All reports during this first year were non-compliant. Compl. ¶ 33. Once compliance was required, as Claim 1 in the Complaint alleges, Swift Beef continued to violate the two WET limits every quarter, from January 2014 through December 2018, and these violations are likely to continue. *Id*. ¶¶ 41-62. Although the Permit provides that "[t]he permittee has the duty to halt or reduce any activity if necessary to maintain compliance with the effluent limitations of the permit," Ex. 3 (Permit, Part II(A)(14)), Swift Beef never halted operations or stopped piping salty wastewater to the Treatment Plant. Nor did the state or EPA enforce any of these violations. Compl. ¶ 5.

Claim 2 alleges violations of the additional testing requirements that are triggered whenever violations of WET limits occur. Compl. ¶¶ 64-77. Initially, Swift Beef sought and the state provided waivers to this requirement, *id*. ¶ 66, but the waivers stopped after the second quarter of 2016, *id*., and Swift Beef has failed to conduct the required additional testing since then, *id*. ¶¶ 67-77. Claim 3 alleges Swift Beef has been violating the Permit term calling for the submittal of detailed information about its WET testing. *Id*. ¶¶ 78-91.[8]

D. The Proposed Solution—the Salt Recovery System

Swift Beef has investigated the root cause of its WET violations. Compl. ¶ 33. In 2013, it conducted two assessments that implicated the salts used to preserve cowhides. *Id*.; Ex. 8; Ex. 10 ("I am also making arrangement to remove brine from our influent for a period of time, to test the effects on our WET test of reduced chlorides in our effluent. I plan to do this by collecting the brine at the hide plant, then trucking it out to the lagoons and placing it into one of our permitting ponds for hold.").

[8] Swift Beef's Motion to Dismiss does not appear to seek dismissal of Claims 2 and 3.

Though diagnosed, Swift Beef had no immediate solution for the problem. As evident by five years of continuous violations, the Treatment Plant lacks equipment, technologies, and processes to neutralize the salty wastewater. Not even mixing it with the other Slaughterhouse waste streams can dilute the heavy concentration of saltwater sufficiently. Swift Beef considered evaporation ponds at the Treatment Plant, but dismissed the idea to avoid the burden of solid waste permitting rules and concerns over groundwater contamination. *See* Ex. 11; Ex. 6 at 1.

Swift Beef chose to buy and install a "salt recovery system," located at the Slaughterhouse in a building next to where the hides soak in saltwater. Compl. ¶ 34; Ex. 12; Ex. 6 ("JBS has selected a mechanical evaporation system that will be located at the processing plant site to address the WET testing conformance.").[9] The system routes the wastewater into several storage tanks before being pumped into a cone-bottom tank, in which sits a submerged natural-gas heating tube. Ex. 15. Once fired up, the heating element causes the water to evaporate and precipitates out the salts for reuse. *Id*. The system is designed to process up to 25,000 gallons of wastewater per day—9.125 million gallons annually—which means no salty wastewater would have to be piped to the Treatment Plant. *Id*. *See also* Compl. ¶ 34; Ex. 6 at 2 ("The system will be designed to evaporate the entire brine wastewater stream…"). In 2014, Swift Beef and the state WQCD agreed on a schedule for its installation, ensuring compliance with WET limits by no later than December 1, 2015. Compl. ¶ 34; Ex. 16 at 1. The company purchased and installed the salt evaporator at the hides processing plant in 2015. Compl. ¶ 35; Ex. 12; Ex. 17; Ex. 9.

1. Operational and Air Emission Problems

Swift Beef did not achieve the December 2015 compliance deadline. Compl. ¶ 35.

[9] The company had experience with this technology at its other slaughterhouses Ex. 13; Ex. 14 (claiming salt recovery systems are "[g]reat [in] 1st year, but efficiency decreases over time").

Several problems prevented the salt recovery system from fully operating. For instance, Swift Beef encountered a "vibration problem" with its newly purchased equipment. *See* Ex. 17.

The biggest problem, however, involves air emissions. Early on it was "discovered" that Swift Beef was emitting "particulate matter" (PM) during the evaporation process, which also created an "opacity" issue. Compl. ¶ 36. *See* Ex. 18 at 3; Ex. 17 ("[W]e are experiencing what we believe to be salt carry over into our emissions which needs to be addressed before we can run full time."); Ex. 20 ("[O]ur solution for reducing chlorides is a 'brine evaporator' system, which is effective but does have a carryover in its air emissions."); Ex. 25 (identifying "opacity issues from the evaporator"); Ex. 23 at 8 ("JBS previously installed a brine evaporator but was unable to run at full capacity due to air issues.").[10]

The salt recovery system thus required a scrubber to reduce air pollution. Compl. ¶ 37; Ex. 25. In April 2016, Swift Beef tried a small "pilot" scrubber, Ex. 25, but that prevented "running the brine evaporator at full capacity." Ex. 21; Ex. 20 (pilot scrubber limited running evaporator to 30 percent capacity). It installed a full-sized scrubber by the end of 2017 that was purportedly fully operational by Feb 2, 2018. Ex. 22 at 2. Yet, by 2018, it was reported that "[a] full size scrubber has been installed recently but still working out some electrical issues." Ex. 23 at 8. In a January 28, 2019 letter to the state, Swift Beef said it "continue[s] to work on resolution of some issues that hinder full time operation. We continue to work with the equipment manufacturers to improve runtime efficiency." Ex. 24. And in November 2019, a

[10] Opacity is "the degree to which emissions reduce the transmission of light and obscure the view of an object in the background." 40 C.F.R. § 60.2. "Opacity is not a pollutant but can serve as a proxy for pollutants," including for PM emissions. *Utility Air Group v. EPA*, 744 F.3d 741, 744 (D.C. Cir. 2014) (explaining relationship between opacity and PM emissions); *Ariz. Public Service Co. v. EPA*, 562 F.3d 1116, 1119 (10th Cir. 2009) ("[A]ccording to the EPA, [opacity] can indicate whether pollution control equipment is properly functioning and whether an emission limit is being maintained.").

Swift Beef spokesperson said: "in early 2020 we will also install an upgraded version of our evaporator to ensure ongoing compliance in the months and years to come."[11]

2. Air Permitting Problems

The air permitting process for the salt recovery system has been fraught with difficulties. The state's Air Pollution Control Division (APCD) issued a permit for the recovery system on July 20, 2015 (the "Air Permit"). Compl. ¶ 36; Ex. 26; Ex. 27. The Air Permit imposed limits on emissions from the system's natural-gas burner, Ex. 26-28, but not from the evaporation process itself. Ex. 18 at 3, 7. But, as noted above, initial performance tests revealed the evaporation process would emit up to 64 tons per year of particulate matter and impact opacity. *Id*; Ex. 25.

This unaccounted for pollution and need for an air scrubber triggered the need for a permit modification, which Swift Beef applied for on July 29, 2018. Compl. ¶ 39; Ex. 22. On February 14, 2019, the state APCD informed Swift Beef that its application was missing information. Ex. 29. Because Swift Beef's first response (Ex. 15) was found inadequate, the state sent another letter on August 6, 2019 seeking more information. Ex. 30 ("As at this date, the Division has not received the required information."). As of this filing, the state APCD has not issued a permit modification.

All this while, Swift Beef had not adhered to several conditions in the July 2015 Air Permit. On October 29, 2019, the state's APCD issued Compliance Advisory that revealed Swift Beef had not submitted a Notice of Startup, self-certified compliance with the permit emission limits, or sampled and tested the wastewater for organic content concentrations. Ex. 33; Ex. 30

[11] Tony Kovaleski, *'Everyone in Colorado Should be Concerned About that Water': Meat Packing Plant Broke Law for 5 Yrs*, The Denver Channel, (Nov. 19, 2019, 8:17 PM), https://www.thedenverchannel.com/news/investigations/everyone-in-colorado-should-be-concerned-about-that-water-meat-packing-plant-broke-law-for-5-yrs (last visited January 21, 2020) [hereafter, "Kovaleski Report"].

(APCD noting Air Permit noncompliance in August 3rd letter); Ex. 31.[12] Most significantly, the state's Compliance Advisory revealed violations of the Air Permit's "opacity" limit. Ex. 33 at 4. Condition 13 in the Air Permit contains an opacity limit of 20% for the salt recovery system. Ex. 27 (Air Permit, Condition 13). During an August 12, 2019 "planned and announced" investigation, Ex. 34 at 2, "the inspector conducted an opacity reading at the source…and found that the average opacity observed was 25.8% which is above the 20% opacity limit," *id*. at 3; Ex. 35. These opacity violations are occurring despite use of an air scrubber.

Over five years after it was first conceived as a solution, the salt recovery system suffers from repeated equipment and operational failures and air emission problems that have prevented a complete remedy to the WET-testing violations and full compliance with the CWA.

ARGUMENT

Constitutional standing is a component of federal court jurisdiction. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992).[13] An organization has associational standing "when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested

[12] Once the recovery system began operating, the Air Permit required Swift Beef to test the wastewater for organic content over a three-month period, because it was believed that the evaporation process would cause emissions of "volatile organic compounds." Ex. 27, ¶¶ 4, 20; Ex. 28. Plaintiffs and the state APCD notified Swift Beef that it had failed to perform this required testing. Ex. 30; Ex. 31 at 5. In response, Swift Beef convinced the state to allow for sampling and testing over a three-week period, ensuring the company could complete the required action before the Notice Letter ripened on December 1, 2019. Ex. 32 at 1.

[13] Plaintiffs have informed Swift Beef that they do not intend to rely on "organizational" standing as an alternative basis to secure subject matter jurisdiction. This is not meant to suggest the Plaintiffs agree that they have not adequately pled causation to pursue an organization standing theory, as Swift Beef argues (Motion at 13-17). Instead, Plaintiffs have decided against pursuing the argument to save time and resources and in the interest of judicial economy.

requires the participation of individual members in the lawsuit." *Laidlaw*, 528 U.S. at 181.[14] Individual members can sue in their own right if: 1) they have suffered an "injury in fact"; 2) the injury is fairly traceable to the challenged action of the defendant; and 3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Id*. at 180–81. Standing is based on facts that exist at the time of the complaint's filing. *Id*. at 180. Courts "must assume the Plaintiffs' claim has legal validity" for standing inquiries. *Initiative & Referendum Instit. v. Walker*, 450 F.3d 1082, 1093 (10th Cir. 2006).

Although Plaintiffs have the burden to demonstrate standing, that burden is lessened when responding to a motion to dismiss. *Lujan*, 504 U.S. at 561. "When evaluating a plaintiff's standing at the stage of a motion to dismiss on the pleadings, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *S. Utah Wilderness All. v. Palma*, 707 F.3d 1143, 1152 (10th Cir. 2013) (internal quotations and citations omitted).[15] Moreover, "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Lujan*, 504 U.S. at 561 (quoting *Lujan v. National Wildlife Federation*, 497 U.S. 871, 889 (1990)); *Sierra Club v. Tri-State Generation & Transmission*

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[14] The Motion does not dispute Plaintiffs' ability to meet the second and third elements of associational standing. Indeed, the interests Plaintiffs seek to protect are germane to their missions, Compl. ¶¶ 7-9, Burd Decl. ¶¶ 4-11, Merkel Decl. ¶¶ 4-11, and individual members are not needed to obtain the relief requested.

[15] Generally, there are two types of jurisdictional motions to dismiss under Rule 12(b)(1): facial or factual attacks. Here, Swift Beef makes a "facial" attack: the Meza Declaration (ECF Doc. 20-1) does not address whether Swift Beef's violations are "ongoing" within the meaning of the CWA and presents no evidence about the cause of the violations or status of remedial measures. Thus, the Court is to accept as true Plaintiffs' factual allegations and construe the Complaint in Plaintiffs' favor. *See Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995).

Assn, 173 F.R.D. 275, 280 (D. Colo. 1997) (applied for Rule 12(b)(1) motion); *Cassanova v. Ulibarri*, 595 F.3d 1120, 1124 (10th Cir. 2010) (same standard for Rule 12(b)(6) motions).[16]

I. The Motion is premised on a flawed understanding of the Clean Water Act.

Swift Beef's main standing contention is that Plaintiffs' injuries are not "fairly traceable" to the challenged illegal conduct—*i.e.*, Permit violations at the Treatment Plant. Motion at 8, 9. Swift Beef makes this argument by contending its long-standing WET-limit violations are "historic." *Id*. But the argument does not grapple with what is illegal conduct under the CWA—specifically, what it means to be "in violation" of the Permit. The Motion ignores how courts have consistently interpreted the citizen-suit provision phrase "alleged to be in violation," 33 U.S.C. § 1365(a)(1). Equally defective, the Motion never addresses the Complaint's allegations—as well as available facts—asserting violations are "ongoing" and likely to recur.

A. Clean Water Act violations are ongoing until their root cause is eradicated.

The Supreme Court has held that a plaintiff, through the CWA's citizen-suit provision, 33 U.S.C. § 1365(a), can enforce CWA violations in two circumstances. *Gwaltney*, 484 U.S. at 57. Citizens can properly allege in their complaint—and later prove—that either (1) violations continued after the complaint is filed or (2) there is a continuing likelihood of recurring, intermittent, or sporadic violations. *Id*.; *Chesapeake Bay Found. v. Gwaltney of Smithfield*, 844 F.2d 170, 171-72 (4th Cir. 1988). A recurring violation exists when there is "a reasonable likelihood that a past polluter will continue to pollute in the future." *Gwaltney*, 484 U.S. at 57. "Intermittent or sporadic violations do not cease to be ongoing until the date when there is no

[16] The *Twombly/Iqbal* rulings do not change these standards. Motion at 3. The Supreme Court made clear that a complaint "does not need detailed factual allegations," *Bell Atlantic v. Twombly*, 550 U.S. 544, 555 (2007), and "reasonable inferences" can be drawn from pleaded facts, *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "[A]t the pleading stage, a complaint must contain the factual allegations to indicate that standing is plausible." *Lopez v. Abbott*, 2017 WL 1209846, *1 (S.D. Tex. Apr. 3, 2017) (citing *Iqbal*, 556 U.S. at 678).

real likelihood of repetition." *Chesapeake Bay*, 844 F.2d at 172. *Accord Sierra Club v. Union Oil of California*, 853 F.2d 667, 671 (9th Cir. 1988). The Tenth Circuit has similarly held that "to establish jurisdiction, citizen-plaintiffs need only make good faith allegations of continuous or intermittent violations." *Sierra Club v. El Paso Mines*, 421 F.3d 1133, 1139 (10th Cir. 2005).

Accordingly, even if violations happen to cease when a complaint is filed, that is not dispositive nor does it end the judicial inquiry. *Cripple Creek*, 2006 WL 2882491, *12 ("Court must determine whether the violations that occurred before the Complaint was filed were likely to recur."). The Fourth Circuit, upon considering the Supreme Court's remand in *Gwaltney*, noted that the CWA "does permit" a citizen suit "even if there is no violation at the moment suit is filed," if it alleges that violations are reasonably likely to recur. *Chesapeake Bay*, 844 F.2d at 172 (highlighting distinction between "an allegation of a wholly past violation from allegations of intermittent or sporadic violations"). Justice Scalia explained: "A good or lucky day is not a state of compliance. Nor is the dubious state in which a past effluent problem is not recurring at the moment but the cause of that problem has not been completely and clearly eradicated. When a company has violated an effluent standard or limitation, it remains, for purposes of [33 U.S.C. § 1365(a)(1)], 'in violation' of that standard or limitation so long as it has not put in place remedial measures that clearly eliminate the cause of the violation." *Gwaltney*, 484 U.S. at 69 (Scalia, J., concurring). Violations are wholly past if risk of a recurring violation "has been completely eradicated when citizen-plaintiff filed suit." *Chesapeake Bay*, 844 F.2d at 172.

B. Plaintiffs adequately pled that Swift Beef's Permit violations are ongoing.

Good faith allegations of ongoing CWA violations suffice at the pleading stage. *Gwaltney*, 484 U.S. at 64, 65. Plaintiffs allege each WET-limit violation committed by Swift Beef at the Treatment Plant from January 2014 through December 2018. Compl. ¶¶ 41-62.

These allegations are based on Swift Beef's certified DMRs that reveal a continuous discharge problem for 20 consecutive quarters during five years of operations at the Treatment Plant. *See id*. Notably, Swift Beef was not trending toward compliance in the fourth quarter of 2018, the last reporting period before Plaintiffs' January 31, 2019 Notice Letter. *See id*. ¶ 4. Instead, the Treatment Plant's effluent had to be diluted to 60% and 69.03% before its effects were acceptable, id. ¶ 61, whereas the Permit required using 100% effluent, *id*. ¶ 31. These allegations are sufficient to refute the Motion to Dismiss. *See Harpeth River Watershed Assn. v. City of Franklin*, 2016 WL 827584, *10 (M.D. Tenn. March 3, 2016) (ruling WET claim survived because violations occurred in five of six quarters leading up to complaint and such "allegations are enough to suggest an intermittent, if not continuing WET problem").[17]

Moreover, Plaintiffs allege: "Upon information and belief, Swift Beef is likely to continue to violate WET testing limits at the Lone Tree Facility." Compl. ¶ 35; *id*. ¶ 5 ("Swift Beef's violations of the CWA and its CWA Permit have been repeated, are ongoing and are likely to continue to occur into the future absent judicial relief."); *id*. ¶ 1 ("Swift Beef has violated and will continue to violate the CWA and the terms and limitations found in its Permit."); *id*. ¶ 62 ("[F]or five continuous years, Swift Beef has been violating the CWA and its Permit's WET testing limits and, upon information and belief, will continue to do so[].").

Notably, Swift Beef does not dispute—or even acknowledge—these allegations of ongoing violations. The company does not deny that recurring violations are likely. The Motion

[17] Swift Beef has submitted a declaration (ECF Doc. 20-1) to claim WET testing performed *after* the Complaint was filed shows present compliance. Even if true, such facts do not pertain to standing, which is determined at the time of the complaint. *Laidlaw*, 528 at 180; *Cripple Creek*, 2006 WL 2882491, *12. Moreover, mootness, though not raised in Swift Beef's Motion, asks whether "subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur"—and comes with a heavy burden that requires showing the problem has been cured. *Laidlaw*, 528 U.S. at 189.

also offers no evidence indicating that "remedial measures [have] clearly eliminate[d] the cause of the violation[s]," *Gwaltney*, 484 U.S. at 69, or the risk of recurring violations "has been completely eradicated when citizen-plaintiff filed suit," *Chesapeake Bay*, 844 F.2d at 172.

Plaintiffs' allegations that Swift Beef's violations are ongoing are made in good faith and reasonably based on available information, including: (1) before receiving Plaintiffs' January 31, 2019 60-Day Notice Letter, Swift Beef had violated WET limits in every quarterly reporting period since Permit issuance in 2012, Compl. ¶¶ 41-62; (2) after receiving the Notice Letter, Swift Beef took samples of the Treatment Plant's effluent discharges on February 26, March 3, and March 5 and, for the first time ever, reported compliance with WET limits; (3) Swift Beef decides when samples are taken at the Treatment Plant and when salty wastewater is piped to the Treatment Plant from the Slaughterhouse's Hides Facility; (4) the Treatment Plant cannot neutralize salty wastewater coming from the Slaughterhouse, *see* Compl. ¶¶ 41-62; (5) the pipeline connecting the Hides Facility with the Treatment Plant remains intact; (6) Swift Beef's salt recovery system is not functioning fully or legally, *id*. ¶¶ 34-39; and (7) when the recovery system is not fully operative, Swift Beef sends the salty wastewater to the Treatment Plant for disposal, where, until notified of this lawsuit, Swift Beef violates WET limits, Compl. ¶¶ 41-62; *see, e.g.*, Ex. 21 ("[A]ny excess brine and its high chlorides are discharged to the wastewater treatment plant."). And recently, the company said "an upgraded version" of the salt recovery system is needed. *See* Kovaleski Report.[18] In short, the problem has not been solved.

For standing purposes, the allegations and facts show that the challenged conduct, which is fairly traceable to Plaintiffs' alleged injuries, is ongoing.

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[18] Plaintiffs intend to conduct discovery to further elucidate this information. *See Am. Canoe Assn. v. Murphy Farms*, 326 F.3d 505, 521 (4th Cir. 2003) ("As with other jurisdictional matters, the plaintiff's burden to establish an ongoing violation evolves over the course of the litigation.").

II. Plaintiffs have sufficiently alleged Article III Standing.

A. Plaintiffs' members have suffered and will continue to suffer injuries.

Injuries must be concrete, particular, and actual or imminent. *Lujan*, 504 U.S. at 560. In environmental cases, like this one, "the standing requirements are not onerous." *Am. Canoe*, 326 F.3d at 527. Plaintiffs "adequately allege injury in fact when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity." *Laidlaw*, 528 U.S. at 183. *Accord S. Utah Wilderness All. v. Office of Surface Mining Reclamation & Enf't*, 620 F.3d 1227, 1234 (10th Cir. 2010) ("[C]omplaint states that [plaintiff's] members use the land affected by these permits for various purposes—scientific study, hunting, aesthetic appreciation, sightseeing, and solitude. They claim that the proposed mining operations would impair many, if not all, of these uses. This is the type of injury that has often been used to demonstrate standing, so we conclude that [plaintiff] meets the first prong of the standing inquiry."). Further, the inquiry looks to plaintiffs' interests and not for environment harm. *Laidlaw*, 528 U.S. at 181; *Utah Physicians for a Healthy Environment v. Diesel Power Gear*, 374 F.Supp.3d 1124, 1132 (D. Utah 2019); *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1151 (9th Cir. 2000) ("Requiring the plaintiff to show actual environmental harm as a condition for standing confuses the jurisdictional inquiry (does the court have power under Article III to hear the case?) with the merits inquiry (did the defendant violate the law?)").[19]

[19] Swift Beef acknowledges this point of law. Motion at 4. Yet later, it cites an outdated pre-*Laidlaw* 1997 decision, *PIRG of New Jersey v. Magnesium Elektron*, 123 F.3d 111 (3rd Cir. 1997), to claim that injury to the impacted river is required. Motion at 10, 11-12. That is not good law. Indeed, to insist upon environmental harm "is to raise the standing hurdle higher than the necessary showing for success on the merits in an action alleging noncompliance with an NPDES permit." *Laidlaw*, 528 U.S. at 181. *See also U.S. v. Hubenka,* 438 F.3d 1026, 1035 (10th Cir. 2006) (for CWA claim, "[t]here is no need to prove a defendant's discharge of pollutants into a tributary caused any deleterious effect on the navigable waters downstream").

The Complaint alleges aesthetic and recreational injuries in the area impacted by Swift Beef's violations. It states that "members use and enjoy the waters of Lone Tree Creek and the South Platte River as well as the aquatic environment and dependent wildlife associated with these waterways for aesthetic enjoyment and recreational activities, including fishing, hunting, swimming, boating, bird and wildlife viewing, hiking, and walking." Compl. ¶ 9. It connects Plaintiffs' interests to the Treatment Plant's discharges: "Lone Tree Creek is a tributary of the South Platte River," "[t]he South Platte River, upstream and downstream of its confluence with Lone Tree Creek, provides habitat for fish, birds and upland wildlife," and Lone Tree Creek's "confluence with the South Platte River is approximately one mile south of the Facility site." *Id*. ¶¶ 19, 9. It alleges injury to Plaintiffs' members: "Swift Beef's unauthorized and illegal discharges from the Lone Tree Facility and noncompliance with the Permit's terms…injure members that engage in these recreational and aesthetic uses [of the South Platte River and nearby habitats] and deter and limit their uses and enjoyment of these places now and in the future." *Id*. ¶ 9. Plaintiffs have sufficiently alleged injury-in-fact at the pleading stage. *See Tri–State Generation*, 173 F.R.D. at 280 ("Plaintiff alleges that its members who live, work, and recreate in the Yampa Valley are injured by defendants' emissions. At this stage of litigation, plaintiff's allegations suffice to establish an injury-in-fact.").

Noting the entire length of the two affected waterways, Swift Beef contends the Complaint fails to place Plaintiffs' members in the area polluted by Swift Beef's toxic discharges. Motion at 12-13. But, as discussed above, a plain reading of the Complaint says otherwise—members use the South Platte River and adjacent habitats, at and near the confluence with Lone Tree Creek, for various purposes. Compl. ¶¶ 9. And because the Treatment Plant's effluent discharges make up almost all of Lone Tree Creek's flow into the South Platte, Ex. 5 at

17, 24, 25, and its discharge point is about a mile from the South Platte River confluence, Compl. ¶ 19, Swift Beef's actions adversely impact Plaintiffs-members' use and enjoyment of this aquatic environment, *id*. ¶ 9. *See also Laidlaw*, 528 U.S. at 182-83 (members used area 20-40 miles downstream of pollution release point sufficient); *Friends of the Earth v. Gaston Copper Recycling*, 204 F.3d 149, 158 (4th Cir. 2000) (finding discharges impact members four miles downstream); *Ohio Valley Envtl. Coal. v. Marfork Coal*, 966 F. Supp. 2d 667, 673–74 (S.D.W. Va. 2013) (injury requirement met where "Plaintiffs' use of Little Marsh Fork and Marsh Fork is an area approximately 3.72 miles from the end of Brushy Fork"); *WildEarth Guardians v. Colorado Springs Utilities Bd.*, 2018 WL 317469, at *7 (D. Colo. Jan. 8, 2018) ("In the context of an environmental pollution case, a plaintiff must merely show that a defendant discharges a pollutant that causes or contributes to the kinds of injuries alleged in the specific geographic area of concern."). The Court should reject Swift Beef's "geographic nexus" argument.[20]

While the Complaint's allegations should be sufficient to defeat a motion to dismiss, Plaintiffs nonetheless provide declarations of three members to support their interests (recreational, viewing nature and wildlife, conserving prairie rivers, aesthetic appreciation) and injuries (curtailed and reduced use and enjoyment). Jackie Eubank is a FWW member, Eubank Decl. ¶ 2, who hunts for wild turkey along the South Platte River downstream of Lone Tree Creek, in and around the Centennial Valley State Wildlife Area. *Id*. ¶ 4. Eubank "began turkey hunting on the South Platte River about six years ago" and "plan[s] to resume hunting in this

[20] Plaintiffs-members' use of the South Platte River at and near its confluence with Lone Tree Creek is far different than the plaintiffs' use of a water body the size of the Gulf of Mexico. *See Ctr. for Biological Diversity v. E.P.A.*, 937 F.3d 533 (5th Cir. 2019); Motion at 12-13. For similar reasons, *Ctr. for Biological Diversity v. Norton* (ECF Doc. 21) does not help Swift Beef. *Norton* was a Wild and Scenic Rivers Act case concerning multiple distinct parcels of federal lands in western Colorado and an untallied number of rivers that flow through these lands. *Id*. at 4. Further, the challenged conduct was an agency's failure to adopt strategies in management plans to protect rivers; there were no specific discharges or projects causing injury. *Id*. at 4, 9.

area in the spring of 2020." *Id*. ¶¶ 4, 6. She says that turkey use the riparian vegetation along the South Platte as "prime" roosting habitat. *Id*. ¶ 5. When hunting, she enjoys the "overall aesthetic experience of being in nature, sitting under the trees, and watching the pelicans and other wildlife." *Id*. ¶ 8. She explains that Swift Beef's salty wastewater discharges "diminish my overall experience." *Id*. She also says "I am concerned that if [Swift Beef] continues to add salts to the river and increases the river's salinity, it could impact the turkeys we hunt." *Id*.

Robert Ukeiley is a member of the Center for Biological Diversity, Ukeiley Decl. ¶ 3, who recreates and performs restoration work along the South Platte River and its tributaries, above and below the Lone Tree Creek. *Id*. ¶¶ 6-9. He explains that when rafting the river recently, "I enjoyed the sights and sounds of the wildlife. I especially relished spotting numerous birds (like pelicans and egrets), fish, and many turtles sunbathing along the shores. I saw a bald eagle nest and bald eagles where Lone Tree Creek enters the Platte, which was the highlight of the trip for me. I really enjoy seeing wildlife along the region's natural rivers and I find myself especially drawn to river ecosystems, like the South Platte, as they enter the plains and prairies." *Id*. ¶ 9. Ukeiley also regularly volunteers for organizations that perform river restoration work along creeks that feed into the South Platte River, both downstream and upstream of Lone Tree Creek, for the purpose of restoring wildlife habitat. *Id*. ¶¶ 6-7. As he states: "My enjoyment of paddling this stretch of river is diminished when I know there are toxic substances in the water that I am paddling. Knowing that the harm is caused by elevated concentrations of salt makes me concerned for the health of this riverine environment and its longevity." *Id*. ¶ 12 ("Adding saltwater to the freshwater river denigrates a freshwater ecosystem, especially for aquatic life like the fish and wildlife that are reliant on healthy streams and rivers and riparian vegetation."). He also notes "the benefits derived from the river and stream

restoration work that I engage in are diminished by the harmful effects of Swift Beef's permit violations which damage this freshwater river ecosystem." *Id*.

Jeremy Nichols is also a member of the Center. Nichols Decl.¶ 5. He is an avid boater, having paddled rivers throughout Colorado, including sections of the South Platte near Lone Tree Creek. *Id*. ¶¶ 6-9, 13. He explains why he chooses to float the South Platte near Lone Tree Creek: "I enjoy floating this section of the South Platte because not many people do it. Whenever I float here, there's a feeling of being somewhere remote and away from people, even in the very populated Front Range region. I also enjoy floating this portion of the river because of the surprising abundance of fish and wildlife to observe. In floating the South Platte near Lone Tree Creek, I've seen turtles, wood ducks, cormorants, bald eagles, red-tailed hawks, goldeneyes (a type of duck), scaup, pelicans, snakes, deer, bobcats, coyotes, and more." *Id*. ¶ 7; *id*. ¶ 9 ("I enjoyed the wide array of birds and other wildlife that use th[is] portion of the South Platte to nest, forage and raise their young. I saw bald eagles, blue herons, white pelicans, red-tailed hawks, sandpipers, muskrats, deer, and more. I also saw fish."); *id*. ¶ 13 ("[W]e saw lots of birds, including nesting bald eagles, blue herons, black-crowned night herons, pelicans, wood ducks, cormorants, and sandpipers. We also saw dozens of spiny softshell turtles, deer, and muskrats. It was amazing how floating through Greeley it felt remote. We were the only people floating—it felt like we had the South Platte River to ourselves."). Unfortunately, Nichols also remarks that "I was concerned that the Lone Tree treatment plant is adding saltwater that is harmful to the freshwater environment" and "I am aware that the majority of the flow of Lone Tree Creek at this point is discharge from the JBS-Swift Beef Wastewater Treatment Plant and this lessened my recreational and aesthetic enjoyment for the remainder of the trip." *Id*. § 15; *id*. ¶ 16 ("Although I very much enjoyed viewing these birds, my enjoyment was diminished by the

sight of Lone Tree Creek, because I knew that the addition of salty wastewater could damage the vegetation on which the eagles in this area rely."); *id*. ¶ 17 ("The salty wastewater discharged from the Treatment Plant harms the aquatic life—plants, animals, birds, fish—that I come to the stretch of the South Platte to view and enjoy.").

"Reasonable concerns" that prevent someone from engaging in an activity or spoil his or her enjoyment of an impacted area satisfy the injury-in-fact requirement. *Laidlaw*, 528 U.S. at 183-85; *Utah Physicians*, 374 F.Supp.3d at 1132 ("A person who has reasonable concerns about pollution suffers injury in fact when their concerns directly affect their recreational, aesthetic, or economic interests."); *Covington v. Jefferson Cty.*, 358 F.3d 626, 639 (9th Cir. 2004) ("[T]he relevant inquiry here is not whether there has been a [violation of law], but whether [defendants'] actions have caused "reasonable concern" of injury[.]"); *Natural Resources Defense Council v. Sw. Marine*, 236 F.3d 985, 994 (9th Cir. 2000) (injury element met when plaintiffs' "use has been curtailed because of their concerns about pollution, contaminated fish, and the like"). The degree of reduced enjoyment is irrelevant; an "identifiable trifle" is sufficient. *Am. Humanist Ass'n v. Douglas Cty. Sch. Dist.*, 859 F.3d 1243, 1253 (10th Cir. 2017).

Plaintiffs-members' diminished enjoyment is based on reasonable concerns. The state WQCD placed WET limits in the Permit to protect aquatic life. Violations of WET limits reflect the adverse effects of Swift Beef's saltwater discharges on a freshwater aquatic environment. According to EPA, WET tests "predict impacts of effluents on the biological integrity of receiving waters" and "WET testing is an effective tool for predicting receiving system impacts when appropriate considerations of exposure are considered." 67 Fed. Reg. 69,952, 69,965-66 (Nov. 19, 2002). WET limits provide a means to control the risks of toxic water pollution on the

aquatic environment, including the growth and reproduction capability of aquatic life.[21] Thus, "[i]f, in the laboratory, the effluent is harmful to the test organisms at a certain concentration, then it is presumed also to be harmful to aquatic life in the stream—*i.e.*, to be toxic—at that concentration." *Edison Electric*, 391 F.3d at 1269. And, as reported in a recent study, "[s]alination of streams and rivers is considered one of the most important threats to the ecological integrity of freshwater ecosystems." Ex. 19 at 1. Swift Beef's WET-limit violations and saltwater discharges justify Plaintiffs-members' reasonable concerns about the South Platte River's freshwater aquatic environment and reducing their enjoyment of the area's natural resources.

Their concerns are also reasonable due to the status of Swift Beef's operations. For five straight years, Swift Beef's discharges from the Treatment Plant violated WET limits. Compl. ¶¶ 41-62. Swift Beef was never able to comply with the Permit's toxicity requirements until after receipt of Plaintiffs' January 31, 2019 Notice Letter. To Plaintiffs' knowledge, nothing changed at the Treatment Plant—it still cannot neutralize the salty wastewater. Yet Swift Beef continues to have access to the pipeline that carries the salty wastewater to the Treatment Plant. The salt recovery system, meanwhile, remains ineffective and cannot operate legally: there is no permit for the air scrubber, it frequently breaks down and is inefficient, the system violates opacity limits when operating, and the system needs an upgrade to work properly. Without a solution in place, Plaintiffs' members reasonably believe that the area they use and enjoy will remain polluted with the Treatment Plant's toxic wastewater discharges. *See* Compl. ¶¶ 5, 9, 62.

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[21] U.S. Envtl. Prot. Agency, *Technical Support Document for Water Quality-Based Toxics Control*, EPA/505/2-90-001, at 4 (Mar. 1991), https://www3.epa.gov/npdes/pubs/owm0264.pdf; *see also id*. at 21 (EPA explaining WET testing assesses "aggregate toxicity," addresses unknown toxicants, measures potential interactions of multiple toxicants, and predicts and prevents ecological impacts before they occur).

It also appears likely that Swift Beef can manufacture compliance when it needs to, even though the pollution problem has not been completely eradicated. In 2013, Swift Beef pinpointed salts as causing the violations by holding back the salty wastewater at the Hides Facility for a "period of time" and testing the remaining effluent. Compl. ¶ 33; Ex. 9 (explaining company "need[s] to have the salt out of our system for about two week[s] to be ready for the WET test"). Also in 2013, Swift Beef stored the untreatable salty wastewater at a pond at the Treatment Plant while conducting "accelerated" WET tests. Compl. ¶ 33; Ex. 6 at 2 ("JBS transferred all of its brine wastewater to a pond at the wastewater treatment facility and held it in this pond while three accelerated WET testing events occurred."); Ex. 10 (noting Swift Beef able to isolate salty wastewater in Treatment Plant's lagoons). These actions highlight the fact that Swift Beef controls all wastewater that is sent to the Treatment Plant. Ex. 5 at 24. Swift Beef also decides which three days, during any quarterly reporting period, it collects effluent for the purpose of WET testing. *See* Ex. 3 (Permit, Part I(B)(3)). Accordingly, Swift Beef's ability to comply with WET limits suddenly in March 2019—just after receipt of Plaintiffs' Notice Letter—appears to be a function of when it is collecting effluent, and not indicative that the problem has been solved. *See Colorado Springs Utilities*, 2018 WL 317469, at *6 ("The members also aver that they believe that when Defendants fail to continuously monitor opacity, levels of harmful air pollutants are not known, potentially resulting in excess emissions, and that they are aware of the harmful health effects of the Plant's emissions."); *Sierra Club v. Simkins Industries*, 847 F.2d 1083, 1112-13 (4th Cir. 1988) (finding injury element met where company failed to report, creating reasonable fears of pollution).

Plaintiffs' members have reasonable concerns about the risks to the aquatic freshwater environment they enjoy posed by Swift Beef's ongoing WET violations.

B. Plaintiffs-members' injuries are fairly traceable to Swift Beef's actions.

Standing's "fairly traceable" element requires some causal connection between the plaintiffs' injury and the challenged conduct—the injury cannot be "the result of the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560. "In the context of an environmental pollution case, a plaintiff must merely show that a defendant discharges a pollutant that causes or contributes to the kinds of injuries alleged in the specific geographic area of concern." *Colorado Springs Utilities*, 2018 WL 317469, at *7 (internal quotations and citation omitted). *See also Tri–State Generation*, 173 F.R.D. at 280 ("Plaintiff's allegations—that defendants' emissions impair its members' ability to breathe clean air and view natural scenery and wildlife—clearly satisfy [the causation] requirement."); *Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546, 558 (5th Cir. 1996) (holding "it [was] sufficient for Sierra Club to show that [defendants'] discharge of produced water *contributes* to the pollution that impairs [a Sierra Club member's] use of the bay") (emphasis in original).

"[T]raceability does not mean that plaintiffs must show with scientific certainty that defendant's effluent…caused the precise harm suffered by the plaintiffs." *Sw. Marine*, 236 F.3d at 995 (quoting *Gaston Copper*, 204 F.3d at 161-62). Nor does it require a showing of proximate cause. *See Nova Health Sys. v. Gundy*, 416 F.3d 1149, 1156 (10th Cir. 2005). Moreover, "[n]o relevant case law supports [the] argument that [a plaintiff claiming violation of pollution standards] must connect the exact time of their injuries with the exact time of an alleged violation by [the defendant]." *Colorado Springs Utilities Bd.*, 2018 WL 317469, at *7 (quoting *Texans United for a Safe Econ. v. Crown Cent. Petroleum*, 207 F.3d 789, 793 (5th Cir. 2000)).

Swift Beef's illegal conduct results in excessive salty wastewater discharges that are toxic to a freshwater ecosystem. These violations, which, as detailed above, are ongoing within the

meaning of the CWA, create a risk of harm to the aquatic environment in the South Platte River. Consequently, as alleged and as attested to, the company's illegal wastewater discharges cause or contribute to Plaintiffs-members' reduced enjoyment of the impacted area for their recreational and aesthetic pursuits. Compl. ¶¶ 2, 9. *See also* Nichols Decl. ¶ 17 ("My enjoyment and recreational and aesthetic experience has been and will be diminished due to water pollution coming into the South Platte from Lone Tree Creek, including pollution that violates the JBS-Swift Beef Wastewater Treatment Plant Clean Water Act permit and exceeds the permit's Whole Effluent Toxicity limits."); *id*. ¶ 11-12, 14-16; Eubank Decl. ¶ 8 ("[K]nowing that the River is more polluted than it would be if JBS-Swift Beef were in compliance with the Clean Water Act is reducing and will continue to diminish my overall experience."); *id*. ¶ 9; Ukeiley Decl. ¶ 12 ("[Swift Beef's] years of violating the WET limits in its permit reduce my enjoyment of the river for recreational endeavors.").[22] Plaintiffs' injuries are traceable to the challenged conduct.

C. Plaintiffs' injuries are redressable.

Injuries are redressable if it is "likely"—not merely "speculative"—that a court can provide some relief. *Lujan*, 504 U.S. at 561; *S. Utah Wilderness All,* 620 F.3d at 1233. Plaintiffs seek declaratory and injunctive relief and civil penalties. Compl., Prayer, ¶¶ 1-3. As alleged, such relief will stop violations and redress their injuries. *Id*. ¶¶ 9, 11; *see id*. ¶¶ 2, 5, 62.

A court order declaring Swift Beef has been violating its Permit is powerful relief here given the company's systemic noncompliance with WET limits and because Swift Beef has not conceded liability. *See Colorado Springs Utilities Bd.*, 2018 WL 317469, at *8 (distinguishing *Steel Co*., when utility was disputing whether it was violating Clean Air Act). The problem has

[22] Conversely, injuries alleged in *Roanoke River Basin v. Duke Energy* (Motion at 6-7) were found unconnected to an allegedly deficient plan that would be used when a power plant closed at some point in the future. 2018 WL 1605022, *4 (M.D. N.C. Mar. 29, 2018).

persisted since the Permit was issued. Compl. ¶¶ 41-62. Swift Beef has known the Treatment Plant is ill-equipped to address salty wastewater. The company did not develop a solution when provided a year grace period to comply with WET limits. *See* Ex. 3 (Permit, Part 1(A)(3)); Ex. 5 at 24. And while the company has endeavored to use a salt recovery system, it is not working effectively and Swift Beef has continued to pipe salty wastewater to the Treatment Plant. A judicial declaration telling Swift Beef it cannot discharge untreatable waste with impunity will therefore settle on ongoing controversy.

Next, Plaintiffs seek injunctive relief, prohibiting Swift Beef from piping salty wastewater to the Treatment Plant. Compl., Prayer, ¶ 2. In asking that the Court "require[e] Swift Beef to take all necessary measures to prevent future violations of its Permit," *id*., the Court should mandate that Swift Beef ensure the salt evaporation system controls the wastewater effectively, legally, and without adverse air emissions, or adopt some other solution that prevents its salty discharges from causing WET violations. *See id*. Such forms of injunctive relief will redress the concern that has diminished Plaintiffs-members' enjoyment of the South Platte River's freshwater environment. *See Tri-State Generation*, 173 F.R.D. at 281 ("Because plaintiff alleges that defendants' emissions impair its members' ability to breathe clean air and view natural scenery and wildlife, it necessarily follows that a reduction in the emissions would reduce the impairments plaintiff's members allegedly suffer.").

Civil penalties will likewise promote immediate compliance and deter Swift Beef's illegal conduct. Compl., Prayer, ¶ 3. These penalties, even if paid to the U.S. Treasury, eliminate the economic incentive Swift Beef has to avoid or delay compliance with the CWA. *Laidlaw*, 528 U.S. at 186 ("To the extent that [civil penalties] encourage defendants to discontinue current violations and deter them from committing future ones, they afford redress to citizen plaintiffs

who are injured or threatened with injury as a consequence of ongoing unlawful conduct."); *Benham v. Ozark Materials River Rock, LLC*, 885 F.3d 1267, 1273 (10th Cir. 2018) (holding CWA penalties will "deter future violations"). "The legislative history of the [CWA] reveals that Congress wanted the district court to consider the need for retribution and deterrence, in addition to restitution, when it imposed civil penalties. ... [The district court may] seek to deter future violations by basing the penalty on its economic impact." *Laidlaw*, 528 U.S. at 185. Based on its historical response to years of violations, the state's WQCD does not pose a credible deterrent to future violations. Imposing penalties will serve this function. *See WildEarth Guardians v. Public Serv. Co.*, 690 F.3d 1174, 1186 (10th Cir. 2012) ("plaintiff's claim for civil penalties is not rendered moot by the defendant's compliance with the law because the plaintiff retains a concrete interest in deterring the defendant from future violations").

Swift Beef quotes from *WildEarth Guardians v. Public Serv.*, seemingly to claim that civil penalties do not support redressability. Motion at 5. No argument follows as to how this case applies—it does not. The case was decided on mootness grounds, not standing. And, unlike here, defendant had shown its violation could not recur because the underlying law had changed. 690 F.3d at 1186. The court reasoned further that "nothing here indicates a history or pattern of [Clean Air Act] violations warranting a deterrent; rather, the alleged violation here was a one-off event caused by an unanticipated change in the law." The same is not true with Swift Beef's operations of the Treatment Plant.

Plaintiffs have sufficiently alleged redressability in their Complaint.

CONCLUSION

The Court should deny Swift Beef's Motion to Dismiss. Plaintiffs have Article III standing to enforce the company's ongoing CWA violations.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 21, 2020, I electronically transmitted Plaintiffs' Opposition To Defendant's Motion To Dismiss to the Clerk's Office using the CM/ECF System for filing and service on all registered counsel.

/s/ Neil Levine
Neil Levine