UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

LOWER SUSQUEHANNA RIVERKEEPER, et al.,	)	
	)	
Plaintiffs,	)	
	)	**CASE NO. 1:19-cv-01307**
v.	)	**JUDGE JENNIFER P. WILSON**
	)	
KEYSTONE PROTEIN COMPANY,	)	
	)	
Defendant.	)	

PLAINTIFFS' BRIEF IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT ON JURISDICTIONAL AND LIABILITY ISSUES

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TABLE OF CONTENTS

Statutory Background 1

Statement of Facts. 2

ARGUMENT 5

I. PLAINTIFFS HAVE STANDING TO BRING THIS ACTION 5

II. THIS COURT HAS SUBJECT MATTER JURISDICTION OVER KEYSTONE'S PERMIT VIOLATIONS...8

III. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT AS TO KEYSTONE'S LIABILITY FOR VIOLATING ITS NPDES PERMIT AND THE CWA ON 2,248 DAYS...10

CONCLUSION 13

TABLE OF AUTHORITIES

Page(s)

Cases

Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield,
484 U.S. 49 (1987)....................9, 10

Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield,
844 F.2d 170 (4th Cir. 1988) 10

Cty. of Maui v. Hawaii Wildlife Fund,
140 S. Ct. 1462 (2020)....................1

Friends of the Earth v. Laidlaw Environmental Services,
528 U.S. 167 (2000)....................6

Golden v. Gov't of Virgin Islands, Bureau of Internal Revenue,
47 Fed. Appx. 620 (3d Cir. 2002)....................4

Hunt v. Washington State Apple Adver. Comm'n,
432 U.S. 333 (1977)....................8

Interfaith Cmty. Org. v. Honeywell Int'l, Inc.,
399 F.3d 248 (3d Cir. 2005) 6

Matsushita Electric Industrial Co. v. Zenith Radio Corp.,
475 U.S. 574 (1986)....................11

NRDC v. Texaco Refining & Marketing,
2 F.3d 493 (3d Cir. 1993) 5, 7, 10, 12

PennEnvironment v. RRI Energy Ne. Mgmt. Co.,
744 F. Supp. 2d 466 (W.D. Pa. 2010)....................6, 8

Piney Run Preservation Ass'n v. County Com'rs of Caroll County, MD,
268 F.3d 255 (4th Cir. 2001) 6

PIRG v. Elf Atochem,
817 F. Supp. 1164 (D.N.J. 1993)....................12

PIRG v. Powell Duffryn Terminals, Inc.,
913 F.2d 64 (3d Cir. 1990) 5, 8, 12

PIRG v. Rice,
774 F. Supp. 317 (D.N.J. 1991) 12

United States v. CPS Chemical Co., Inc.,
779 F. Supp. 437 (E.D. Ark. 1991)....................11, 12

United States v. Smithfield Foods,
191 F.3d 516 (4th Cir. 1999) 13

United States v. Smithfield Foods, Inc.,
972 F. Supp. 338 (E.D. Va. 1997) 7

Statutes

33 U.S.C. § 1311(a) 1

33 U.S.C. § 1319....................1

33 U.S.C. § 1319(g) 9

33 U.S.C. § 1319(g)(6)(A) 2, 9

33 U.S.C. § 1342(b)(7)....................1

33 U.S.C. § 1365(a) 11

33 U.S.C. § 1365(b)(1)(A)....................1

33 U.S.C. § 1365(b)(1)(B) 2

33 U.S.C. § 1365(f)(6) 11

33 U.S.C. § 1365(g) 5

Other Authorities

76 Fed. Reg. 549 (Jan. 11, 2011) 3

Federal Rules of Civil Procedure Rule 56(c)....................10

S. Rep. No. 414, 92nd Cong., 2nd Sess. (1972) 11

Statutory Background. The Federal Water Pollution Control Act (commonly called the Clean Water Act ("CWA")) prohibits any person from discharging any pollutant without specific authorization. 33 U.S.C. § 1311(a). As the Supreme Court recently recognized, Congress' purpose as reflected in the language of the Clean Water Act is to "'restore and maintain the ... integrity of the Nation's waters.'" *Cty. of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1468 (2020) (citation omitted). The Act does this "by insisting that a person wishing to discharge any pollution into navigable waters first obtain EPA's permission to do so."[1] *Id*. (citations omitted).

Under the CWA, permittees who violate their National Pollutant Discharge Elimination System ("NPDES") permits are subject to federal and state enforcement action. 33 U.S.C. §§ 1319, 1342(b)(7). In addition, citizens may sue any person who violates any term or condition in an NPDES permit, subject to two limitations. *Id*. §§ 1365(a)(1), (f)(6). First, the citizen must give 60 days' advance notice of his intent to file suit to EPA, the state, and the violator. *Id.* § 1365(b)(1)(A). Second, a citizen may not sue if EPA or the State bring certain types of judicial or administrative

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[1] In *Cty. of Maui,* the Court held that the CWA requires a permit where a sewage treatment plant discharges polluted water into the ground where it mixes with groundwater, which, in turn, flows into a navigable river if the addition of the pollutants through groundwater is the functional equivalent of a direct discharge from the point source into navigable waters. Plaintiffs bring the *Cty. of Maui* case to the Court's attention because it is a recent case from the Supreme Court addressing the CWA. (There is no dispute that the CWA applies to the discharges here.)

enforcement actions. *Id.* §§ 1365(b)(1)(B), 1319(g)(6)(A).

Statement of Facts. The parties have stipulated to the following facts. Stipulation, ECF No. 31. On March 30, 2012, the Pennsylvania Department of Environmental Protection ("PaDEP") issued NPDES Permit No. PA0080829 to Keystone Protein Company ("Keystone"). *Id.* ¶ 1. The permit limited Keystone's discharges of total nitrogen from Outfall 001 to 134 mg/l as a monthly average concentration and 194 mg/l as a daily maximum concentration. *Id.*

In February and April 2019, Plaintiffs notified Keystone, PaDEP, and the U.S. Environmental Protection Agency ("EPA") of their intent to file a citizen suit against Keystone for violations of the total nitrogen limits in its NPDES permit. *Id.* ¶ 2. Neither PaDEP nor EPA has filed a judicial proceeding against Keystone to enforce its nitrogen limits. *Id.* ¶ 3. In 2012 and 2017, PaDEP and Keystone entered into Consent Administrative Orders and Agreements ("COAs") that imposed stipulated penalties for Keystone's violations of its nitrogen limits. *Id.* ¶¶ 4, 6. The 2012 and 2017 COAs were negotiated and signed without any prior public notice to the public or Plaintiffs, and without any opportunity for the public or Plaintiffs to comment on or object to those orders. *Id.* ¶ 8.

More than 60 days after sending their notice letters, Plaintiffs filed their Complaint on July 29, 2019. *Id.* ¶ 11. Keystone has stipulated that it violated its monthly average concentration limit for total nitrogen at Outfall 001 for 66

consecutive months from October 2014 through March 2020. *Id*. ¶ 12. Keystone has also stipulated that it violated its daily maximum concentration limit for total nitrogen at Outfall 001 on 257 days in those same months. *Id*. ¶ 13.

Keystone's wastewater treatment plant ("WWTP") was not designed to meet, and therefore could not meet, its permit limits for total nitrogen. Plaintiffs' Statement of Material Facts ("SOMF") ¶ 4. In 2012, Keystone designed an upgrade to its WWTP to meet those limits and obtained financing to build the upgrade, but never built it. *Id.*

EPA has listed the Chesapeake Bay as impaired because of excess nitrogen, phosphorus, and sediment. Stipulation ¶ 14. In 2010, EPA issued a Total Maximum Daily Load under the CWA that established nitrogen, phosphorus, and sediment allocations for the Bay and the streams that flow into it, including the Susquehanna River watershed. *Id.* PaDEP has classified Keystone as a significant discharger of nitrogen to the Chesapeake Bay. *Id.* ¶ 15.

Keystone's WWTP discharges into an unnamed tributary of Beach Run which merges with Deep Run to form Elizabeth Run which flows into the Little Swatara Creek, then Swatara Creek, the Susquehanna River and ultimately the Chesapeake Bay. *Id.* ¶ 16. The total nitrogen discharged by Keystone's WWTP is one of the pollutants that is the focus of the Chesapeake Bay TMDL. *Id.* Keystone stated in a 2013 report that Beach Run, Elizabeth Run, Little Swatara Creek, Swatara Creek,

the Susquehanna River and ultimately the Chesapeake Bay would see "greatly reduced nutrient discharges" if Keystone upgraded its WWTP. SOMF ¶ 5.

Plaintiffs are non-profit organizations that seek to protect the ecological integrity and water quality of the Lower Susquehanna River, its tributaries, and the Chesapeake Bay. Stipulation ¶ 17. Plaintiffs' members Ted Evgeniades, Keith Williams and Todd Kennedy use Swatara Creek, the Susquehanna River, and the Chesapeake Bay for recreational activities, including fishing, kayaking, boating, snorkeling, and observing nature. *Id.* ¶ 18. The Creek, River, and Bay are downstream from Keystone's discharges. *Id.* ¶ 19. Excessive nutrients like total nitrogen can feed the growth of algae and slime in downstream waters and create oxygen-depleted dead zones in the Bay. *Id.* All three members complain that they have seen these conditions and that those conditions have reduced their aesthetic and recreational enjoyment of the Creek, River, and Bay. *Id.*

The parties can stipulate to the facts supporting standing, but not to the legal conclusion that standing exists. *Golden v. Gov't of Virgin Islands, Bureau of Internal Revenue*, 47 Fed. Appx. 620, 622 (3d Cir. 2002) (Because "standing is an Article III requirement for jurisdiction, the parties do not have the power to confer such jurisdiction upon the Court by conceding the standing of certain plaintiffs."). Plaintiffs are therefore moving for partial summary judgment and a declaratory judgment that Plaintiffs have constitutional and statutory standing and that this Court

has subject matter jurisdiction.

Keystone would not stipulate to the number of days that it has violated the CWA. A violation of a monthly average limit is counted as a violation for each day of the month that the facility operated. *NRDC v. Texaco Refining & Marketing*, 2 F.3d 493, 507 (3d Cir. 1993). Keystone discharges 24 hours a day, seven days a week. SOMF ¶ 2. Its WWTP flow records show that it discharged from Outfall 001 on all but eighteen days from October 2014 through March 2020, for a total of 2,248 days. *Id.* ¶ 3. Consequently, Keystone's 66 monthly average violations represent 1,991 days of violation. *Id*. Adding Keystone's 257 days of violation of its daily maximum limit increases that total to 2,248 days. Plaintiffs seek partial summary judgment and a declaratory judgment that Keystone is liable for 2,248 days of violation of its NPDES permit. Plaintiffs will later request a hearing and an order compelling Keystone to pay an appropriate civil penalty for its permit violations and remediate its harm to the River and the Bay.

ARGUMENT

I. PLAINTIFFS HAVE STANDING TO BRING THIS ACTION

Section 505(g) of the CWA authorizes the filing of a citizen suit by "any person or persons having an interest which is or may be adversely affected." 33 U.S.C. § 1365(g). This provision confers standing to the limits of the U.S. Constitution. *PIRG v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 70 n. 3 (3d Cir.

1990). To have constitutional standing, a plaintiff must suffer an actual or threatened injury-in-fact that is fairly traceable to the challenged action by the defendant and is likely to be redressed by a favorable decision. *Friends of the Earth v. Laidlaw Environmental Services*, 528 U.S. 167, 180-81 (2000). Plaintiffs' members satisfy these requirements.

To establish injury-in-fact, "a plaintiff need only show that he [or she] used the affected area and that he [or she] is an individual for whom the aesthetic and recreational values of the area [are] lessened by the defendant's activity." *Piney Run Preservation Ass'n v. County Com'rs of Caroll County, MD*, 268 F.3d 255, 263 (4th Cir. 2001); *see also Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 399 F.3d 248, 255-56 (3d Cir. 2005); *PennEnvironment v. RRI Energy Ne. Mgmt. Co.*, 744 F. Supp. 2d 466, 477 (W.D. Pa. 2010). The declarations of three of Plaintiffs' members demonstrate that they have suffered injury-in-fact. Each member uses Swatara Creek, the Susquehanna River, and the Chesapeake Bay for recreational activities, including fishing, kayaking, boating, snorkeling, and observing nature. Keith Williams has a business that takes people on snorkeling and nature education trips in the Susquehanna River watershed and the Chesapeake Bay. Stipulation, Ex. H ¶ 20. Ted Evgeniades and Todd Kennedy fish and kayak in the Susquehanna River and Swatara Creek. *Id*. Ex. G ¶¶ 5-6, 8; *id.* Ex. I ¶¶ 3, 5. The Creek, River and Bay are downstream from, and affected by, Keystone's discharges. Excessive nutrients

like total nitrogen can feed the growth of algae and slime in downstream waters and create oxygen-depleted dead zones in the Bay. Stipulation, ¶ 19 and Ex. G ¶ 9; *id.* Ex. I ¶ 8; *see also United States v. Smithfield Foods, Inc.*, 972 F. Supp. 338, 344 (E.D. Va. 1997) ("Excessive nutrient loadings stimulate productivity of algae, which decreases sunlight to plants, and causes increased algae growth on plants and increased turbidity"). All three members complain that they have seen these conditions and that it has reduced their aesthetic and recreational enjoyment of the Creek, River, and Bay. Stipulation ¶ 19.

To establish traceability, a citizen plaintiff must show that the defendant has (1) discharged pollutants in violation of its permit (2) into a waterway used by plaintiff and (3) the pollutants cause or contribute to the kinds of injuries alleged by plaintiff. *NRDC*, 2 F.3d at 505. Keystone has discharged total nitrogen into the Creek, River, and Bay in violation of its permit. That pollutant can cause or contribute to the adverse effects described above and experienced by Plaintiffs' members. Keystone admits that if it had upgraded its WWTP, the upgrade would have greatly reduced its nitrogen discharges. SOMF ¶ 5. Nitrogen is one of the pollutants which are the focus of the Chesapeake Bay TMDL. Stipulation ¶ 16. That TMDL is designed to reduce nutrient loading and thereby protect the aquatic integrity of the River and the Bay.

As to redressability, the injunctive relief and the civil penalties sought by

Plaintiffs are more than likely to redress their injuries because (1) ordering Keystone to comply with its permit will improve conditions in the Creek, River, and Bay and (2) imposing monetary sanctions will "deter future violations as well as promote immediate compliance." *PennEnvironment,* 744 F. Supp. 2d at 481 (citing *Powell Duffryn*, 913 F.2d at 73; *Laidlaw*, 528 U.S. at 185-86). Keystone admits that upgrading its WWTP would greatly reduce nutrient discharges from the facility. SOMF ¶ 5. Thus, a court order requiring such an upgrade would redress Plaintiffs' injuries.

Plaintiffs meet the three requirements for representational standing. *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). First, at least one of their members has standing to sue in his or her own right. Second, the organizational purposes are germane to the interests sought to be protected. Stipulation ¶ 17. Third, because Plaintiffs are only seeking injunctive and declaratory relief and not monetary damages, there is no need for the direct participation of the individual members in the action. *Powell Duffryn*, 913 F.2d at 70.

II. THIS COURT HAS SUBJECT MATTER JURISDICTION OVER KEYSTONE'S PERMIT VIOLATIONS

Plaintiffs satisfy the jurisdictional prerequisites for the commencement and prosecution of a citizen suit against Keystone. They sent two 60-day notice letters and filed suit more than 60 days after the second one. Stipulation ¶¶ 2, 11. No federal

or state agency has filed a judicial action which has preclusive effect under the CWA. *Id*. ¶ 3. PaDEP's 2012 and 2017 administrative penalty actions do not meet the requirements for preclusion under either subparagraphs (ii) or (iii) of § 1319(g)(6)(A) of the CWA because: (1) both subparagraphs require comparability, and the penalty provisions in the Pennsylvania statute under which both COAs were prosecuted are not comparable to the federal penalty provisions in § 1319(g) of the CWA; (2) the 2017 COA does not satisfy the "commencement" and "diligent prosecution" requirements under subparagraph (ii); and (3) the two COAs do not meet the "assessed penalty" requirement under subparagraph (iii). *See* Pl. SJ Opp. Br, ECF No. 20.[2]

Furthermore, Plaintiffs have satisfied the jurisdictional standard set forth in *Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield*, 484 U.S. 49 (1987). In that case, the Supreme Court held that, to invoke the jurisdiction of the federal courts, citizen plaintiffs must "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." 484 U.S. at 57. On remand from the Supreme Court in *Gwaltney*, the Court of Appeals for the Fourth Circuit held that the plaintiffs could establish jurisdiction

[2] That brief responds to Keystone's first motion for summary judgment on the preclusion issue, ECF No. 15, which the Court will dismiss as moot after Keystone files its second consolidated motion for summary judgment. ECF No. 29 at 2. Plaintiffs will restate their full argument on preclusion in response to that second motion.

under this standard (844 F.2d 170, 171-172 (1988)):

> either (1) by proving violations that continue on or after the date the complaint is filed, or (2) by adducing evidence from which a reasonable trier of fact could find a continuing likelihood of a recurrence in intermittent or sporadic violations.

Furthermore, the Fourth Circuit stated that violations do not cease to be ongoing unless "the risk of defendant's continued violation had been completely eradicated when citizen-plaintiffs filed suit." *Id*. at 172. The Third Circuit has adopted the Fourth Circuit's standard for proving ongoing violations under *Gwaltney*. *NRDC*, 2 F.3d at 501. The time for determining whether an ongoing violation exists is when plaintiff's complaint is filed. *Id*. at 502.

The present case meets the first jurisdictional test for proving ongoing violations. Plaintiffs' complaint was filed on July 29, 2019. Keystone admits that it has violated its total nitrogen limits in every month from August 2019 through March 2020. Stipulation, ¶¶ 12-13 and Ex. F. "[P]roof of one or more post-complaint violations is itself conclusive" of the ongoing nature of the pre-complaint violations. *NRDC*, 2 F.3d at 502. This Court therefore has subject matter jurisdiction over Keystone's permit violations.

III. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT AS TO KEYSTONE'S LIABILITY FOR VIOLATING ITS NPDES PERMIT AND THE CWA ON 2,248 DAYS

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment shall be rendered if "there is no genuine issue as to any material fact and .

. . the moving party is entitled to a judgment as a matter of law." It further provides that summary judgment may be rendered on the issue of liability alone, although there may be an issue as to the remedy. The Supreme Court has explained that "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Electric Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986). Here, there are no genuine issues of material fact as to Keystone's liability.

Section 505(a)(1) of the CWA authorizes citizens to bring suit for violation of any "effluent standard or limitation." 33 U.S.C. § 1365(a). Section 505(f)(6), in turn, defines "effluent standard or limitation" to include "a permit or condition thereof issued under Section 402." 33 U.S.C. § 1365(f)(6). The Court has the power to require compliance with those permit conditions. 33 U.S.C. § 1365(a).

Enforcement of the CWA is "intentionally straightforward." *United States v. CPS Chemical Co., Inc*., 779 F. Supp. 437, 442 (E.D. Ark. 1991). The legislative history of the CWA shows that Congress intended to expedite enforcement actions. The Senate report on the 1972 CWA states that "[e]nforcement of violations of requirements of this Act should be based on a minimum of discretionary decisionmaking or delay." S. Rep. No. 414, 92nd Cong., 2nd Sess. (1972) at 64, *reprinted in* 1972 U.S. Code Cong. & Ad. News at 3730. This report also states that "[a]n alleged violation of an effluent control limitation or standard would not require

reanalysis of technological [or] other considerations at the enforcement stage" and that therefore "the issue before the courts would be a factual one of whether there had been compliance." S. Rep. No. 414 at 79, 80, *reprinted in* 1972 U.S. Code Cong. & Ad. News at 3745, 3746.

The CWA achieves the goal of expedited enforcement in two ways. First, it places the burden of measuring and reporting pollutant levels on permit holders. Enforcement is thus made easy and inexpensive because evidence of violations must be compiled and documented by the permit holders themselves. *PIRG v. Elf Atochem*, 817 F. Supp. 1164, 1178 (D.N.J. 1993). Second, the CWA imposes strict liability for permit violations. *Powell Duffryn,* 913 F.2d at 73 n. 10. A discharger's culpability or good faith does not excuse a violation. *CPS Chemical*, 779 F. Supp. at 442. Consequently, a violation of a permit requirement by a discharger is an automatic violation of the CWA. *PIRG v. Rice*, 774 F. Supp. 317, 325 (D.N.J. 1991).

Keystone admits that it violated its monthly average concentration limit for total nitrogen at Outfall 001 for 66 consecutive months from October 2014 through March 2020.[3] *Id.* ¶ 12. A violation of a monthly average limit is counted as a violation for each day of the month that the facility operated. *NRDC*, 2 F.3d at 507. Keystone operated and discharged flow from Outfall 001 on 1,991 of those days.

[3] The statute of limitations for past violations begins to run when DMR is filed, and expires after five years plus sixty days for the required notice letter. *Powell Duffryn,* 913 F.2d at 75-76. Thus, all violations are within the limitations period.

SOMF ¶ 3. Consequently, Keystone's 66 monthly average violations represent 1,991 days of violation. Adding Keystone's 257 days of violation of its daily maximum limit increases that total to 2,248 days. Plaintiffs are therefore entitled to summary judgment as to Keystone's liability for violating the CWA on 2,248 days.[4]

CONCLUSION

For these reasons, Plaintiffs' motion for partial summary judgment on jurisdiction and liability should be granted.

Respectfully submitted,

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[4] As noted by the Fourth Circuit, "the two limits are included in the Permit for different reasons and serve distinct purposes: daily maximum effluent limits protect the environment from the acute effects of large, single releases, and monthly averages protect against chronic effects occurring at lower levels." *United States v. Smithfield Foods*, 191 F.3d 516, 527 (4th Cir. 1999) (upholding district court ruling that violations of monthly average and daily maximum limits for same pollutant in same month constitute separate violations of Clean Water Act).

CERTIFICATE OF SERVICE

I certify that on May 29, 2020, I served a copy of the foregoing document via the Court's ECF system on the following:

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