UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

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

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

James M. Hecker (special admission)
Public Justice
1620 L Street, N.W. Suite 630
Washington, DC 20036
(202) 797-8600 ext. 225
jhecker@publicjustice.net

Stephen G. Harvey
Steve Harvey Law LLC
1880 John F. Kennedy Blvd.
Suite 1715
Philadelphia, PA 19103
(215) 438-6600
steve@steveharveylaw.com

Attorneys for Plaintiffs

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Defendant Keystone Protein Company ("Keystone") argues that two administrative consent orders issued by the Pennsylvania Department of Environmental Protection (PaDEP) in 2012 and 2017 meet the requirements for preclusion in 33 U.S.C. § 1319(g)(6)(A) and bar Plaintiffs' claims. Keystone's arguments are meritless.

COUNTERSTATEMENT OF FACTS

In 2004, EPA issued effluent limitation guidelines ("ELG") for the meat and poultry products point source category. 69 Fed. Reg. 54476 (Sept. 8, 2004). The ELG set technology-based limits for discharges of total nitrogen from those facilities, which took effect at the time their NPDES permits were reissued. *Id.* at 54477; 40 C.F.R. § 432.103; Pl. Response to Def. Statement of Material Facts ("Facts"), ¶ 3 and Water Quality Protection Report, Pl. Ex. A to Facts at 4-5, 10. In 2006 and again in 2010, Keystone's engineering consultant, Mr. Reid, told Keystone it would need to upgrade its wastewater treatment plant ("WWTP") to comply with those limits. *Id.* ¶¶ 5, 7. He proposed to do this by converting Keystone's existing anaerobic tank to an anoxic reactor. *Id.* ¶ 5. But Keystone did not promptly follow this advice. Many years later in 2018 it decided to build its "interim upgrade" that converts its existing anaerobic tank to an anoxic reactor. *Id.* ¶ 6.

PaDEP drafted an NPDES permit for reissuance to Keystone in 2011. In its comments on that draft permit, EPA stated that "there cannot be compliance

schedules to meet technology-based limits" and that the "total nitrogen concentrations are technology-based requirements of the ELG that this facility is subject to, and the limits must be met at permit issuance." Facts, ¶ 10. PaDEP told Keystone in 2011 that its reissued permit would contain ELG limits that "would be effective immediately," that no time extension or compliance schedule could be granted for delayed compliance, and Keystone "should have made provision for this [ELG] requirement" since it was promulgated in 2004. Facts, ¶¶ 8, 11.

On March 30, 2012, PaDEP reissued Keystone's NPDES Permit No. PA0080829 with the ELG limits for total nitrogen. ECF #36-1 at 8. On that same day, Keystone entered into a Consent Order and Agreement (the "2012 COA") with PaDEP. ECF #36-2. Contrary to EPA's and PaDEP's prior statements, the COA contained a compliance schedule purporting to give Keystone four and a half years until October 2016 to comply with the ELG limits. *Id.* at 5. PaDEP described the COA "as a means of protection for" Keystone and to "limit KPC's liability for any violation of the ELG during the design/construction period for the planned upgrades at the plant." Facts, ¶ 8. Keystone's Mr. Weaver similarly described the 2012 COA as "the ultimate environmental shield and protection from EPA (Federal) claims on TN [total nitrogen] non-compliance." *Id.* ¶ 9.

In December 2012, PaDEP issued a construction permit to Keystone to upgrade its WWTP to meet the ELG limits ("the 2012 upgrade"). Facts, ¶ 13. In

April 2013, PENNVEST gave Keystone a $6.433 million loan to build that upgrade. *Id.* ¶ 14. But Keystone never accessed the loan and abandoned the project in 2015. *Id.* ¶¶ 17-18. Mr. Weaver testified at his deposition that the reason for this was because Keystone had been acquired by Sechler Family Foods in 2014 and that company wanted to wait until it built a new WWTP that would service both a new chicken processing plant and Keystone's existing rendering plant. *Id.* ¶¶ 15, 17.

In May 2015, Keystone asked PaDEP to extend by three years the June 2015 deadline to begin construction of the 2012 upgrade. Facts, ¶ 20. In 2016, Keystone made a similar request even though the design of the 2012 upgrade was 80% complete and it was "committed to begin WWTP construction in the Spring 2017." *Id*. In May 2017, Keystone entered into a second COA (the "2017 COA") with PaDEP that superseded and replaced the 2012 COA. Facts, ¶ 21. In that COA, PaDEP extended the deadline to complete construction of the 2012 upgrade by nearly five years from July 2016 to June 2021 and purported to eliminate the deadline for ELG compliance. *Id.* Keystone admits that 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]." Stipulation, ECF #31 ¶ 8.

In October 2018, Keystone finally decided to upgrade its WWTP to comply with the ELG nitrogen limits. Facts, ¶ 22. Keystone admits that it was technically

feasible to have done this by April 1, 2012. *Id.* ¶ 23. Keystone anticipates that the upgrade will be operational by December 2020. ECF #36-7 ¶ 5.

Keystone admits that it violated its monthly average concentration limit for total nitrogen in 66 consecutive months and its daily maximum concentration limit for total nitrogen on 257 days from October 2014 through March 2020. *Id.* ¶ 12-13. Combined, these violations comprise 2,248 days of violation and are subject to a maximum statutory civil penalty of $116,140,721.[1]

Keystone paid a total of $18,950 in stipulated penalties under both COAs for one monthly average and one daily maximum violation in those 66 months. Facts, ¶ 3.[2] Keystone paid no penalties for 191 other daily maximum violations during that

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[1] Keystone is potentially liable for a maximum of $37,500 in civil penalties for each day of violation before November 2, 2015 and $54,833 in civil penalties for each day of violation thereafter. 40 C.F.R. § 19.4; 84 Fed. Reg. 2059 (Feb. 6, 2019). Keystone violated its nitrogen concentration limits on 2,248 days, of which 411 were before and 1,837 were after November 2, 2015. ECF #34 at 9; ECF #32-6. The maximum civil penalty for those violations is therefore $116,140,721 (411 x $37,500 + 1,837 x $54,833).

[2] Keystone paid an additional $166,899.68 in stipulated penalties for its violations of the annual mass loading limit for nitrogen, but Plaintiffs are only enforcing the concentration limits, not the mass limit. ECF #36-7 at 6 ("Additional Annual Fees"); *see* ECF #36-3 at 6 (imposing a "penalty of $1.23 per pound in exceedance of the permitted limit of 19,786 pounds" of total nitrogen per year). The concentration limits for nitrogen are separate from, and in addition to, the quantity limits for nitrogen based on mass loading. *See id.* at 5 ("Quantity and Concentration shall be considered separate violations"); ECF #36-1 at 12-13 (showing separate permit limits for mass (in pounds) and concentration (in milligrams per liter) of total nitrogen); *see also NRDC v. Texaco Refining & Marketing*, 800 F. Supp. 1, 21 (D. Del. 1992) ("separate exceedances of weight and concentration limits can constitute separate violations").

time. *Id.* The amount of stipulated penalties that Keystone has paid is 0.016% of its potential maximum liability. Plaintiffs' experts calculate that Keystone obtained an economic benefit of approximately $818,000 by delaying its compliance with the nitrogen limits for over eight years. *Id.* ¶¶ 24-25.

ARGUMENT

I. PADEP'S 2012 AND 2017 ADMINISTRATIVE CONSENT ORDERS DO NOT SATISFY SECTION 1319(g)(6)(A)'S REQUIREMENTS FOR PRECLUSION

Subparagraph (ii) of § 1319(g)(6) precludes a citizen penalty action when a State "has commenced and is diligently prosecuting an action under a State law comparable to this subsection," while subparagraph (iii) precludes such an action when a State "has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under this subsection, or such comparable State law." 33 U.S.C. §§ 1319(g)(6)(A)(ii), (iii). Thus, subparagraph (ii) applies to ongoing prosecutions, while subparagraph (iii) applies to completed prosecutions. Each subparagraph has specific requirements. "Congress has not provided that citizen suits are barred whenever an administrative action is underway or simply because there may be some duplication with a government proceeding." *Ark. Wildlife Fed'n v. Bekaert Corp.*, 791 F. Supp. 769, 775 (W.D. Ark. 1992).

The 2012 COA was superseded and replaced by the 2017 COA. ECF #36-3

at 1. Effectively, however, the 2017 COA was a continuation of the 2012 COA, because it involved the same permit, the same noncompliance issue (total nitrogen), the same WWTP upgrade to address that issue, and the same types of remedies—a construction timetable and stipulated penalties. The only changes in 2017 were delayed dates in the timetable and increases in the amount of stipulated penalties. The 2019 amendment to the 2017 delayed those dates again. Thus, the two COAs and the 2019 amendment should be viewed as one continuing prosecution.

Plaintiffs contend that the three COAs do not meet the requirements for preclusion under either subparagraphs (ii) or (iii) because: (1) both subparagraphs require comparability, and the penalty provisions in the Pennsylvania statute under which the COAs were prosecuted are not comparable to the federal penalty provisions in § 1319(g); (2) the COAs do not satisfy the "commencement" and "diligent prosecution" requirements under subparagraph (ii); and (3) the COAs do not meet the "assessed penalty" requirement under subparagraph (iii).

A. The COAs Do Not Meet the Comparability Requirement Under § 1319(g)(6)(A)(ii) or (iii)

Section § 1319(g)(6)(A) provides that "any violation … with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection … shall not be the subject of a civil penalty action under … section 505 of this Act." 33 U.S.C. § 1319(g)(6)(A). The plain meaning of this language is that citizen suits are barred only if the state administrative action has

been brought under a state law which is comparable to "this subsection." The words "this subsection" refer to subsection 1319(g).

Section 1319(g) establishes procedures for EPA's administrative penalty actions. Two of those procedures are pertinent here. First, EPA must consider several factors in assessing penalties, including the "economic benefit or savings (if any) resulting from the violation." 33 U.S.C. § 1319(g)(3). Second, EPA must provide public notice and opportunity for comment on proposed EPA penalty orders before those orders are issued in final form:

> Before issuing an order assessing a civil penalty under this subsection the Administrator or Secretary, as the case may be, shall provide public notice of and reasonable opportunity to comment on the proposed issuance of such order.

Id. § 1319(g)(4) (emphasis added). The Senate Report explained what this means:

> There are several safeguards in this provision to prevent abuse of the administrative penalty authority, such as significant violators escaping with nominal penalties. The Administrator is required to provide the public with notice of the proposed penalty assessment and a reasonable opportunity to comment on the proposal. Public notice of such proceedings must be given in a manner that will apprise interested citizens of the proceeding.

S. Rep. No. 50, 99th Cong., 1st Sess. 27 (1985) (emphasis added) (CWA Legis. History Excerpts, Pl. Ex. A). Thus, public notice and opportunity for comment must precede issuance of an EPA administrative penalty order.

The preclusion language in § 1319(g)(6) was taken from the Senate bill. H. Rep. No. 1004, 99th Cong., 2d Sess. 139 (1986) (Pl. Ex. A) ("From the Senate bill

… included in the conference substitute … is the language on preclusion of citizen suits"). Senator Chafee, who was the chairman of the Senate conferees for the conference with the House, stated that:

> in order to be comparable, a State law must provide for a right to a hearing and for public notice and participation procedures similar to those set forth in section 309(g); it must include analogous penalty assessment factors and judicial review standards; and it must include provisions that are analogous to the other elements of section 309(g).

133 Cong. Rec. 1264 (1987) (emphasis added) (Pl. Ex. A).

Consistent with this direction from Congress, EPA and the federal courts have interpreted the comparability requirement to mean that a state law's provisions for penalty assessment, public participation, and judicial review must all be comparable to the corresponding class of federal provisions governing EPA's administrative enforcement actions under § 1319(g). EPA, Guidance on State Actions Preempting Civil Penalty Actions Under the Federal Clean Water Act, at 4 (1987) (ECF #20-1); *Paper, Allied-Indus., Chem. and Energy Workers Int'l Union v. Cont'l Carbon Co. ("PACE")*, 428 F.3d 1285, 1294 (10th Cir. 2005).[3]

[3] The Circuits are split on the proper standard for comparability under § 1319(g)(6). The Ninth, Tenth, and Eleventh Circuits apply a "rough comparability" standard. *PACE*, 428 F.3d at 1294*; McAbee v. City of Fort Payne*, 318 F.3d 1248, 1256 (11th Cir. 2003); *Citizens for a Better Env't-Calif. v. Union Oil Co.*, 83 F.3d 1111, 1118 (9th Cir. 1996). The First, Fifth, Sixth, and Eighth Circuits apply a more lenient "overall comparability" standard, which originated with *N. & S. Rivers Watershed Ass'n v. Town of Scituate*, 949 F.2d 552, 556 (1st Cir. 1991). *See Ark. Wildlife Fed'n v. ICI Americas*, 29 F.3d 376, 381 (8th Cir. 1994); *Lockett v. Envtl. Prot. Agency*, 319 F.3d 678, 683-84 (5th Cir. 2003); *Jones v. City of Lakeland*, 224

PaDEP cited the Pennsylvania Clean Streams Law ("CSL"), 35 P.S. § 691.1 *et seq.*, as its authority to issue the two penalty orders. ECF #36-2 at 2-3; ECF #36-3 at 2, 4.[4] Three Pennsylvania federal district courts, including this Court, have held that the CSL is not comparable to § 1319(g). In *Mount Pocono* (ECF #20-2), this Court stated that "for a state law to be considered 'comparable' within the meaning of § 1319(g)(6)(A), the state law must include provisions as to public notice and participation, penalty assessment, judicial review, and other matters comparable to those in § 1319(g)." *Id*. at 6 (quoting *Atlantic States Legal Foundation v. Universal Tool & Stamping Co.*, 735 F. Supp. 1404, 1415 (N.D. Ind. 1990). This Court then stated that:

> the Pennsylvania Clean Streams Law[] includes no provisions as to public notice and participation. It makes no provision that members of the public be given a reasonable opportunity to comment upon the penalty assessment, nor does it allow citizens to obtain judicial review of administrative orders. Thus, we must conclude

F.3d 518, 523 (6th Cir. 2000) (*en banc*). The Third Circuit has not yet decided this issue. *But see PennEnvironment v. RRI Energy Ne. Mgmt. Co.*, 744 F. Supp. 2d 466, 476 (W.D. Pa. 2010) (rejecting *Scituate); Pennsylvania Env'tl Defense Found. v. Mount Pocono Mun. Auth.*, Civil No. 90-1208, Mem. Op. at 6-7 (M.D. Pa., May 14, 1991) (ECF #20-2) (using the same analysis as that in the rough comparability standard). EPA has repudiated *Scituate* in both an amicus brief and agency guidance. EPA Supplemental Guidance on Section 309(g)(6)(A) of the Clean Water Act (Mar. 5, 1993) (ECF #20-3); Amicus Brief of the United States, filed in *Union Oil*, No. 95-15139 (9th Cir. Apr. 26, 1995), 1995 WL 17069780 at *20-*22. For the reasons stated in *PACE*, 428 F.3d at 1294, and EPA's Supplemental Guidance, Plaintiffs submit that the rough comparability standard is the correct one to apply.

[4] The other statute cited by PaDEP, 71 P.S. § 510-17, authorizes it to abate nuisances but does not authorize penalty assessments.

> that the Pennsylvania Clean Streams Law is not "comparable" to §1319(g) and §1319(g)(6)(A)(ii) is not a bar to the instant action.

Id. at 7. Similarly, in *Tobyhanna Conservation Ass'n v. Country Place Waste Treatment Co.*, 734 F. Supp. 667, 669-70 (M.D. Pa. 1989), this Court refused to dismiss a citizen suit under § 1319(g), holding that the CSL was not a comparable state law because "no hearing was held subject to the terms of § 1319(g)(3)" and "no public notice was provided to interested persons." *Id*. at 770.

The U.S. District Court for the Eastern District of Pennsylvania reached the same conclusion in *L.E.A.D. v. Exide Corp.*, Civil No. 96-3030, 1999 WL 124473 (E.D. Pa. 1999) (ECF #19-1). There, the court declined to dismiss a CWA citizen suit under § 1319(g) because:

> Nowhere in the civil penalty scheme of the CSL, *see* 35 P.S. § 691.605, does the public have a meaningful opportunity to participate in the civil penalty phase of the administrative enforcement process. We find, therefore, that since Plaintiffs lacked any meaningful opportunity to participate in the assessment of civil penalties against the Defendants, the CSL is not 'a State law comparable' to the CWA.

Id. at *31. Those decisions demonstrate that the CSL is not comparable to the CWA.

Moreover, the procedures that PaDEP actually followed in issuing the 2012 and 2017 COAs were not comparable to those in § 1319(g). Keystone admits that they were issued without any public notice or opportunity to comment. The penalty factors in the CSL are narrower than those under federal law, because the CSL does

not require consideration of the violator's economic benefit. *Compare* 35 P.S. § 691.605(a), *with* 33 U.S.C. § 1319(g)(3).[5] The absence of a penalty factor demonstrates a lack of comparability. *Citizens for a Better Env't-Calif. v. Union Oil Co.*, 861 F. Supp. 889, 908-09 (N.D. Cal. 1994), *aff'd*, 83 F.3d 1111 (9th Cir. 1996). PaDEP has never calculated or considered Keystone's economic benefit from its delayed compliance. In fact, Keystone's actual economic benefit far exceeds the stipulated penalties that it has paid to date.

Keystone's argument on comparability is limited to the single contention that the CSL allowed Plaintiffs to seek judicial review of the COAs by appealing them to the Environmental Hearing Board. ECF #37 at 18-19. That right to judicial review does not cure the CSL's deficiencies with public participation and penalty assessment. The Tenth and Eleventh Circuits have required comparability for all three categories of provisions in § 1319(g): penalty assessment, public participation, and judicial review. "[F]or state law to be 'comparable,' each class of state-law provisions must be roughly comparable to the corresponding class of federal provisions." *McAbee*, 318 F.3d at 1256. "Each category of federal provisions must have a 'roughly comparable' provision under state law in order for the bar against

[5] Recovering a violator's economic benefit is a key purpose of civil penalties. "A penalty serves as a successful deterrent only if potential violators believe that they will be worse off by not complying with the applicable requirements." *Friends of the Earth v. Laidlaw Envtl. Servs.*, 890 F. Supp. 470, 491 (D.S.C. 1995).

citizen suits to apply." *PACE*, 428 F.3d at 1294; *see also Mount Pocono*, ECF #20-2 at 6. At most, the CSL might be comparable as to one category—judicial review. Keystone's argument is also directly inconsistent with Senator Chafee's interpretation of § 1319(g) at the time that section was enacted. Thus, the two COAs fail the comparability standard in § 1319(g).

B. The COAs Do Not Meet the Commencement Requirement Under § 1319(g)(6)(A)(ii)

The lack of comparability also means that PaDEP never "commenced" an administrative penalty proceeding under § 1319(g)(6)(A)(ii). "[A]n administrative action 'commences' at the point when notice and public participation protections become available to the public and interested parties." *Friends of Milwaukee's Rivers v. Milwaukee Metropolitan Sewerage District*, 382 F.3d 743, 756 (7th Cir. 2004). When those protections are absent, a qualified administrative penalty action does not commence and a citizen suit is not barred. *Id*. at 757. Similarly, in this case, PaDEP never commenced a qualified administrative penalty action because it failed to provide any notice or public participation.

C. The COAs Do Not Meet the Diligent Prosecution Requirement Under § 1319(g)(6)(A)(ii)

The COAs also were not "diligently prosecuted" under § 1319(g)(6)(A)(ii). "[A] diligent prosecution analysis requires more than mere acceptance at face value of the potentially self-serving statements of a [government] agency and the violator."

Milwaukee, 382 F.3d at 760. The lack of diligence is shown here in four ways.

First, PaDEP's prosecution was not diligent because PaDEP colluded with Keystone to evade a mandatory compliance deadline. An agency's "actions with respect to defendant have not been diligent . . . [w]here the embodiment of the [agency's] efforts—the administrative consent order—is itself invalid in its attempt to extend impermissibly the [CWA]'s compliance deadlines." *Student PIRG of N.J. v. Fritzsche, Dodge & Olcott, Inc.*, 579 F. Supp. 1528, 1536-37 (D.N.J. 1984), *aff'd*, 759 F.2d 1131 (3d Cir. 1985).

EPA regulations provide that "[a]ny schedules of compliance under this section shall require compliance as soon as possible, but not later than the applicable statutory deadline under the CWA." 40 C.F.R. § 122.47(a)(1). The statutory deadline for compliance with the nitrogen ELG was the date of permit reissuance—March 30, 2012. 69 Fed. Reg. at 54477.[6] It was illegal for PaDEP to purport to extend that deadline by allowing a compliance schedule. EPA, NPDES Permit Writers' Manual (2010) at 10 ("all applicable technology-based requirements (i.e., effluent guidelines and case-by-case limitations based on BPJ) must be applied in NPDES permits

[6] Once national limitations are established, state permit programs are required to apply them in order to achieve the statutory goal of uniform effluent limitations for "similar point sources with similar characteristics." *Nat'l Res. Def. Council v. U.S. E.P.A.*, 437 F. Supp. 2d 1137, 1160 (C.D. Cal. 2006), *aff'd*, 542 F.3d 1235 (9th Cir. 2008).

without the benefit of a compliance schedule").[7] *Id. See also Save Our Bays & Beaches v. City & Cty. of Honolulu*, 904 F. Supp. 1098, 1123 (D. Haw. 1994) (administrative orders cannot be used to extend CWA compliance deadlines).

PaDEP and Keystone colluded to evade the April 1, 2012 deadline for compliance with the ELG nitrogen limits. PaDEP issued the COA "as a means of protection for" Keystone and to "limit KPC's liability" until the upgrade was constructed. Facts ¶ 8. Keystone described the COA as "the ultimate environmental shield and protection" from EPA enforcement. *Id.* ¶ 9. Thus, PaDEP did not enforce the CWA, but instead tried to immunize Keystone from enforcement actions. A citizen-plaintiff can demonstrate a lack of diligence by showing that the agency and the violator engaged in collusive conduct. *Group Against Smog & Pollution v. Shenango Inc.*, CIV.A. 14-595, 2015 WL 1405447, at *3 (W.D. Pa. Mar. 26, 2015), *aff'd on other grds*, 810 F.3d 116 (3d Cir. 2016).

Second, PaDEP's prosecution was not diligent because it has allowed Keystone's violations to continue. A non-diligent prosecution may be shown "[i]f a citizen-suit plaintiff demonstrates that there is a realistic prospect that the violations alleged in its complaint will continue notwithstanding the government-backed consent decree." *Envtl. Conservation Org. v. City of Dallas*, 529 F.3d 519, 528–29 (5th Cir. 2008). Here the nitrogen violations have continued unabated for eight years

[7] Available at https://www.epa.gov/npdes/npdes-permit-writers-manual.

after the first COA. *Sierra Club v. SCM Corp.*, 572 F. Supp. 828, 831 n. 3 (W.D.N.Y. 1983) (the government may "fail the test of diligent prosecution if it fails to adequately monitor or enforce the consent order or if it permits new and independent pollution law violations to occur"); *Lakeland*, 224 F.3d at 522-23 (no diligent prosecution where state agency agreed to allow violations to continue).

Third, PaDEP's prosecution was not diligent because it set stipulated penalties at a nominal level that has not deterred those violations. The $18,950 in stipulated penalties that Keystone has paid under the COAs for its 2,248 days of ELG nitrogen concentration violations work out to $8.43 per day and are a tiny fraction of Keystone's maximum penalty liability of over $116 million. *Ohio Valley Envtl. Coal., Inc. v. Hobet Min., LLC*, 723 F. Supp. 2d 886, 908 (S.D.W. Va. 2010) ("A lenient penalty that is far less than the maximum penalty may provide evidence of non-diligent prosecution" (*quoting Laidlaw*, 890 F. Supp. at 491)); *Lakeland*, 224 F.3d at 522–23 (holding that imposition of "nominal token penalties in lieu of punitive compliance incentive penalties of $10,000.00 per day authorized by the Clean Water Act . . . contradicted a level of 'diligent prosecution'").

Fourth, PaDEP's prosecution was not diligent because it failed to recover, or even determine, Keystone's economic benefit. *Laidlaw*, 890 F. Supp. at 497 ("the failure of the state enforcement agency to recover, or even to determine, a violator's economic benefit is strong evidence that the agency's prosecution of that violator

was not diligent"); *Hobet*, 723 F. Supp. 2d at 908 (finding no diligent prosecution in part because the consent decree's penalties "appear inadequate to remove the economic benefit of non-compliance"); *Ohio Valley Envtl. Coal., Inc. v. Bluestone Coal Corp.*, CV 1:19-00576, 2020 WL 2949782, at *8 (S.D.W. Va. June 3, 2020) (finding no diligent prosecution because the state failed to consider the violator's economic benefit despite its payment of $280,000 in stipulated penalties). Keystone's economic benefit of over $800,000 dwarfs its penalty payments of $18,950. In sum, PaDEP COAs were not diligently prosecuted because PaDEP colluded with Keystone to help it evade a mandatory compliance deadline, failed to abate or even reduce Keystone's eight years of violations, imposed token penalties, and failed to recover Keystone's economic benefit from its lengthy noncompliance.

D. The COAs Do Not Meet the Penalty Assessment Requirement Under § 1319(g)(6)(A)(iii)

"[A] state administrative action must seek and assess administrative penalties to trigger the § 1319(g)(6)(A) bar." *California Sportfishing Prot. All. v. Chico Scrap Metal*, 728 F.3d 868, 877 (9th Cir. 2013). In the two COAs, however, PaDEP assessed no penalties for past violations. Instead, it only imposed stipulated penalties for potential future violations, and Keystone has only paid penalties on the monthly average violation and the highest daily maximum violation in each month. Keystone has not paid any penalties at all on 191 other daily maximum violations that were less than the highest violation in each month. It is axiomatic that an unpenalized

violation has not been prosecuted at all, much less diligently prosecuted. *Citizens Legal Envtl. Action Network, Inc. v. Premium Standard Farms*, Civ. No. 97-6073-CV-SJ-6, 2000 WL 220464, at *13 (W.D. Mo. Feb. 23, 2000) (ECF #20-10) (Consent Judgment's release of unspecified claims "itself evidences no prosecution at all, much less a diligent one").

Administrative orders have no preclusive effect under § 1319(g)(6) if they merely "notify Defendants that they 'may be liable for penalties' in the future if they fail to comply with the terms of those orders." *Chico*, 728 F.3d at 877. A stipulated penalty does not commence an administrative proceeding nor is it an "assessed" penalty under § 1319(g)(6)(A)(iii). A stipulated penalty is negotiated and agreed upon in advance of a violation's occurrence. It is not a penalty determined and assessed after the violation occurs. Thus, "stipulated penalties . . . of a negotiated order[] are clearly not the type of penalties contemplated under section 1319(g)(6)." *PennEnvironment*, 744 F. Supp. 2d at 473.[8]

Congress intended § 1319(g) penalty proceedings to be used to assess penalties only for "less complex cases" involving "past, rather than continuing,

[8] The court repeated that statement in *PennEnvironment v. Genon Ne. Mgmt. Co.*, CIV. A. 07-475, 2011 WL 1085885, at *3 n. 2 (W.D. Pa. Mar. 21, 2011) (ECF #20-11). In May 2014, after receiving Plaintiffs' first notice letter, Keystone's counsel sent an email to PaDEP in which he cited that statement as a reason why stipulated penalties are not preclusive. ECF #20-12. That statement demonstrates the weakness of Keystone's argument.

violations of the Act," where violations would be "likely uncontested by the violator" and "easily corrected." S. Rep. No. 50 at 26-27; *see PennEnvironment*, 744 F. Supp. 2d at 473 n. 4 ("section 1319(g) generally speak[s] to violations that have already occurred"). "Continuing violations are more appropriately addressed by abatement orders or injunctive relief actions," and "if EPA seeks both civil penalties and injunctive relief, one judicial action should be filed." S. Rep. No. 50 at 26. Consequently, the two COAs do not meet the "assessed penalty" requirement.

II. EVEN IF THE ORDERS DID HAVE PRECLUSIVE EFFECT UNDER § 1319(g)(6)(A), THEY DO NOT PRECLUDE PLAINTIFFS' CLAIMS FOR DECLARATORY AND INJUNCTIVE RELIEF

Even if Plaintiffs' claims for civil penalties were barred by § 1319(g)(6)(A), their claims for declaratory and injunctive relief are not. The plain language of § 1319(g)(6)(A) only refers to preclusion of "a civil penalty action under . . . section 1365." This language is unambiguous and refers only to claims for civil penalties. Most courts have agreed with this conclusion.[9] Even if the statutory language were

[9] *PACE*, 428 F.3d at 1298; *California Sportfishing Prot. All. v. City of West Sacramento*, 905 F. Supp. 792, 806-07 (E.D. Cal. 1995); *North Carolina Shellfish Growers Ass'n v. Holly Ridge Associates*, 200 F. Supp. 2d 551, 557 (E.D.N.C. 2001); *Coalition for a Liveable West Side v. NYC Dept. of Environmental Protection*, 830 F. Supp. 194, 196-97 (S.D.N.Y. 1993); *Orange Env't v. Cty. of Orange*, 860 F. Supp. 1003, 1018 (S.D.N.Y. 1994); *New York Coastal Fishermen's Ass'n v. New York City Dept. of Sanitation*, 772 F. Supp. 162, 169 (S.D.N.Y. 1991). The contrary decisions are wrong because they elevate policy considerations over the plain statutory language. *Scituate*, 949 F.2d at 557-58; *ICI*, 29 F.3d at 382-83; *see PACE*, 428 F.3d at 1299-1300 (rejecting *Scituate* and *ICI*).

ambiguous, the legislative history expressly states that § 1319(g)(6)'s "limitation would not apply to: 1) an action seeking relief other than civil penalties (e.g., an injunction or declaratory judgment)." H. Rep. No. 1004 at 133.

III. ALTERNATIVELY, IF THE COURT DOES NOT DENY DEFENDANT'S MOTION ON LEGAL GROUNDS, IT SHOULD DENY IT BECAUSE THERE IS A GENUINE DISPUTE OF MATERIAL FACT AS TO WHETHER PaDEP HAS DILIGENTLY PROSECUTED THE COAs

Diligent prosecution is a question of fact and is material to determining whether Plaintiffs' suit is precluded. *Hudson Riverkeeper Fund v. Harbor at Hastings*, 917 F. Supp. 251, 256 (S.D.N.Y. 1996). Plaintiffs have submitted evidence that PaDEP colluded with Keystone to evade a mandatory compliance deadline, allowed violations to continue unabated for eight years, and imposed token penalties that are far less than Keystone's economic benefit. That evidence is sufficient to raise a genuine dispute of material fact as to diligent prosecution.

CONCLUSION

For these reasons, Keystone's motion for summary judgment should be denied.

Respectfully submitted,

/s/James M. Hecker (special admission)
Public Justice
1620 L Street, N.W. Suite 630
Washington, DC 20036
(202) 797-8600 ext. 225
jhecker@publicjustice.net

Stephen G. Harvey
Steve Harvey Law LLC
1880 John F. Kennedy Blvd.
Suite 1715
Philadelphia, PA 19103
(215) 438-6600
steve@steveharveylaw.com

Attorneys for Plaintiffs

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.8(b)(2)

I certify under Federal Rule of Civil Procedure 11 that the foregoing brief complies with the word count limitation in Local Rule 7.8(b)(2) as it contains 4,943 words (excluding the caption, tables of contents and authorities, and signature block), as determined by the word court feature of the word processing system used to prepare the brief.

/s/ James M. Hecker
James M. Hecker

CERTIFICATE OF SERVICE

I certify that on June 19, 2020, I served a copy of the foregoing brief via the Court's ECF system on the following:

Paul M. Schmidt
Aaron S. Mapes
Post & Schell, P.C.
17 North Second Street, 12th Floor
Harrisburg, PA 17101

Erin R. Kawa
Post & Schell, P.C.
17 North Second Street, 12th Floor
Harrisburg, PA 17101

/s/ James M. Hecker
James M. Hecker