UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
TEXARKANA DIVISION

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| ARKANSAS WILDLIFE FEDERATION, | ) | |
| Plaintiff, | ) | |
| v. | ) | Civil Action No. 92-4098 |
| HUDSON FOODS, INC., | ) | |
| Defendant. | ) | |

PLAINTIFF'S BRIEF IN SUPPORT OF ITS MOTION
FOR PARTIAL SUMMARY JUDGMENT

## INTRODUCTION

Plaintiff Arkansas Wildlife Federation (the Federation) has brought this citizen suit against defendant Hudson Foods, Inc. (Hudson) under Section 505 of the Federal Water Pollution Control Act (hereafter "the Act"), 33 U.S.C. § 1365. Plaintiff seeks injunctive relief and the imposition of civil penalties for Hudson's violations of its National Pollution Discharge Elimination System (NPDES) permit number AR0021326, which was issued to Hudson pursuant to Section 402(a) of the Act, 33 U.S.C. § 1342(a). Based on Hudson's official reports and monitoring records, plaintiff has moved for partial summary judgment holding that (1) plaintiff has standing to bring this action; (2) this Court has subject matter jurisdiction over all of the alleged violations in this action; and (3) Hudson is liable for at least 4105 violations of the Act.

## FACTUAL BACKGROUND

The facts supporting this brief are set forth in detail in Plaintiff's Statement of Facts as to Which There is No Genuine Issue (hereafter "PSF"), and are summarized briefly here. Hudson operates a plant in Hope, Arkansas that processes about 200,000 chickens a day and generates 5-

6 gallons of wastewater per chicken. PSF 3. Since May 1, 1988, the Hope plant has frequently discharged polluted wastewater at levels in excess of its permit limits. PSF 5, 8, 16, 38. Hudson misreported the number and magnitude of its violations in its reports to government agencies. PSF 28-37, 40. Hudson failed to prepare and retain all of the monitoring records that its permit requires. PSF 41-43. And Hudson failed to monitor its discharges as frequently as its permit requires. PSF 44.

Hudson's violations are serious. Hudson exceeded its maxi-mum discharge limits by over 100% 404 times, and by over 500% 106 times. Pl. Ex. 5, Table 6. The waters downstream from Hudson's discharge, which were once clear enough to swim in, have become green, slimy and smelly. Pl. Ex. 21. In addition, while hundreds of discharge violations were reported, hundreds more went unreported, and the unreported values were often higher.

The Hudson plant manager who signed the reports admitted that even though Hudson was monitoring its discharges up to five times a week, he reported only two days' results, and then chose the two lowest values. PSF 27, 35: Sigman Dep. 10, 138.[1] While Hudson's permit only requires monitoring twice a week, it clearly provides that all increased monitoring "shall be included in the calculation and reporting of data submitted in the [discharge monitoring report (DMR)]." PSF 10; Pl. Ex. 3, p. 9. After this plant manager was told by Hudson's manager of environmental engineering in the spring of 1992 that this was wrong, Hudson continued to conceal the past unreported violations and continued daily monitoring, but moved its sampling

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[1] Knowing falsification of monitoring reports is a criminal offense under the Clean Water Act. 33 U.S.C. § 1319(c)(4). See United States v. Little Rock Sewer Committee, 460 F. Supp. 6 (E.D. Ark. 1978).

point on some days to a "field" site about 100 feet upstream from its designated monitoring point. PSF 18-25; Starkey Dep. 290; Sigman Dep. 167. Hudson reported some, but not all, of the "field" data as monitoring data on its DMRs. PSF 19.[2]

Hudson now claims in this litigation that "field" site data was unrepresentative of its discharge and did not have to be reported. PSF 19. To avoid a factual dispute over this issue for purposes of this motion, plaintiff has only used (1) data Hudson reported as monitoring data on its DMRs, (2) unreported data for days that Hudson itself selected and reported as monitoring site days on its DMRs, and (3) unreported data for days that Hudson has otherwise admitted were monitoring site days. PSF 19-21. As a matter of law, "DMRs may be used to establish the permittee's liability" on a motion for summary judgment. U.S. v. CPS Chemical Co., Inc., 779 F. Supp. 437, 442-443 (E.D. Ark. 1991). If Hudson should challenge any of this data, it will then be in violation of its permit requirement which requires accurate DMRs. Id. at 442; Pl. Ex. 3, p. 15.

While the facts and supporting documents in this case are voluminous, this is due to the enormous number and scope of Hudson's permit violations and does not suggest that there is any factual dispute as to Hudson's liability for those violations. Plaintiff's entire analysis is based on Hudson's own monitoring records and on the sworn testimony of its employees. All plaintiff has done is assemble the relevant admitted facts and compare them with Hudson's permit

[2] There may be an issue of fact as to whether data from other "field" site days had to be reported, but plaintiff has not used data from those days to calculate the violations listed in this motion. Plaintiff reserves the right to present this issue at trial to show additional reporting and discharge violations.

requirements.

## STATUTORY BACKGROUND

The Federal Water Pollution Control Act was enacted in 1972 "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). In order to achieve these goals, Section 301(a) of the Act makes unlawful the discharge of any pollutant into navigable waters except as authorized by specific sections of the Act. 33 U.S.C. § 1311(a).

One of these specific sections is Section 402, which establishes the National Pollutant Discharge Elimination System (NPDES). 33 U.S.C. § 1342. Pursuant to Section 402(a), EPA may issue NPDES permits authorizing the discharge of pollutants in accordance with specified conditions. 33 U.S.C. § 1342(a). Under the 1972 Act, the performance of an NPDES permittee is measured primarily by its compliance with the "effluent limitations" in its permit. 33 U.S.C. § 1362(14). An "effluent limitation" is "any restriction established by a State or the Administrator [of EPA] on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources * * *." 33 U.S.C. § 1362(11).[3]

Effluent limitations are based on technological as well as water quality considerations. In the 1972 Act, Congress required dischargers to achieve specified levels of treatment. Dischargers were required to use by 1977 the best practicable control technology currently available ("BPT"), 33 U.S.C. §§ 1311(b)(1)(A) and 1314(b)(1), and to use by l983-l987 the best

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[3] A "point source" is "any discernible, confined and discrete conveyance * * * from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

available technology economically achievable ("BAT"), 33 U.S.C. §§ 1311(b)(2) and 1314(b)(2).

Congress chose this system in 1972 because the prior water pollution control system "proved ineffective." EPA v. State Water Resources Control Board, 426 U.S. 198, 202 (1976). The goal of the pre-1972 system was "to achieve water quality standards rather than to require individual dischargers to minimize effluent discharge." Id. at 203. These standards were "very difficult to develop and enforce" because they "focused on the tolerable effects rather than the preventable causes of water pollution." Id. at 202.

Effluent limitations, unlike water quality standards, measure pollution at the point of discharge. As a result, they "facilitate enforcement by making it unnecessary to work backward from an over-polluted body of water to determine which point sources are responsible and must be abated." Id. at 204. The Senate Report on the 1972 Act described this change in pollution control methods (S. Rep. No. 414, 92d Cong., 1st Sess. 8 (1971), 1972 U.S. Code Cong. & Ad. News 3668, 3709):

> Unlike its predecessor program * * *, this legislation would clearly establish that no one has the right to pollute -- that pollution continues because of technological limits, not because of any inherent right to use the nation's waterways for the purpose of disposing of wastes.

Thus, the 1972 Act focused on the control of pollutant discharge, rather than only the resultant water quality.[4]

Unless a timely challenge is filed, the obligations of an NPDES permit are binding on the

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[4] The 1972 Act retained water quality standards as a supplemental basis for effluent limitations, so that dischargers "may be further regulated to prevent water quality from falling below acceptable levels." EPA v. State Water Resources Control Board, supra, 426 U.S. at 205, n. 12.

discharger. The terms of a permit issued by EPA "shall not be subject to judicial review in any civil or criminal proceeding for enforcement." 33 U.S.C. § 1369(b)(2).

The Act provides that each discharger holding a NPDES permit must monitor and report on its compliance with its permit. Each discharger must install, use, and maintain monitoring equipment and must sample its effluents. 33 U.S.C. § 1318(a)(4)(A). The discharger must report the results of its self-monitoring to EPA and to the state agency that issues the permit and must certify that its reports are true, accurate, and complete. 40 C.F.R. §§ 122.41(l)(4) and 122.22(d).

A discharger which is in compliance with the terms and conditions of its NPDES permit is deemed to be in compliance with Section 301 of the Act and therefore is allowed to discharge pollutants which would otherwise be unlawful. 33 U.S.C. § 1342(k). Conversely, noncompliance with a permit constitutes noncompliance with Section 301 and is a violation of the Act.

If the holder of a federal NPDES permit violates its permit, it is subject to enforcement action by EPA, including administrative, civil and criminal sanctions. 33 U.S.C. § 1319. If the holder of a state NPDES permit violates its permit, it is subject to both federal and state enforcement action. 33 U.S.C. §§ 1319, 1342(b)(7).

Private citizens may bring civil actions against any person alleged to be in violation of a federal or state NPDES permit. 33 U.S.C. § 1365(a)(1). There are two limitations on the right of citizens to bring suit. First, the citizen must give sixty days' notice of his intent to file suit to EPA, the state and the violator. 33 U.S.C. § 1365(b)(1)(A). Second, a citizen may not commence a suit if EPA or the state bring certain specified types of enforcement actions within

certain specified time periods. 33 U.S.C. §§ 1365(b)(1)(B) and 1319(g)(6). If the citizen prevails in a citizen suit, the court may order injunctive relief and/or impose civil penalties of up to $25,000 per day for each violation. 33 U.S.C. §§ 1365(a) and 1319(d). A citizen suit is pre-empted if the federal or state government commences a judicial enforcement action during the 60-day notice period or before the citizen action is filed. 33 U.S.C. § 1365(b)(1)(B). A citizen claim for civil penalties, but not a claim for injunctive relief, is pre-empted if EPA or a state commences an administrative civil penalty action before the citizen notice letter is filed, or if such an action is commenced after the citizen notice letter is filed and the citizen does not commence its judicial action within 120 days after the filing of its notice letter. 33 U.S.C. § 1319(g)(6).

## ARGUMENT

### I

### PLAINTIFF HAS STANDING TO BRING THIS ACTION

Section 505(g) of the Act 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). The courts have repeatedly held that a plaintiff may demonstrate standing under this section by showing that Hudson 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. Arkansas Wildlife Federation v. Bekaert Corp., 791 F. Supp. 769, 776-777 (W.D. Ark. 1992); PIRG v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 72 (3d Cir. 1990), cert. denied, 111 S.Ct.

1018 (1991); Friends of the Earth v. Consolidated Rail Corp., 768 F.2d 57, 61 (2d Cir. 1985); Sierra Club v. SCM Corp., 747 F.2d 99, 107 (2d Cir. 1984); NRDC v. Outboard Marine Corp., 692 F. Supp. 801, 807-808 (N.D. Ill. 1988); PIRG v. Yates Industries, Inc., 757 F. Supp. 438, 443 (D.N.J. 1991); Atlantic States Legal Foundation v. Al Tech Specialty Steel Corp., 635 F. Supp. 284, 287 (N.D.N.Y. 1986); Atlantic States Legal Foundation, Inc. v. Universal Tool & Stamping Co., Inc., 735 F. Supp. 1404, 1411-1412 (N.D. Ind. 1990).

The health, recreational, aesthetic and environmental interests of plaintiff's members have been adversely affected by Hudson's excessive discharges because those members have used waters and nearby areas downstream from Hudson's discharges, including Caney Creek and Boise d'Arc Creek, for fishing, hunting and nature study. They have observed the water in Caney Creek for many years and found that, in recent years, it has smelled bad and had a green, slimy appearance. They would enjoy and use this area more if it were less polluted. PSF 59; Pl. Ex. 21.

The type of pollutants discharged by Hudson cause adverse effects on the environment or public health which are related to these uses. PSF 52-57. Hudson has violated its permit limits for biochemical oxygen demand (BOD), carbonaceous biochemical oxygen demand (CBOD), total volatile suspended solids (TVSS), oil and grease (O&G), and ammonia-nitrogen (AM/N). EPA has recognized that "all pollutants introduced into the environment create some harm or risk, of course, and it will be difficult in many cases to precisely quantify the harm or risk caused by the violation in question." EPA, Civil Penalty Policy, p. 10 (July 18, 1980), quoted in PIRG v. Powell Duffryn Terminals, Inc., 720 F. Supp. 1158, 1167 (D.N.J. 1989), affirmed in pertinent part, 913 F.2d 64 (3d Cir. 1990), cert. denied, 111 S.Ct. 1018 (1991).

The pollutants discharged by Hudson in excess of its permit limits have adverse environmental effects. PSF 52-57. BOD is "designed to limit the amount of oxygen demanding material which is discharged into receiving waters." PIRG v. Powell Duffryn, supra, 720 F. Supp. at 1161.[5] High levels of BOD in streams can kill fish. Texas Municipal Power Agency v. Administrator, 836 F.2d 1482, 1491 (5th Cir. l988). As the court stated in U.S. v. Metropolitan District Comm'n, 23 ERC 1350, 1353 n. 4 (D. Mass. 1985):

> BOD is a measure of the oxygen requirement exerted by micro-organisms to stabilize organic matter. Waste water entering [a body of water] exerts an oxygen demand thereby depleting the amount of oxygen available for use by fish and plants. Without adequate oxygen, fish and plants die, eventually choking [the body of water].

Excessive BOD also causes the water to give off odors. PSF 52; EPA, Primer for Wastewater Treatment, p. 3 (July 1980), Pl. Ex. 18.

TVSS is a form of total suspended solids (TSS). PSF 54. As the court stated in U.S. v. Metropolitan District Comm'n, supra, 23 ERC at 1353, n. 4:

> TSS, or Total Suspended Solids, is an indication of the physical quality of the water. Very high levels of suspended solids can affect the ecology of [a body of water] by inhibiting light transmission needed for photosynthesis, by which plant life survives.

In addition, "[s]olids in suspension burden aquatic life by depleting the oxygen content of the water and clogging the respiratory passages of various fauna." NRDC v. Texaco, 800 F. Supp. 1, 6 (D. Del. 1992). See also Texas Municipal Power Agency v. Administrator, supra, 836 F.2d at 1491. Suspended solids increase the turbidity of water, which interferes with recreational use and aesthetic enjoyment of water. EPA, Quality Criteria for Water, p. 210 (1976), Pl. Ex. 20.

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[5] CBOD is a form of BOD. PSF 53.

"The less turbid the water the more desirable it becomes for swimming and other water contact sports." Id.

Ammonia-nitrogen is a nitrogen compound, which "can degrade a river by depleting its oxygen supply." Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd., 611 F. Supp. 1542, 1562 (E.D. Va. 1985), affirmed, 791 F.2d 304 (4th Cir. 1986), vacated and remanded, 484 U.S. 49 (l987), on remand, 844 F.2d 170 (4th Cir. l988), judgment reinstated, 688 F. Supp. 1078 (E.D. Va. l988), affirmed in part, reversed in part and remanded, 890 F.2d 690 (4th Cir. 1989). It can also stimulate the excessive growth of aquatic algae. EPA, Primer for Wastewater Treatment, supra, p. 13. Algae and ammonia can be directly toxic to fish. Id.; NRDC v. Texaco, supra, 800 F. Supp. at 6.

Discharges of oil and grease degrade water quality. PIRG v. Powell Duffryn Terminals, Inc., supra, 720 F. Supp. at 1162. They create an oily and greasy sheen on the surface of the water which is aesthetically offensive. PIRG v. Powell Duffryn Terminals, Inc., supra, 913 F.2d at 73. See also EPA, Quality Criteria for Water, supra, p. 111-113.

Thus, plaintiff has demonstrated its standing by showing that Hudson has discharged pollutants in violation of its permit and that plaintiff's members use downstream waters in ways which are adversely affected by those discharges. Excess BOD, TSS, O&G, and Am/N cause water to be green with algae, slimy, and smelly--the same conditions that plaintiff's members have complained of in this case. They also kill fish and thereby impair the interests of plaintiff's members in fishable waters.[6]

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[6] Plaintiff also has standing to complain of Hudson's monitoring and reporting violations

II

THIS COURT HAS SUBJECT MATTER JURISDICTION
OVER HUDSON'S PERMIT VIOLATIONS

Plaintiff has satisfied the jurisdictional prerequisites for the commencement and prosecution of a citizen suit against Hudson. It sent a 60-day notice letter and filed suit more than 60 days thereafter. No federal or state agency has filed a judicial or administrative action which has preclusive effect under Sections 505(b)(1)(B) or 309(g)(6) of the Act. See p. 7, n. 5, supra.

Furthermore, plaintiff has 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 addressed the issue of whether Section 505 of the Act "confers federal jurisdiction over citizen suits for wholly past violations." 484 U.S. at 52. That section provides that citizens may commence civil actions against any person "alleged to be in violation of" the conditions of their NPDES permit.

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 under this standard (844 F.2d 170, 171-172 (l988)):

> 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.

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because they prevent the Federation from determining Hudson's permit compliance accurately and completely and thereby frustrate the Federation's ability to protect the interests of its members in water quality. PSF 57-58.

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 Fifth, Ninth and Eleventh Circuits have adopted the Fourth Circuit's standard for proving ongoing violations under Gwaltney. Sierra Club v. Union Oil Co., 853 F.2d 667, 671 (9th Cir. 1988); Atlantic States Legal Foundation v. Tyson Foods, 897 F.2d 1128, 1135 n. 12 (11th Cir. 1990); Carr v. Alta Verde Industries, Inc., 931 F.2d 1055, 1062 (5th Cir. 1991). Judge Waters of this Court adopted this same standard in the Bekaert case, supra, 791 F. Supp. at 778.

The time for determining whether an ongoing violation exists is when plaintiff's complaint is filed. Carr, supra, 931 F.2d at 1064, n. 8. Plaintiff's complaint was filed on August 17, 1992.

The present case meets both of the jurisdictional tests for proving ongoing violations. First, after plaintiff's complaint was filed, Hudson reported violations of its discharge limits for TVSS and Am/N. Pl. Ex. 7, pp. D75-76; Pl. Ex. 5, paras. 14, 15, Table 6, Nos. 633-650, Table 7, Nos. 75-78. Hudson also admits that, subsequent to the filing of plaintiff's complaint, it has still not told EPA or PC&E that it failed to report numerous measured values from samples taken at the monitoring site. Sigman Dep. 145; Starkey Dep. 263. Evidence of a post-complaint violation is conclusive on the issue of whether jurisdiction exists. Carr, supra, 931 F.2d at 1065, n. 12.

Second, when plaintiff's complaint was filed, Hudson had not "completely eradicated" the risk of continuing permit violations. In his concurring opinion in Gwaltney, Justice Scalia

explained the contours of this standard (484 U.S. at 69-70):[7]

> 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 § 505(a), "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. It does not suffice to defeat subject matter jurisdiction that the success of the attempted remedies becomes clear months or even weeks after the suit is filed. Subject matter jurisdiction "depends on the state of things at the time of the action brought"; if it existed when the suit was brought, "subsequent events" cannot "oust[]" the court of jurisdiction. [citations omitted] It is this requirement of clarity of cure for a past violation * * * that meets the Court's concern for "'the practical difficulties of detecting and proving chronic episodic violations'" * * *.
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> Thus, I think the question on remand should be whether petitioner had taken remedial steps that had clearly achieved the effect of curing all past violations by the time suit was brought. I cannot claim that the Court's standard and mine would differ greatly in their practical application. [emphases added]

Thus, this passage makes clear that, in order to defeat jurisdiction at trial, defendant must have

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[7] Although Justice Scalia wrote the concurring opinion in Gwaltney, that opinion provides authoritative guidance on how to prove a continuing violation. As the Fourth Circuit noted in its remand decision, the Supreme Court's majority and concurring opinions in Gwaltney differed only on the issue of when proof of an ongoing violation was required. 844 F.2d at 171, n. 1. The majority opinion held that subject matter jurisdiction attaches if the plaintiff makes a good faith allegation of continuing violations in its complaint, but the plaintiff must then prove the allegation at trial in order to prevail on the merits. Id. The concurring opinion would have required plaintiff to prove a continuing violation as a threshold matter in order to commence and maintain the action. Id. The Fourth Circuit concluded that, under either of these opinions, plaintiff ultimately must prove a continuing violation in order to prevail in its suit. Id. Given the post-complaint history of defendant's permit violations, defendant cannot dispute that plaintiff's allegation of continuing violations in its complaint was made in good faith. Plaintiff has therefore satisfied the standard in the majority opinion in Gwaltney for subject matter jurisdiction to attach. The only remaining jurisdictional issue, then, is whether plaintiff can prove continuing violations in support of its motion for partial summary judgment as to defendant's liability. Because the majority and concurring opinions did not disagree on the type of evidence necessary to prove a continuing violation, Justice Scalia's concurring opinion provides authoritative guidance on this issue.

"put in place" remedial measures which "had clearly achieved the effect of curing all past violations" by the time that the plaintiff filed its complaint. Furthermore, jurisdiction is proper even if subsequent violations never materialize. A risk of subsequent violations is sufficient to confer jurisdiction.

The facts supporting jurisdiction under this standard in the present case are much stronger than those in Gwaltney. In Gwaltney, defendant had installed a new chlorination system and an upgraded wastewater treatment system before plaintiff even filed suit. 484 U.S. at 53-54. In addition, while defendant had a prior history of intermittent permit violations, it did not report a single permit violation for five years after plaintiff filed suit. In holding that jurisdiction nevertheless existed, the lower courts relied on findings that plaintiffs' suit was filed in June, that defendant's permit violations "were more likely to occur in winter," and that defendant's own experts had expressed "some doubt" about whether defendant could stay in compliance during the winter following the filing of plaintiff's complaint. 890 F.2d at 694-695.

Here, unlike in Gwaltney, defendant has a history of permit violations both prior to and after the filing of plaintiff's complaint. In addition, unlike in Gwaltney, Hudson upgraded its treatment system after plaintiff's suit was filed because it believed that its existing system was inadequate to achieve permit compliance. That upgrade affected all of Hudson's pollutant parameters, because Hudson has only one treatment system with one outfall.

John Starkey, Hudson's manager of environmental engineering, oversees permit compliance at Hudson's facilities. Starkey Dep. 9, 11. In March 1992, Starkey wrote a report to PC&E which described the permit compliance problems at the Hope facility. Pl. Ex. 15. He noted that Hope had a treatment system which used screening, dissolved air floatation (DAF), a

series of treatment lagoons, and 80 acres of overland flow terraces. Id. at 1. The DAF unit was added in the fall of 1991, but permit compliance was still "marginal." Id. Hudson then decided to install a chemical addition system in February 1992 to improve DAF performance. Id.

In May 1992, Starkey wrote a memo containing "my judgment on where we stand with our chemical pretreatment program * * *." Pl. Ex. 16, p. 1. Starkey stated that "the program we are on simply is not doing a good enough job to get us where we need to be." Id. at 2. He concluded that "the center pivot/field rework offers us the most promising likelihood for returning us to compliance." Id. at 5. Starkey testified at his deposition that "[u]ltimately we opted for the center pivot irrigation system * * * because it was my opinion that it offered us a sure form of return to compliance." Starkey Dep. 110.

Hudson approved a $252,310 capital expenditure for the center pivot system in July 1992. Pl. Ex. 17. The approval form states that the justification for this expenditure was that it was "necessary to bring Hope Complex into compliance with NPDES permit." Id. The two center pivots were installed in the first half of October 1992, nearly two months after plaintiff's complaint was filed. Starkey Dep. 58.

These facts demonstrate even more clearly than in Gwaltney that defendant had not "completely and clearly eradicated" (484 U.S. at 69) the cause of its prior permit violations before plaintiff filed suit. Those problems still existed for at least two months after plaintiff filed suit. This Court therefore has subject matter jurisdiction over all of defendant's permit violations in this case.

III

PLAINTIFF IS ENTITLED TO SUMMARY JUDGMENT
AS TO HUDSON'S LIABILITY

A. HUDSON IS STRICTLY LIABLE FOR ITS PERMIT VIOLATIONS

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 Hudson's liability. Hudson has admitted in official reports that its discharges have exceeded the discharge and monitoring requirements of its permit hundreds of times.

The courts have long approved the use of reports or records, which the law requires to be kept, as admissions in establishing civil liability. See, e.g., Garner v. United States, 424 U.S. 648 (1976); Shapiro v. United States, 335 U.S. 1, 17, 35 (1948). This well-recognized rule has been specifically applied by the Supreme Court to reports required by the Federal Water Pollution Control Act. In United States v. Ward, 448 U.S. 242 (1980), the Court held that the defendant's report of an oil spill into navigable waters, as required by Section 311(b)(5), 33 U.S.C. § 1321(b)(5), could be used to establish the defendant's liability for civil penalties under Section 311(b)(6) of the Act, 33 U.S.C. § 1321(b)(6). As a result, federal courts have frequently relied on monitoring reports to grant summary judgment to plaintiffs in citizen suits under the Water Act. See, e.g., PIRG v. U.S. Metals Refining Co., 681 F. Supp. 237, 240 (D.N.J. 1987); U.S. v. CPS Chemical Co., Inc., supra, 779 F. Supp. at 442-443.

Dischargers are strictly liable for their permit violations. E.g., United States v. Earth Sciences, Inc., 599 F.2d 368, 374 (10th Cir. 1979). A discharger's good-faith efforts to comply are considered only in assessing the amount of civil penalties to be imposed and in determining what other relief is appropriate. PIRG v. P.D. Oil & Chemical Corp., 627 F. Supp. 1074, 1090 (D.N.J. 1986). Consequently, a violation of the requirements of a NPDES permit is automatically a violation of the Act. SPIRG v. AT&T Bell Laboratories, 617 F. Supp. 1190, 1203 (D.N.J. 1985).

The legislative history of the Water Act shows that Congress intended to expedite enforcement actions. The Senate report on the 1972 Act 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, supra, p. 64, 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, supra, pp. 79, 80, 1972 U.S. Code Cong. & Ad. News at 3745, 3746.

Section 505(a)(1) of the Act 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). Thus, the monitoring and reporting requirements of a permit, like the discharge limitations, are fully enforceable in a citizen suit. E.g., Sierra Club v. Simkins Industries, Inc., 847 F.2d 1109, 1115 (4th Cir. 1988), cert. denied, 109 S.Ct. 3185 (1989);

Arkansas Wildlife Federation v. Bekaert Corp., supra, 791 F. Supp. at 782-783; PIRG v. Yates Industries, Inc., supra, 757 F. Supp. at 451.

B. HUDSON HAS COMMITTED 4105 VIOLATIONS OF ITS NPDES PERMIT

Hudson submitted DMRs to EPA and PC&E from May 1988 through September 1992. PSF 15. However, those DMRs do not present a complete picture of Hudson's compliance record.

As plaintiff has explained in its statement of facts, Hudson's permit required it to retain records of monitoring information used in preparing its DMRs. PSF 11. Plaintiff obtained this information in discovery. PSF 14. Hudson's DMRs and monitoring records show that it committed four types of permit violations: (1) Hudson violated its discharge limits; (2) Hudson misreported its monitoring data and discharge violations on its DMRs; (3) Hudson failed to monitor its discharges with the required frequency; and (4) Hudson failed to maintain required monitoring records. PSF 15-44.

While Hudson's excessive discharges cause the most direct harm to the environment, its violations of monitoring, reporting, and record-keeping requirements are also serious. As the court explained in Sierra Club v. Simkins Industries, supra, 847 F.2d at 1115:

> * * * Simkins' monitoring obligations were not designed to be a mere academic exercise. Simkins was bound by the reporting and records retention requirements of the NPDES permit that are central to the adequate administration and enforcement of limits on substantive discharges under the Clean Water Act. Unless a permit holder monitors as required by the permit, it will be difficult if not impossible for state and federal officials charged with enforcement of the Clean Water Act to know whether or not the permit holder is discharging effluents in excess of the permit's maximum levels.

1. Hudson Violated Its Discharge Limits 3018 Times

Plaintiff has compared the measured values in Hudson's monitoring records with the

maximum and monthly average discharge limits in its NPDES permit. PSF 38. This comparison shows that Hudson exceeded its maximum discharge limits 650 times and its monthly average discharge limits 78 times. Id. These violations are explained and listed in the Pl. Ex. 5, paras. 1-7, 14-16, and Tables 6-7, and are summarized below:

| | Number of Violations | | |
|---|---|---|---|
| Pollutant | Max. | Ave. | Total |
| BOD Qnty. | 104 | 13 | 117 |
| CBOD Qnty. | 26 | 4 | 30 |
| CBOD Conc. | 43 | 14 | 57 |
| TVSS Qnty. | 54 | 9 | 63 |
| TVSS Conc. | 44 | 8 | 52 |
| O&G Qnty. | 3 | | 3 |
| O&G Conc. | 2 | | 2 |
| AM/N Qnty. | 175 | 14 | 189 |
| AM/N Conc. | 199 | 16 | 215 |
| | | Total | 728 |

A violation of a monthly average limit is counted as a violation for each day of the month. EPA v. City of Green Forest, 921 F.2d 1394, 1407 (8th Cir. 1990), cert. denied, 112 S.Ct. 414 (1991).[8] The 78 monthly average violations represent 2368 days of violation. PSF 38. Each of Hudson's 650 maximum violations is counted separately as a violation for one day. NRDC v. Texaco, supra, 800 F. Supp. at 21-22. Hudson is therefore liable for 3018 violations of the discharge limits in its NPDES permit.

2. Hudson Violated its Reporting Requirements 670 Times

[8] Accord, Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd., supra, 791 F.2d 304, 313 (4th Cir. 1986); Atlantic States Legal Foundation v. Tyson Foods, supra, 897 F.2d at 1139; Atlantic States Legal Foundation, Inc. v. Universal Tool & Stamping Co., Inc., 786 F. Supp. 743, 746-747 (N.D. Ind. 1992); International Union v. Amerace Corp., 740 F. Supp. 1072, 1085 (D.N.J. 1990); PIRG v. Star Enterprise, 771 F. Supp. 655, 668 (D.N.J. 1991).

Hudson's 1986 permit required it to include all sampling results in its calculation and reporting of data on its DMRs, to report monitoring data accurately, to report all instances of permit noncompliance, to report the frequency and method of its sampling activities, and to report instances in which it monitored its discharges more frequently than that required by its permit. PSF 10. Hudson violated each of these requirements.

Hudson omitted 338 measured values from its calculation and reporting of data on its DMRs. PSF 28-34. Permittees are liable for failures to report valid measured values "regardless of whether the unreported measurements indicate violations." International Union v. Amerace Corp., supra, 740 F. Supp. at 1085.

As a result of omitting these values from its DMR calculations, Hudson misreported 133 maximum and monthly average values on its DMRs. PSF 36-37. Dischargers are liable for failure to file accurate DMRs. Menzel v. County Utilities Corp., 712 F.2d 9l, 94, 95 (4th Cir. l983); SPIRG v. Fritzsche, Dodge & Olcott, Inc., 579 F. Supp. 1528, 1539 n. 14 (D.N.J. 1984), affirmed, 759 F.2d 1131 (3d Cir. 1985).

Hudson failed to report 424 of its 728 violations on its DMRs in the "number of exceedances" column or on the monthly summary attached to the DMR. PSF 40. Hudson underreported its frequency of sampling 45 times on its DMRs. PSF 35. Hudson failed to report any frequency of sampling 15 times and failed to report any sampling method 15 times on its DMRs. Id. Courts have held dischargers liable for these same types of reporting violations. NRDC v. Loewengart & Co., Inc., 776 F. Supp. 996, 999 (M.D. Pa. 1991)(failure to report sample frequency and type); PIRG v. Star Enterprise, supra, 771 F. Supp. at 659, 668-669 (underreporting the number and severity of violations); PIRG v. U.S. Metals Refining Co., supra,

681 F. Supp. at 245 (underre-porting the number of violations); PIRG v. Witco Chemical Corp., 31 ERC 1571, 1581 (D.N.J. 1990). Hudson is therefore liable for 670 violations of the reporting requirements in its NPDES permit.

3. Hudson Violated Its Monitoring Requirements 58 Times

Hudson's 1986 NPDES permit established required frequencies for monitoring its discharges. Hudson admittedly failed in 58 instances to monitor its discharges with the required frequency. PSF 44. Permittees are liable for violating the monitoring requirements in their permits. PIRG v. Witco Chemical Corp., supra, 31 ERC at 1581; PIRG v. Yates Industries, supra, 757 F. Supp. at 451. Hudson is therefore liable for 58 violations of the monitoring requirements in its permit.

4. Hudson Violated Its Record-Keeping Requirements At Least 359 Times

Hudson's 1986 permit required it to make records containing specific types of monitoring information and to retain those records for at least 3 years. PSF 11. Hudson violated these requirements 359 times from September 1989 through September 1992 by failing to make and retain records of the results of its sample analysis for CBOD, BOD, TVSS, O&G and Am/N. PSF 41-42. Hudson also violated these requirements by failing to keep monitoring records which show the time of day samples were taken, the person who took the sample, the person who analyzed the samples, and the time of day they were analyzed. PSF 43. Hudson's records are so inadequate that it is difficult or impossible to determine the number of days that these latter requirements were violated. Citizens may enforce violations of requirements that permittees maintain records showing their monitoring results. Sierra Club v. Simkins Industries, Inc., supra, 847 F.2d at 1115, 1116 n. 1. Hudson is therefore liable for at least 359 violations of the

record-keeping requirements in its permit.

## CONCLUSION

For these reasons, this Court should enter partial summary judgment holding that (1) plaintiff has standing to prosecute this action; (2) this Court has subject matter jurisdiction over all of the permit violations alleged in this action; and (3) Hudson is liable for at least 4105 violations of the Act.

Respectfully submitted,

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By:_____
James M. Hecker

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

| | | |
|---|---|---|
| ARKANSAS WILDLIFE FEDERATION, | ) | |
| Plaintiff, | ) | |
| v. | ) | Civil Action No. 92-4098 |
| HUDSON FOODS, INC., | ) | |
| Defendant. | ) | |

ORDER

Upon consideration of plaintiff's motion for partial summary judgment, and the briefs and exhibits submitted by all parties in support or opposition thereto, it is this ____ day of _____ , 1993,

ORDERED, that plaintiff's motion for summary judgment on the issues of plaintiff's standing, this Court's subject matter jurisdiction, and defendant's liability for 4105 violations of the Federal Water Pollution Control Act, 33 U.S.C. § 1251, et seq., is granted.

_____
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

| | | |
|---|---|---|
| ARKANSAS WILDLIFE FEDERATION, | ) | |
| Plaintiff, | ) | |
| v. | ) | Civil Action No. 92-4098 |
| HUDSON FOODS, INC., | ) | |
| Defendant. | ) | |

CERTIFICATE OF SERVICE

I hereby certify this 20th day of April, 1993, that I have caused a true copy of the foregoing "Plaintiff's Motion for Partial Summary Judgment," "Plaintiff's Statement of Facts as to Which There is No Genuine Issue," "Plaintiff's Brief in Support of Its Motion for Partial Summary Judgment," accompanying exhibits, and a proposed order, to be delivered via overnight courier to:

Charles R. Nestrud
Chisenhall, Nestrud & Julian, P.A.
400 W. Capitol, Suite 2840
First Commercial Bank Building
Little Rock, Arkansas 72201

_____
James M. Hecker