

**UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

LOWER SUSQUEHANNA)
RIVERKEEPER, et al.,)
)
Plaintiffs,)
)
v.)
KEYSTONE PROTEIN)
COMPANY,)
)
Defendant.)

CASE NO. 1:19-cv-01307
JUDGE JENNIFER P. WILSON

**PLAINTIFFS' REPLY IN SUPPORT OF THEIR
MOTION FOR PARTIAL SUMMARY JUDGMENT**

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In its response to Plaintiffs' motion for partial summary judgment and statement of facts, Defendant Keystone Protein Company ("Keystone") agrees that Plaintiffs have standing to sue and that it is liable under the Clean Water Act ("CWA") for hundreds of violations of its permit limitations for total nitrogen. ECF #43 at 1-2; ECF #44 at 1-2. Keystone raises only two issues: (1) whether its 2012 and 2017 Consent Administrative Orders with the Pennsylvania Department of Environmental Protection ("PaDEP") preclude Plaintiffs' suit; and (2) how many days it has violated the monthly average limit in its permit.

Plaintiffs have addressed the first issue in their opposition to Keystone's motion for summary judgment, and will not repeat their arguments here. ECF #41. Plaintiffs note only that the proper sequence in deciding the issues raised in the summary judgment motions is standing first, preclusion second, and liability third. Standing and preclusion are jurisdictional issues that must be decided before addressing the merits of Keystone's liability. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95-101 (1998) (standing and jurisdiction are threshold issues that must be decided first before reaching the merits). Plaintiffs address in Part II below the second issue concerning the number of days of violation. Before addressing that argument, however, we discuss in Part I two irrelevant factual issues that Keystone raises as defenses to liability: its purported good faith and the supposedly limited environmental impact of its discharges. ECF #43 at 5-9; ECF #44, ¶¶ 6-13.

ARGUMENT

I. UNDER THE CWA, GOOD FAITH AND ENVIRONMENT HARM ARE IRRELEVANT AT THE LIABILITY STAGE AND CAN ONLY BE CONSIDERED LATER AT THE PENALTY STAGE

“The courts have held that NPDES enforcement actions are based on strict liability and that defendant’s intent and good faith are irrelevant to the issues of statutory violations and the defendant’s liability.” *Student Pub. Interest Research Grp. of New Jersey, Inc. v. P.D. Oil & Chem. Storage, Inc.*, 627 F. Supp. 1074, 1090 (D.N.J. 1986), *aff’d in relevant part sub. nom Pub. Interest Research Grp. of New Jersey, Inc. v. Powell Duffryn Terminals Inc.*, 913 F.2d 64 (3d Cir. 1990). “If a defendant had made good faith efforts to comply, this may only be considered in assessing the amount of the penalty for which it is liable and in determining what other relief is appropriate.” *Id.*; *see* 33 U.S.C. § 1319(d) (listing “good faith efforts to comply” as a factor to be considered in assessing civil penalties).

The issue of environmental harm is also irrelevant at the liability stage. *Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs. (TOC), Inc.*, 528 U.S. 167, 181, (2000) (CWA plaintiffs need not show injury to the environment to succeed on the merits); *United States v. Hubenka*, 438 F.3d 1026, 1035 (10th Cir. 2006) (“There is no need to prove a defendant’s discharge of pollutants into a tributary caused any deleterious effect on the navigable waters downstream”); *State of Georgia v. City of East Ridge, Tenn.*, 949 F. Supp. 1571, 1579 n.7 (N.D. Ga. 1996) (same); *Arkansas*

Wildlife Federation v. Bekaert Corp., 791 F. Supp. 769, 780 (W.D. Ark. 1992) (“The fact that defendant asserts the discharge has not had an adverse affect [sic] on the environment does not matter”); *United States v. CPS Chem. Co., Inc.*, 779 F. Supp. 437, 450 (E.D. Ark. 1991) (“Liability under the Clean Water Act is not determined by whether the discharge has an adverse effect on the environment”); *Student Pub. Interest Research Grp. of New Jersey, Inc. v. Georgia Pacific Corp.*, 615 F. Supp. 1419, 1424 (D.N.J. 1985) (“The Clean Water Act presumes unlawful discharges to reduce water quality because definite proof of the proposition is often nearly impossible”). Again, environmental harm can be considered at the penalty stage under the statutory factor for the seriousness of the violations. *Powell Duffryn*, 913 F.2d at 79; 33 U.S.C. § 1319(d) (listing “seriousness of the violation or violations” as a factor to be considered in assessing civil penalties).

II. KEYSTONE’S NUMBER OF DAYS OF VIOLATION IS AT LEAST 257 DAYS AND ITS MAXIMUM STATUTORY PENALTY IS AT LEAST \$13 MILLION.

Relying on *United States v. Allegheny Ludlum Corp.*, 366 F.3d 164 (3d Cir. 2004), Keystone argues that the number of days of violation and the five penalty factors in 33 U.S.C. § 1319(d) should be considered together and deferred to the penalty stage of the case. ECF #43 at 6-7. We agree that that is the appropriate course for Keystone’s monthly average violations, but the Court should still set the maximum penalty for Keystone’s daily maximum violations.

In *Allegheny*, the Third Circuit did not question the proposition that each violation of a daily maximum limit should be counted as one day of violation in setting the maximum statutory penalty. Instead, its focus was solely on how many days of violations should be assigned to violations of monthly average limits. The Third Circuit noted that the Fourth Circuit held in *Gwaltney* that a violation of a monthly average parameter constitutes a violation for each day of the month, and “adopt[ed] *Gwaltney* insofar as it establishes an absolute upper bound on the penalty that can be assessed for a monthly average violation.” 366 F.3d at 169. The Third Circuit then modified the *Gwaltney* approach as follows:

We hold that district courts have discretion to determine, on the facts of each case, how many violation days should be assessed for penalty purposes for the violation of a monthly average limit, based on whether violations are already sufficiently sanctioned as violations of a daily maximum limit.

Id.

There are no disputed fact issues about the number of days that Keystone has violated its daily maximum limit. Keystone has stipulated that it violated its daily maximum limits for nitrogen on 257 days. ECF #31 at 3, ¶ 13. Keystone is therefore indisputably liable for 257 days of violation of its maximum limit. Keystone is 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). Fifty-four of Keystone’s daily maximum violations occurred before November 1, 2015 and 203 violations occurred

thereafter. ECF #31-6 at 3-9. Keystone's maximum civil penalty for those violations is therefore \$13,156,099. Consequently, even without considering Keystone's violations of its monthly average limits, its maximum civil penalty is at least that amount, and the Court should make that finding in its order.

The Court should leave for future consideration at the penalty stage the issue of whether Keystone's violations of the monthly average limit should count as a violation each day of the month, "taking into account the factors enumerated in 33 U.S.C. § 1319(d)," in accordance with *Allegheny*. 366 F.3d at 189. For that reason, the Court need not address Keystone's remaining arguments to decide the motion before it.

Specifically, the Court need not address Keystone's argument that it should not be assessed a penalty for each day of the month for its violations of the monthly average limit because (1) it cooperated with PaDEP and complied with its consent agreements in good faith, (2) the monthly average limit is based on available technology rather than water quality, (3) its daily maximum and monthly average violations were both caused by inadequate treatment equipment, (4) its violations of the total nitrogen limits did not cause significant harm to the receiving waters, and (5) those discharges account for only 0.03% of the total nitrogen discharged into the Chesapeake Bay. ECF #43 at 8-9.

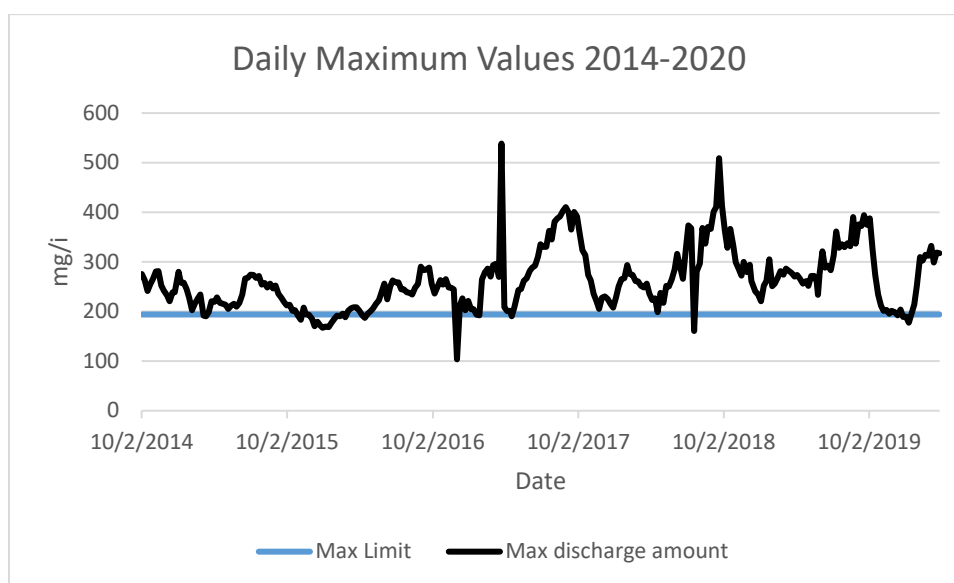
Although the Court need not address these issues now, but instead should

reserve decision until the penalty assessment phase, here is Plaintiffs' partial response to Keystone's arguments. This response is not a substitute for the complete argument that Plaintiffs will make at the penalty phase on all of the statutory factors, including lack of good faith and environmental harm, and Plaintiffs respectfully request the opportunity to supplement this argument as needed at the penalty phase.

As a legal matter, Plaintiffs agree that good faith and environmental harm are proper factors for the Court to consider in assessing a civil penalty. *Powell Duffryn*, 913 F.2d at 79-81. As a factual matter, however, Plaintiffs dispute Keystone's assertions. Keystone did not act in good faith. Good faith is measured by Keystone's "efforts to comply with the applicable requirements." 33 U.S.C. § 1319(d). Those requirements are its permit limits, not PaDEP's COAs that illegally attempted to extend its statutory compliance deadline. *See* ECF #41 at 13-14. Measured by the proper standard, Keystone did not act in good faith, but instead allowed its illegal discharges to continue unabated for eight years. Keystone's violations have also caused significant environmental harm because they have added nitrogen to downstream waters that are listed by EPA as impaired by that same pollutant. *See* ECF #34 at 3.

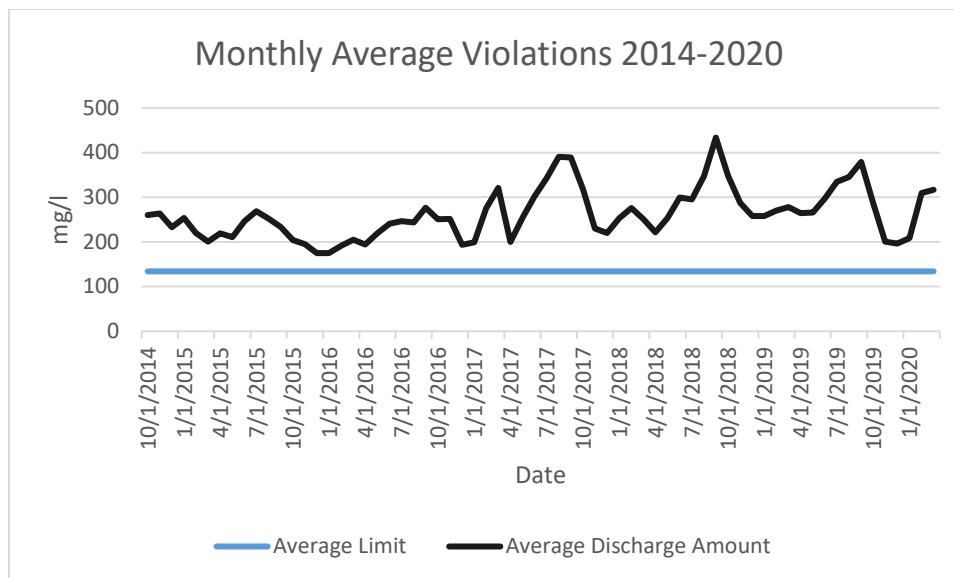
Furthermore, Plaintiffs believe that the continuity and persistence of Keystone's average violations support an actual penalty that is a large fraction of its maximum statutory penalty of at least \$13 million. Keystone's supplemental DMRs

contain the total universe of its sampling data for total nitrogen. ECF #32-5. Keystone sampled one day a week for 285 weeks between October 2014 and March 2020. Pl. Ex. A (full list of 285 measurements of total nitrogen based on those DMRs). Keystone violated its daily maximum for total nitrogen in 257 of those weeks, or 90% of the 285 sampling days. *Id.* The following chart summarizes Keystone’s history of maximum measurements:



Although Keystone violated its daily maximum limit on 90% of the days it sampled, it only sampled once every seven days. As a result, its 257 days of maximum violations represent only 13% of the 1,991 total days that Keystone operated from October 2014 through March 2020. ECF #33 ¶ 3; ECF #44 ¶ 3.

The following chart shows that Keystone violated its monthly average by large amounts and continuously for 66 consecutive months—effectively on all of the 1,991 days that it operated during those months:



Keystone also admits that it has been in continuous noncompliance with its total nitrogen limits since April 1, 2012—more than eight years. ECF #33 ¶ 1; ECF #44 ¶ 1.

The penalty concerns that the Third Circuit identified in *Allegheny* are consistent with imposing a large penalty based on the relationship between its average and maximum violations. The court of appeals stated that:

permit limits can be exceeded in many different ways, both by very large, isolated discharges and by moderate continuous discharges. Furthermore, daily and monthly average limits are designed to avoid distinct environmental harms. As a result, in some cases a violator's wrongful conduct will merit punishment for both daily and monthly violations, while in others, the conduct will have been sufficiently punished by penalties for daily violations alone.

366 F.3d at 169.¹ Keystone's continuous wrongful conduct merits serious

¹ EPA described its general method for setting technology-based average and maximum limits for industrial plants in *Nat'l Wildlife Fed'n v. EPA*, 286 F.3d 554, 572 (D.C. Cir. 2002), and used that same method to set the maximum and average

punishment. Its maximum violations are worse than “large and isolated,” and its average violations are worse than “moderate.” Its maximum violations are large and occurred in 90% of its 285 samples. Its average violations are large and occurred in 100% of 66 months. Keystone has exceeded its maximum limit by an average of 35% and its average limit by an average of 95%. Pl. Ex. A.

Later in its opinion, the court of appeals stated that:

A discharger who exceeds the monthly average maximum by a great amount will probably also have committed a number of daily violations, and the penalties for those violations will mete out at least part of the total punishment that the permittee’s conduct for the month merits.

366 F.3d at 188. The 257 days that Keystone violated its daily maximum limit mete out only a small part of the total punishment that Keystone’s conduct merits for its continuous violations of its average limit for 1,991 days.

CONCLUSION

For these reasons, Plaintiffs’ motion for partial summary judgment on jurisdiction and liability issues should be granted, and the Court should find that Keystone is subject to a maximum statutory penalty of at least \$13,156,099.

Respectfully submitted,

/s/James M. Hecker (special admission)

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limits for plants in Keystone’s industrial category. 67 Fed. Reg. 8582, 8631-32 (Feb. 25, 2002).

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