UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
TEXARKANA DIVISION

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

PLAINTIFF'S BRIEF IN OPPOSITION TO
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Defendant Hudson Foods, Inc. (Hudson) has filed a motion for summary judgment based on the central factual claim that it has been in compliance with its permit "at all times immediately prior to and since the initiation of this litigation." Def. SJ Br. 1. Based on that claim, Hudson argues that (1) this Court lacks subject matter jurisdiction to adjudicate plaintiff's complaint or (2) plaintiff's action has become moot. Id. While we show below that Hudson's legal arguments are erroneous, the fundamental defect with Hudson's motion is that its claim of complete post-complaint compliance is false. Indeed, Hudson knew it was false when it filed its motion, because Hudson's claim is flatly inconsistent with its own monitoring records and DMRs.[1]

[1] Plaintiff believes that Hudson's conduct would warrant sanctions under Rule 11, F.R.Civ.P. However, since plaintiff is confident that it will prevail in this case and receive a fee award under 33 U.S.C. § 1365(d), and since plaintiff wants to move this case to resolution on the merits, plaintiff is not pursuing this option at this time. Plaintiff reserves the right to file such a motion at a later date.

On April 29, 1993, after several delays,[2] Hudson produced additional post-complaint monitoring records. 2d Hecker Aff., para. 6, Pl. Ex. 22. The weekly summary covering December 28-30, 1992 shows that Hudson measured two violations of its maximum limit for ammonia-nitrogen. Id., paras. 7, 12. Hudson failed to report those violations on its DMR for that month. Id.; Def. Ex. 20. The weekly summary covering November 4-5, 1992 shows that Hudson failed to analyze for TVSS, oil and grease, or pH during that week. Pl. Ex. 22, paras. 8-9. The weekly summaries for November and December 1992 show that Hudson only analyzed its samples for oil and grease once during that two-month period, even though its permit requires weekly sampling. Id., para. 10. These monitoring violations also went unreported on Hudson's DMRs. Id., paras. 8-10.

Hudson has not only ignored its own internal monitoring records, but has concealed its most recent DMR filed with the state and EPA. Hudson's March 1993 DMR was signed by Mr. Sigman on April 23, 1993. Nevertheless, Hudson failed to produce that DMR as part of its document production on April 28, 1993. Id., paras. 6, 13. Plaintiff had to obtain it from PC&E. That DMR shows that Hudson reported four violations of its discharge limits in that month. Id.

It is shocking that Hudson would move for summary judgment despite this evidence. Equally shocking are the obvious conflicts between this evidence and the sworn representations made by Hudson's employees to this Court. Mr. Sigman testified at his April 15, 1993

[2] Plaintiff subpoenaed Hudson's recent monitoring records for production at the deposition of John Starkey on April 14, 1993. Pl. Ex. 3, pp. 158-162. Hudson failed to produce them at that time or by the April 16 date promised during that deposition. Id. at 159-160. 2d Hecker Aff., paras. 2-5, Pl. Ex. 22.

deposition that Hudson had not exceeded or violated any of its permit limits since September 1992.[3] Sigman Dep. 204, Pl. Ex. 23.[4] Mr. Starkey stated in his April 20, 1993 affidavit filed with this Court that "since this litigation was initiated, Hudson has reported all required monitoring data, recorded all required information, and has retained all required records." Starkey Aff., p. 12. Based on Hudson's own records, those statements are false.

ARGUMENT

I

THIS COURT HAS SUBJECT MATTER JURISDICTION OVER THIS ACTION

Hudson argues that all of its permit violations occurred prior to the filing of plaintiff's complaint and that, under Gwaltney, this Court lacks subject matter jurisdiction over this action. Def. SJ Br. 7-18. Hudson's application of Gwaltney to this case is fundamentally flawed.

Hudson's brief focuses entirely on whether it has committed post-complaint violations. Hudson claims that all of its violations preceded the complaint or can be excused as bypasses. This is incorrect. Post-complaint violations have occurred, and Hudson has no factual or legal basis to claim any bypass defense.

However, regardless of whether there are any post-complaint violations, Hudson completely fails the alternative test of jurisdiction under Gwaltney, i.e., did it completely

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[3] While this deposition was eight days before he signed the March 1993 DMR, Mr. Sigman must have known the March results at that time, since he receives weekly summaries of monitoring data. Sigman Dep. 132-133, 162-164.

[4] Except where noted otherwise in this brief, deposition page references are to the exhibits to plaintiff's April 20, 1993 motion for partial summary judgment. Additional deposition pages that were not previously excerpted are attached as Pl. Ex. 23 to this brief.

eradicate the cause of the violations prior to the filing of the complaint? Hudson's own affiant admits that the upgraded treatment system needed to return the facility to compliance is still not completed. Starkey Aff., pp. 4-5, 8-9, 12. In short, this is not even a close case. Jurisdiction clearly exists.

A. REGARDLESS OF WHETHER THERE HAVE BEEN POST-COMPLAINT DISCHARGE VIOLATIONS, JURISDICTION EXISTS BECAUSE HUDSON HAD NOT COMPLETELY ERADICATED THE CAUSE OF THE VIOLATIONS AT THE TIME PLAINTIFF'S COMPLAINT WAS FILED

Gwaltney established two alternative tests for jurisdiction. One is the existence of post-complaint violations, and the other is whether the defendant had put in place remedial measures that had clearly achieved the effect of curing all past violations by the time plantiff's complaint was filed. See Pl. SJ Br. 13-15.

Hudson's own affiant, Mr. Starkey, states that, as of May 1992, Hudson's treatment system "was inadequate to return the facility to consistent compliance." Starkey Aff., pp. 4-5. To remedy that inadequacy, he decided to install a new center pivot system, double the size of the spray fields, and reseed those fields with Bermuda grass. Id. at 5, 8. While Mr. Starkey states that he believes that Hudson can achieve "continuous compliance with the applicable NPDES permit limitations," that opinion is expressly conditioned on "the installation of the permanent Tifton 44-bermuda grass cover," which "is still ongoing as of the date of execution of this Affidavit." Id. at 9, 12. If the system that Hudson says it needs to achieve continuous permit compliance is still not completed, it is obvious that there was a continuing risk of permit noncompliance when plaintiff filed its complaint eight months ago in August 1992.[5]

[5] Other aspects of the treatment system upgrade also post-dated the filing of plaintiff's complaint on August 17, 1992. The state did not even issue a permit to construct the system

Hudson does not cite a single case which would support the denial of subject matter jurisdiction based on these or similar facts. On the contrary, courts have found jurisdiction on much weaker facts. First and foremost is Gwaltney itself, where there were no permit violations for five years after the complaint was filed and all of the treatment upgrades were completed before plaintiff's complaint was filed. See Pl. SJ Br. 15-16. If Hudson's theory of jurisdiction were correct, the Supreme Court should have dismissed that case. Instead, the Court remanded it to the Fourth Circuit, which found that there was sufficient doubt about the adequacy of Gwaltney's improvements to support jurisdiction and an award of $289,822 in civil penalties. Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd., 890 F.2d 690, 698 (4th Cir. 1989).

Similarly, in PIRG v. Star Enterprise, 771 F. Supp. 655, 660-661 (D.N.J. 1991), the defendant completely stopped discharging the day after plaintiff's complaint was filed. The court held that, based on defendant's recent record of violations and its continuing discharge as of the date the complaint was filed, subject matter jurisdiction existed.

The clear message from these cases is that a continuing risk of noncompliance on the date of the complaint is sufficient to support subject matter jurisdiction, regardless of whether there are any post-complaint permit violations. By that standard, the facts of the instant case establish jurisdiction even more solidly than in Gwaltney and Star. Hudson is still discharging, and it has still not completed the upgrade of its treatment system that it admittedly needs to improve its permit compliance. Therefore, under the second prong of the Gwaltney test, subject matter jurisdiction clearly exists.

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until September 8, 1992. Starkey Aff., p. 6. The temporary storage lagoon was constructed in late September. Id. at 7. The center pivots were installed in early October. Id. at 8.

B. HUDSON HAS COMMITTED POST-COMPLAINT DISCHARGE VIOLATIONS AND ITS ASSERTED BYPASS DEFENSE IS BASELESS

Hudson also fails the alternative test of jurisdiction under Gwaltney because it has committed post-complaint violations. Hudson admits that there are "discrepancies" between its post-complaint discharges and its permit limits. Def. SJ Br. 7. In its motion for summary judgment, plaintiff has identified 18 maximum and 4 average discharge violations after the filing of its complaint. Pl. SJ Br. 14. As we have shown above, recent monitoring records show more violations through March 1993.

Hudson invokes the affirmative bypass defense to attempt to negate these violations. Def. SJ Br. 8-10. That defense is inapplicable for three reasons.

First, there is no admissible evidence to support Hudson's claim that PC&E approved any bypass. Hudson's permit generally prohibits any bypasses. Pl. Ex. 3, p. 5, para. II.B.4.c.[6] There are only two exceptions. One is if the Director of PC&E approves a bypass. Id., para. II.B.4.c.(2). The other is if the bypass meets a tri-partite test of unavoidable loss, lack of feasible alternatives, and notice. Id., para. II.B.4.c.(1).

Here, Hudson only claims that the c.(2) exception is applicable, and that PC&E approved a bypass in July 1992. Def. SJ Br. 9-10.[7] This claim is not supported by any admissible

[6] Hudson cites the bypass requirements in EPA's regulations. Def. SJ Br. 8. However, the bypass provision in a state-issued permit is controlling to the extent that it is more stringent. 40 C.F.R. § 123.25 (note); Chesapeake Bay Foundation v. Bethlehem Steel Corp., 652 F. Supp. 620, 631 (D. Md. 1987). Here, the bypass provision in Hudson's permit is more stringent because it omits the "reasonable engineering judgment" condition in 40 C.F.R. § 122.41(m)(4)(B).

[7] The c.(1) exception is clearly inapplicable. There is no evidence that "bypass was unavoidable to prevent loss of life, personal injury, or severe property damage." Pl. Ex. 3, Part II.B.4.c.(1)(a). On the contrary, the only reason for the bypass was to allow the sprayfields to

evidence, as Rule 56(e), F.R.Civ.P., requires. The only basis is Mr. Starkey's statement that "ADPC&E authorized this anticipated bypass of a portion of the land application wastewater treatment system at the July 16, 1992 meeting." Starkey Aff., pp. 4-5. This is inadmissible hearsay, which cannot support a motion for summary judgment. Furthermore, Mr. Starkey does not name the individual who purportedly gave this approval and does not even claim that it was the Director of PC&E, who is the only individual with such approval authority. Nor does he cite or attach a single document from PC&E which approves of any type of bypass. While PC&E issued a permit to Hudson construct the upgraded treatment system and gave short-term authorization to discharge wastewater from Hudson's fresh water pond, neither of these two documents say anything about a bypass. Def. Exs. 8, 11.

Second, even if there were an approved bypass, it could not excuse the violations in this case that occurred before September 22, 1992. Those violations had nothing to do with any bypass. Hudson did not stop discharges from its treatment system until that date, which was over a month after plaintiff's complaint was filed. On September 22, according to Mr. Starkey, Hudson shut down its all four of its spray nozzles, ceased all wastewater discharges from the spray fields, and diverted its wastewater to the temporary storage lagoon. Starkey Aff., p. 7 and Def. Ex. 10. Prior to September 22, only one of the four nozzles in Hudson's spray field was disconnected. Starkey Aff., p. 6 and Def. Ex. 9, p. 2. Hudson continued to use the other three nozzles and the rest of its spray fields during that time, and its DMRs reported discharge flows and permit violations at outfall 001 throughout July and August and up to September 22, 1992.

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dry out so that Hudson could install the new center pivots. Starkey Aff., p. 6.

Def. Ex. 9; Pl. Ex. 7, pp. D74-D76; Pl. Ex. 8, pp. 2-0780 (July 1992), 2-1491 (August 1992), and 2-0785 (Sept. 1992).

Thus, Hudson's theory is that if it bypasses one-quarter of its system, it is free to violate its permit on the other three-quarters of its system that is still operating. This is absurd. An approved bypass could excuse, at most, violations involving the portion of wastewater that is bypassed and untreated. Indeed, EPA has interpreted the bypass defense to require the maximum operation of treatment facilities (49 Fed. Reg. 37998, 38036 (Sept. 24, 1984)):

> The NPDES regulations prohibit bypass, which is defined as the intentional diversion of waste streams from any portion of a treatment facility. The regulations thus requires permittees to operate their entire treatment facility at all times. * * *
>
> The bypass provision was intended to accomplish two purposes. First, it excused certain unavoidable or justifiable violations of permit effluent limitations, provided the permittee could meet the bypass criteria. Second, it required that permittees operate control equipment at all times, thus obtaining maximum pollutant reductions consistent with technology-based requirements.

Thus, a partial bypass cannot excuse violations involving wastewater that is not bypassed and is still processed through the land application treatment system. Otherwise, any partial bypass would, in effect, allow unlimited pollution. That would be completely inconsistent with the requirement that permittees obtain the maximum pollutant reductions at all times.

Third, Hudson's invocation of the bypass defense is completely inconsistent with the requirement that bypasses be used only in emergency situations. A bypass is permissible only when it is "unavoidable to prevent loss of life, personal injury, or severe property damage" and there are "no feasible alternatives." Pl. Ex. 3, Part II.B.4.c.(1)(a) and (b). When EPA created this defense, it stated that (44 Fed. Reg. 32854, 32862 (June 7, 1979)):

> The bypass provision is intended to provide relief from permit limitations during unusual circumstances; it is not intended to allow limitations to be routinely exceeded.

EPA also stated that, "[i]n general, bypass will not be excused except in extreme situations * * *." 45 Fed. Reg. 33290, 33339 (May 19, 1980). Given the duration and frequency of Hudson's permit violations between July and September 1992, they "certainly would not comport to the emergency situation scenario suggested in the [bypass] permit exception." U.S. v. Town of Lowell, 637 F. Supp. 254, 258 (N.D. Ind. 1985).

Furthermore, Hudson had a feasible alternative. Hudson could have shut down its poultry operations while it installed the new center pivots, thereby eliminating the source of its wastewater temporarily. As the court stated in Atlantic States Legal Foundation v. Tyson Foods, 897 F.2d 1128, 1141 (11th Cir. 1990):

> There was one simple and straightforward way for Tyson to avoid paying civil penalties for violations of the Clean Water Act: After purchasing the plant, Tyson could have ceased operations until it was able to discharge pollutants without violating the requirements of its NPDES permit.

Hudson's permit provides that (Pl. Ex. 3, Part II.B.2, p. 4):

> It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with conditions of this permit.

However, Hudson has never even considered reducing its production as a method of permit compliance. Sigman Dep. 58; Starkey Dep. 71, Pl. Ex. 23.

Hudson therefore has no valid bypass defense. The numerous post-complaint violations require a finding of subject matter jurisdiction.

C. HUDSON'S MONITORING, REPORTING, AND RECORD-KEEPING VIOLATIONS WERE ONGOING WHEN PLAINTIFF'S COMPLAINT WAS FILED AND ARE LIKELY TO CONTINUE

Hudson looks at its monitoring, reporting, and record-keeping violations with the same

myopia that it applies to its discharge violations. Hudson's theory is that, unless there is a post-complaint violation for every single kind of monitoring, reporting, or record-keeping violation, there is no subject matter jurisdiction over those violations under Gwaltney. Def. SJ Br. 10-17.[8] However, as we have shown above, the issue is whether there are either post-complaint violations or a continuing risk of such violations. Again, Hudson fails both of these tests.

First, there are numerous post-complaint violations of monitoring, reporting and record-keeping requirements. As we have shown above, Hudson's most recent monitoring records show repeated post-complaint failures to monitor pollutants and report permit violations. Pl. Ex. 22.[9] Hudson's record-keeping is so inadequate that it has attempted to impeach the records of its own sample-taker, Pat Hurd. Mr. Hurd's diary and deposition testimony state that he took samples at the monitoring site on August 24 and 25 and September 8 and 9, 1992, after plaintiff's complaint was filed. PSF ¶ 23. Hudson now claims that these records are inaccurate,[10] but has

[8] Hudson attempts to belittle these violations by calling them "paperwork" violations. Def. SJ Br. 11. However, as we have shown (Pl. SJ Br. 2, 21), Hudson's sampling, monitoring and reporting obligations are "central to the adequate administration and enforcement of limits on substantive discharges" (Sierra Club v. Simkins Industries, 847 F.2d 1115 (4th Cir. 1988), cert. denied, 491 U.S. 904 (1989)) and a knowing violation of those obligations is a criminal offense. 33 U.S.C. § 1319(c)(4).

[9] Hudson's records show additional post-complaint violations. Hudson failed to monitor for CBOD twice a week during the week beginning September 13, 1992, even though it discharged on four days during that week. Pl. Ex. 5, Table 11, No. 18; Pl. Ex. 8, p. 2-0785. It monitored for CBOD only once during the last week of December 1992. Pl. Ex. 22, para. 11. Hudson has still not reported hundreds of measured values from its monitoring site to the state or EPA. PSF ¶s 28-34, 46.

[10] Mr. Sigman first said that Mr. Hurd's diary was accurate, and then immediately recanted and said it was inaccurate after he conferred with his counsel. Sigman Dep. 183. See also Starkey Aff., p. 14; Starkey Dep. 179-182.

no other records which state that the samples were actually taken at a different location. PSF ¶ 24-25.[11]

Second, there is a substantial continuing risk of such violations. To judge that risk, violations cannot be parsed by parameter and then viewed in isolation from other parameters. Plaintiff does not accept Hudson's parameter-by-parameter analysis of its violations.[12] All of these violations flow from a common underlying problem--Hudson's failure to take its self-monitoring obligations seriously and to report its monitoring data completely and truthfully.

The court in Natural Resources Defense Council v. Texaco, 800 F. Supp. 1, 14 (D. Del. 1992), used this broader approach to look at the continuity of underlying problems rather than only at the continuity of separate types of violations:

If these ongoing violations are related to the basic underlying problem, the fact that past

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[11] On April 30, 1993, nearly seven months after plaintiff first requested all of Hudson's monitoring records, Hudson produced documents which purport to show the location of sampling on some days from March 23, 1992 through September 23, 1992. Pl. Ex. 22, paras. 15-16. Because of Hudson's belated production, plaintiff was unable to question Hudson's employees about these documents or verify their authenticity. In any event, this set of documents contains no records for August 24, August 25, or September 8, 1992, and the record for September 9, 1992 indicates that the sample was taken at the monitoring site on that day. Id.

[12] Section 505 of the Act allows a citizen to sue anyone alleged to be in violation of an "effluent standard or limitation"; this, in turn, is defined to include "a permit." 33 U.S.C. § 1365(a), (f). Thus, to violate a permit, without more, is to violate the Act. EPA v. California ex rel. State Water Resources Control Board, 426 U.S. 200, 205 (1976). It is the violation of the permit, not of individual permit terms, that must be "ongoing" for jurisdictional purposes. Sierra Club v. Port Townsend Paper Corp., 28 ERC 1676, 1678 (W.D. Wash. 1988).

In Arkansas Wildlife Federation v. Bekaert Corp., 791 F. Supp. 769, 780 (W.D. Ark. 1992), Judge Waters held that a parameter-by parameter showing is not necessary to defeat a motion to dismiss for lack of jurisdiction, but is necessary to prevail on the merits and to obtain appropriate relief. This distinction has no basis in the language of the Act and confuses jurisdictional and remedial issues. Once jurisdiction exists, the court has the authority to grant relief for all past and ongoing violations. PIRG v. Carter-Wallace, Inc., 684 F. Supp. 115, 118-119 (D.N.J. 1988).

> violations show up in one parameter and a post-complaint violation occurs in a different parameter, should not, under our reading of Gwaltney I, deprive us of jurisdiction in a citizen's suit to grant a remedy for what is essentially the same, inadequately resolved source of difficulty.
>
> We believe that public policy, at least as enunciated in the Act and in Gwaltney I, favors judicial pressure to fully comply with permit limits. These sources of policy do not encourage adjudication of violations that cease well before a complaint is filed. However, they do demand the effective means of correcting underlying causes of violations be identified and implemented. If appropriate remedial measures are not taken, the fact that the failure to solve the problem is manifested from time to time in different parameters should not preclude a citizen's suit directed at the unresolved source of the trouble.

Similarly, in PIRG v. Yates Industries, 790 F. Supp. 511, 515-516 (D.N.J. 1991), the court held that post-complaint violations for some monitoring and reporting requirements could lead the court to conclude that there is a continuing likelihood of reporting and monitoring violations in general.

Hudson has a long history of sloppy, inaccurate, and incomplete monitoring and reporting. Its records, when they exist at all, are a mess. When the same people who created this mess now say it is fixed, and offer as evidence their own self-serving statements made during the pendency of litigation seeking thousands of dollars in civil penalties, the Court must be especially cautious and must insist on convincing evidence that the underlying problems have been completely remedied.

The Court should focus first on the scope and magnitude of Hudson's past monitoring, reporting and record-keeping violations.[13] Hudson's own list of violations takes a whole page of its brief, single-spaced. Def. SJ Br. 11-12. Hudson failed to report hundreds of measured

[13] See PIRG v. Yates Industries, 757 F. Supp. 438, 449 (D.N.J. 1991)(jurisdiction exists based on permittee's "prior record of frequent noncompliance" with monitoring requirements).

values. Pl. SJ Br. 22. It misreported average values, maximum values, numbers of exceedances, and frequency of sampling on its DMRs. Id. at 23. It failed to monitor its discharges with the required frequency. Id. at 24. It failed to make and retain records for hundreds of sampling results, including accurate records of the location of sampling. Id. It failed to record the time of sampling and analysis and the person who performed those tasks. Id.

The Court should next focus on the conduct and remedial efforts of the people who carry out the program. The key person is Mr. Sigman. He assembles the monitoring data and prepares the DMRs. Sigman Dep. 10, 161. For a year or more, and at least until May 1992, he filed false DMRs which underreported Hudson's violations. Starkey Aff., p. 13; Starkey Dep. 289-290. When Mr. Sigman had more than two data points, he chose the lowest values. Sigman Dep. 138. Mr. Sigman has still not told the state or EPA that data was left off the DMRs. Id. at 145.[14] Mr. Sigman stated at his deposition that there were no post-complaint violations, when Hudson's own monitoring records show that the opposite is true. See p. 2 above.

Mr. Sigman supervises Pat Hurd and tells him when to take samples of Hudson's discharge. Sigman Dep. 121, 167-168; Hurd Dep. 7, 22-23. Mr. Sigman says he still tries to avoid taking samples on days with high rainfall because it "would put you over on your mass limits sometimes." Sigman Dep. 169. Mr. Hurd now apparently records the location and time of sampling in a diary and on another form, but Mr. Sigman does not even use those records.

[14] Hudson argues that its misreporting "did not result in any misleading information being provided to PC&E." Def. SJ Br. 14. This is false. Hudson underreported 133 of its values on its DMRs during this period, and concealed hundreds of discharge violations. PSF ¶s 37, 40.

Hurd Dep. 26-27, 31, 66; Hurd Diary, Pl. Ex. 13; Sigman Dep. 126-128, 173-174, 176-177. Mr. Sigman instead relies primarily on weekly and monthly summaries of lab data to prepare DMRs, and those summaries, at least through February 1993, do not state the location of sampling. Starkey Dep. 184; Sigman Dep. 132-134, 137-138, 164-166, 174-175; Pl. Ex. 14, pp. 2-0049 to 2-0146; Pl. Ex. 22, pp. L1-L13. Mr. Sigman simply "assumed that they were all at the monitoring site, unless there was no CBOD or BOD run on them." Sigman Dep. 177, 182-183. Mr. Sigman has taken some samples himself, but cannot tell from Hudson's records when that was. Id. at 188-189.

Another key person is Mr. Starkey, who told Mr. Sigman in May 1992 that his selective reporting of data was wrong. Starkey Dep. 290. However, Mr. Starkey did not tell Mr. Sigman at that time to report the past unreported data from extra monitoring days to the state or EPA, and it has still not been reported as of April 1993. Id. at 263, 290-291. Instead of reporting the extra past data, or reducing the data collected from then on, Mr. Starkey moved the sample point on some days slightly upstream to a "field" site. Sigman Dep. 167; Starkey Dep. 192-214. Hudson reported some of this "field" data as monitoring data on its DMRs, but now claims it did not have to. Starkey Dep. 260-262; Starkey Aff., pp. 13-14. Mr. Starkey told Mr. Sigman in 1992 to stop attaching monthly summaries of monitoring data with its DMRs, and that information is no longer reported. Sigman Dep. 192-193. Mr. Starkey also believes that 26 of the "monitor" site designations on lab analyses for TVSS in July, August, and September 1992 are erroneous, including designations for many dates after the filing of plaintiff's complaint. Admit., para. 32, Nos. BW-CV; Starkey Dep. 255-258; Pl. Ex. 14, pp. 2-1287 to 2-1289. And, as we have shown above, the affidavit that Mr. Starkey filed with this Court appears to be false.

Hudson's record-keeping practices have been and still are inadequate. Mr. Sigman is responsible for maintaining Hudson's monitoring records, but could not explain why records prior to May 1991 were missing. Sigman Dep. 147-150. Mr. Starkey said he had to interpret three different documents to determine where samples were taken by Mr. Hurd in the summer of 1992. Starkey Dep. 177-191. As of January 1993, Hudson had not told Mr. Hurd to change his record-keeping practices in any way. Hurd Dep. 64. Hudson has no single document which states who took and analyzed each sample, and instead has referred to employment, vacation and attendance records in addition to its monitoring records. Starkey Dep. 236-242, 244-245. Hudson can't tell when outside laboratory results were used without comparing the lab document with the DMR and seeing if the numbers match up. Id. at 246-248. Hudson's lab records do not identify the analytical method used to analyze each sample. Id. at 248.

Neither Mr. Sigman nor Mr. Starkey has ever been criticized by Hudson management about the way they carried out their work relating to environmental compliance. Sigman Dep. 22-23, Pl. Ex. 23; Starkey Dep. 22, Pl. Ex. 23.

The overall picture that emerges from these facts is a monitoring, reporting, and record-keeping program with a pervasive history of concealment, mistakes, omissions and confusion, both before and after the date plaintiff's complaint was filed. The remedial efforts include the continued cover-up of past unreported data and a reduction in the amount of newer monitoring data that is reported. And the same people who were responsible for the past misconduct are still in charge.

Finally, Hudson's record of concealment extends to its discovery strategy in this litigation. Hudson failed to produce its most recent DMR in response to plaintiff's discovery

requests. Pl. Ex. 22, paras. 6, 14. That DMR just happens to show multiple, serious permit violations. Id. Based on this record, it is clear that Hudson's monitoring, reporting, and record-keeping violations were ongoing when plaintiff's complaint was filed and are likely to continue.

II

PLAINTIFF'S CLAIMS FOR CIVIL PENALTIES AND INJUNCTIVE RELIEF ARE NOT MOOT

Relying on the Supreme Court's decision in Gwaltney and one lower court decision in Atlantic States Legal Foundation v. Pan American Tanning Corp., 807 F. Supp. 230 (N.D.N.Y. 1992), appeal pending, No. 92-7723 (2d Cir., argued Dec. 1992), Hudson argues that plaintiff's claims for civil penalties and injunctive relief are moot because it is currently in compliance with its permit limits. Def. SJ Br. 18-24. Hudson's argument is factually and legally erroneous. Plaintiff's claims are not moot.

A. HUDSON HAS NOT MET ITS "HEAVY BURDEN" OF DEMONSTRATING THAT PLAINTIFF'S CLAIMS FOR INJUNCTIVE RELIEF AND CIVIL PENALTIES ARE MOOT

In Gwaltney, the Court noted in dicta that citizen suits, like any other cases, can become moot. However, the Court cautioned that mootness doctrine "protects plaintiffs from defendants who seek to evade sanction by predictable 'protestations of repentance and reform'" (484 U.S. at 67 (quoting U.S. v. Oregon State Medical Society, 343 U.S. 326, 333 (1952)), by placing a "heavy burden" on defendants claiming mootness to "demonstrate that it is 'absolutely clear that the allegedly wrongful behavior could not reasonable be expected to recur.'" Id. at 66 (emphasis in original)(quoting U.S. v. Phosphate Export Ass'n, 393 U.S. 199, 203 (1968)).

Hudson's mootness argument is based on four months of recent DMRs (November 1992-February 1993) purportedly showing compliance with discharge limits. Def. SJ Br. 22-23;

Starkey Aff., p. 8. However, Hudson's March 1993 DMR reports 4 discharge violations and its December 1992 DMR failed to report 2 such violations.

Hudson also relies on Mr. Starkey's assertion that, when its current remedial efforts are completed, he expects Hudson to remain in compliance in the future. Def. SJ Br. 22-23; Starkey Aff., pp. 8, 12. However, by Mr. Starkey's own admission, those efforts are still not complete. Id. at 12. Until they are, and until there is a considerable record of post-completion compliance, it is obviously premature to conclude that they will be effective. In any event, Hudson has not shown that these measures are a permanent remedy, have a history of effectiveness, or will remain effective for an extended period of time.

In fact, Hudson's own documents show that the center pivot irrigation method was tried once before at the Hope facility and failed. According to an April 9, 1981 letter from Hudson to EPA (Pl. Ex. 24, p. 2):

> The center pivot irrigation system has not proven effective for overland flow process at this instalation [sic]. The water applied to the site will flow down the slopes until it comes to a tire track. It then flows [down] the tire track until [sic] to the lowest point on the slope washing the track out and making a gulley directly to the monitoring site. This washing reduces the retention time of the process and therefore the system efficiency.

This time, Hudson has put gravel in the tire tracks to try to address this problem. Starkey Aff., pp. 8, 11; Def. Ex. 13. However, in his January 19, 1993 deposition, Pat Hurd stated that this problem has already recurred (Hurd Dep. 14, Pl. Ex. 23):

> Q: Have you ever had any problem with the tracks of the pivots creating pathways for the water, water tends to go there rather than elsewhere?
> A: Occasionally.
> Q: Tell me how that happens.
> A: It gets a little wet in the tracks and the wheels will make a little deeper track.
>
> And we'll have to go in there and put some more gravel in there to make it level back up.

Thus, the effectiveness of the center pivot system is in doubt.

Furthermore, Hudson's strategy has been to take minimal and incremental steps toward compliance rather than install the sure fix. This is illustrated by the following colloquy with Mr. Sigman (Sigman Dep. 86-87, Pl. Ex. 23):

> Q. Why did Hudson add the chemicals later rather than at the same time that it installed the DAF?
> A. We wanted to see what the DAF by itself would do. You don't know if adding chemicals did any good unless you know what the unit will do by itself.
> Q. Well, didn't Hydron say they would do some good?
> A. They felt like -- yes, I believe they did make that statement.
> Q. Did you agree with that, that they would do some good?
> A. Yes, I agreed that they would do some good.
> Q. So wouldn't you have gotten better performance by doing the chemicals at the same time that you put in the DAF?
> A. Yes, but how do you know you need that better performance?
> Q. Well, how do you define "need"? I'm not -- you mean whether you need it for permit compliance?
> A. If the unit itself will bring you into compliance, then you don't need to add the chemicals. And if you haven't tried the unit, then you don't know if it will bring it into compliance.
> Q. Is that the -- is that the strategy that you were following at this time, to do one thing at a time to see whether it was enough to work?
> A. Yes.

Hudson used the same strategy with the center pivot system--it did not install it until the chemical addition system was first proven inadequate. Starkey Aff., pp. 3-5. Given Hudson's long history of permit noncompliance, its violations in December 1992 and March 1993, the past failure of the center pivot system, and Hudson's repeated adherence to an incremental trial-and-error compliance strategy, Hudson's evidence is grossly insufficient to meet its "heavy burden" of demonstrating mootness.[15]

[15] The courts have repeatedly denied motions to dismiss on mootness grounds and granted injunctive relief under the Act despite the absence or near absence of recent permit violations. Sierra Club v. C.G. Mfg., Inc., 638 F. Supp. 492, 495 (D. Mass. 1985)(dismissal for mootness

B. EVEN IF PLAINTIFF'S CLAIM FOR INJUNCTIVE RELIEF WERE MOOT, PLAINTIFF'S CLAIM FOR CIVIL PENALTIES IS NOT MOOT

Even if this Court were to determine that plaintiff's claim for injunctive relief were moot, the Supreme Court's decision in Gwaltney still authorizes an assessment of civil penalties against Hudson for its repeated violations of the Act. By the time the Gwaltney case reached the Supreme Court, there was no longer any claim for injunctive relief and the parties stipulated that Gwaltney had not violated the Act after the case was commenced. 484 U.S. at 54. Nevertheless, the Court did not dismiss the action but remanded the case to the lower courts for further jurisdictional findings. Id. at 67. If the mooting of a claim for injunctive relief had deprived the Court of the power to assess penalties, then the Court should not have remanded the case for a penalty determination in Gwaltney.

On remand, the Fourth Circuit held that Gwaltney's compliance subsequent to the filing of a complaint did not moot the citizen plaintiff's action for civil penalties (890 F.2d at 696):

> In our view, the penalty factor keeps the controversy alive between plaintiffs and defendants in a citizen suit, even though the defendant has come into compliance and even though the ultimate judicial remedy is the imposition of civil penalties assessed for past acts of pollution.

The court of appeals concluded that "a suit seeking penalties is intrinsically incapable of being

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denied despite eight months of recent compliance); SPIRG v. Monsanto Co., 29 ERC 1078, 1091 (D.N.J. 1988)(injunction granted despite no violation for 22 months); PIRG v. Yates Industries, supra, 757 F. Supp. at 438 (injunction granted despite only one violation in prior 14 months); PIRG v. Powell Duffryn Terminals, 720 F. Supp. 1158, 1168 (D.N.J. 1989) (injunction granted despite only one violation in prior 13 months), affirmed in part, reversed in part and remanded, 913 F.2d 64 (3d Cir. 1990), cert. denied, 111 S.Ct. 1018 (1991). In these cases, the courts gave significant weight to the defendant's long history of prior violations. E.g., PIRG v. Yates Industries, supra, 757 F. Supp. at 438. That same long history of prior violations is present here.

rendered moot by the polluter's corrective actions" and affirmed an assessment of penalties. 890 F.2d at 696, 698.

The Eleventh Circuit agreed with the Fourth Circuit's decision in Gwaltney in Atlantic States Legal Foundation v. Tyson Foods, supra, 897 F.2d at 1134-1135:

> If, after the complaint is filed, the defendant comes into compliance with the Act, then traditional principles of mootness will prevent maintenance of the suit for injunctive relief as long as there is no reasonable likelihood that the wrongful behavior will recur. However, the mooting of injunctive relief will not moot the request for civil penalties as long as such penalties were rightfully sought at the time the suit was filed. [footnote omitted; emphasis in original]

The court found "most dangerous" the prospect that dismissals based on post-suit compliance would encourage violators to delay the litigation until they could achieve compliance. Such a result "reads the civil penalties provision out of the Clean Water Act." Id. at 1137.[16]

If Gwaltney was not moot despite the absence of any post-complaint violations during five years of litigation, this case cannot possibly be moot. Here, Hudson has reported numerous post-complaint violations, including violations as recently as March 1993. See p. 2 above.

Hudson relies primarily on the decision in Pan American Tanning, supra. That case is wrongly decided. It is flatly inconsistent with Gwaltney. Plaintiff agrees with the United

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[16] These same principles have repeatedly been followed by this Court and other courts in citizen suits under the Act. In Work v. Tyson Foods, Inc., 720 F. Supp. 132, 137-139 (W.D. Ark. 1989), affirmed in pertinent part sub nom. U.S. EPA v. City of Green Forest, 921 F.2d 1394, 1406-1408 (8th Cir. 1990), this Court awarded $43,000 in civil penalties despite the absence of injunctive relief. See also Carr v. Alta Verde Industries, Inc., 931 F.2d 1055, 1064-1065 (5th Cir. 1991); PIRG v. Star Enterprise, supra, 771 F. Supp. at 664-665; State Line Fishing & Hunting Club v. City of Waskom, 754 F. Supp. 1104, 1111-1112 (E.D. Tex. 1991); Tobyhanna Conservation Ass'n v. Country Place Waste Treatment Facility, 769 F. Supp. 739, 742-745 (M.D. Pa. 1991); Atlantic States Legal Foundation v. Universal Tool & Stamping Co., Inc., 735 F. Supp. 1404, 1417-1419 (N.D. Ind. 1990); Sierra Club v. Port Townsend Paper Corp., supra, 28 ERC at 1677-1678; Sierra Club v. C.G. Mfg. Co., supra, 638 F. Supp. at 494-495.

States' March 1993 amicus brief on appeal in that case (Pl. Ex. 25, p. 6):

> The district court erred in dismissing plaintiffs' claim for civil penalties in this case merely because it found that plaintiffs' claim for injunctive relief had become moot. Black letter legal principles allow a party to continue to seek monetary relief despite the mooting of non-monetary claims. This basic legal principle has been applied by the only two appellate courts to consider the issue in the context of Clean Water Act citizen suits. Neither the Supreme Court's Gwaltney opinion nor any constitutional or statutory consideration suggests that the usual rule should not apply to the instant case.

Hudson also cites Atlantic States Legal Foundation v. Eastman Kodak Co., 933 F.2d 124, 128 (2d Cir. 1991). However, as the United States stated in that same amicus brief (Pl. Ex. 25, p. 9):

> To the extent that Eastman Kodak suggests that post-complaint compliance provides a basis for dismissing a citizen's claim for civil penalties, it is out of step with the majority of the case law as well as the Supreme Court's Gwaltney decision * * *.

This Court should therefore hold that plaintiff's claims are not moot.

CONCLUSION

For these reasons, Hudson's motion for summary judgment must be denied.

Respectfully submitted,

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