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 REPLY BRIEF IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT

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I

PLAINTIFF HAS STANDING

Hudson argues that plaintiff lacks standing to prosecute this action. Def. Resp. Br. 1-9. However, Hudson's arguments are contrary to numerous decisions under the Clean Water Act in which, based on facts similar to those presented here, courts have repeatedly found that the standing requirements have been met. Hudson's arguments also raise no disputed factual issues.

A. PLAINTIFF'S MEMBERS HAVE SUFFERED INJURY-IN-FACT

Hudson argues that plaintiff's members have nothing more than a "generalized interest" in environmental protection which is no different than that shared by all citizens. Def. Resp. Br. 1-2. However, this argument simply ignores the specific facts set forth in the affidavits of plaintiff's three members.

Each of those members has a direct environmental and recreational interest in the quality of the creeks immediately downstream from Hudson's discharge point. Each member regularly

observes or uses those creeks, sees them to be seriously polluted, and would enjoy and use the area more if the creeks were less polluted. Pl. Ex. 21.[1] When an individual complains about the pollution of an area, the loss or impairment of that area as a place for environmental and recreational activities is a direct injury to that person's environmental and recreational interests.[2] The members' use of this specific location clearly differentiates them from the public at large. It certainly is not true that everyone in the United States, or even everyone in Arkansas, uses or wants to use these creeks as plaintiff's members have. They therefore have a direct and concrete interest in challenging any activities that may adversely affect the water, the fish, and the wildlife in this area.

Hudson argues that this type of harm is not specific or immediate enough to confer standing. Def. Resp. Br. 1. However, plaintiff's showing in this case is the same as the showing made by other plaintiffs that have been found to suffer injury from illegal discharges in citizen suits under the Act. Based on similar facts, Judge Waters recently held (Arkansas Wildlife Fed-eration v. Bekaert Corp., 791 F. Supp. 769, 776 (W.D. Ark. 1992):

> Here the members have alleged use of the area in question and have indicated their concerns over the effect of the pollutants on the recreational and aesthetic values of the area as well as the effect of such pollutants on the fish caught in the river. We believe these allegations are sufficient to establish an individual injury in fact.

Hudson argues that plaintiff's affidavits contain "no statements reflecting any

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[1] Since Hudson has not disputed the affidavits of plaintiff's members in its response to plaintiff's statement of material facts (PSF ¶ 59), the facts in those affidavits are admitted.

[2] In Lujan v. Defenders of Wildlife, 112 S.Ct. 2130, 2143, n. 8 (1992), the Supreme Court endorsed the proposition that a citizens' group has standing to challenge environmentally harmful activities in the area that its members use. See generally Cass R. Sunstein, What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III, 91 Mich. L. Rev. 163, 224 (1992).

particularized harm." Def. Resp. Br. 2. Hudson does not cite a single case which establishes that plaintiffs in a citizen suit must show actual physical injury from an illegal discharge. Judge Waters rejected this same argument in Bekaert, stating that "[t]he argument * * * that plaintiff must point to a specific injury or harm caused by the defendant is too stringent a requirement." 791 F. Supp. at 777.[3]

Hudson also argues that PC&E's reports under 33 U.S.C. § 1315(b) do not identify any water quality problems for Caney or Bois d'Arc Creeks. Def. Resp. Br. 2; Ford Aff., p. 2. However, the absence of a finding in these reports cannot negate the direct personal knowledge of plaintiff's members or create any issue of material fact. PC&E is not omniscient and its 305(b) reports are not based on comprehensive monitoring data for all of the state's waters. PC&E's 1990 305(b) report indicates that it does not have a monitoring station on Caney or Bois d'Arc Creeks and did not assess 178 of the 389 stream miles in the planning segment which includes those creeks. Pl. Ex. 26, pp. 72, 105, 108. Furthermore, Hudson's permit limits are based on state water quality standards; that is, they are designed to ensure that those standards are met. Starkey Aff., Ex. 2, PC&E Response to Comments, pp. 2-3. A violation of those limits necessarily harms water quality. PIRG v. Powell Duffryn Terminals, Inc., 720 F. Supp. 1158, 1162 (D.N.J. 1989), aff'd in pertinent part, 913 F.2d 64 (3d Cir. 1990), cert. denied, 111

[3] See also SPIRG v. Georgia-Pacific Corp., 615 F. Supp. 1419, 1423-1424 (D.N.J. 1985) (standing found even though defendant's expert stated that its discharge was "so small that it is not discernible"); NRDC v. Outboard Marine Corp., 692 F. Supp. 801, 807-808 (N.D. Ill. 1988)("standing is not undermined because [plaintiff's] members have not explicitly said they are harmed by [defendant's] permit violations"); ASLF v. Universal Tool & Stamping Co., Inc., 735 F. Supp. 1404, 1411-1412 (N.D. Ind. 1990)(A "defendant's assertions that its permit violations did not cause the water to become discolored, unsafe to drink, or unfit for animal life, even if true, are irrelevant in determining [plaintiff's] standing to sue based on its member's injuries").

S.Ct. 1018 (1991). Plaintiff has therefore demonstrated injury in fact.

B. THE MEMBERS' INJURIES ARE TRACEABLE TO HUDSON'S EFFLUENT

Hudson contends that the injuries suffered by plaintiff's members are not fairly traceable to Hudson's permit violations. Def. Resp. Br. 3-5. Based on Mr. Ford's affidavit, Hudson argues that the green slimy appearance in Caney and Bois d'Arc Creeks could also have been caused by animal waste from livestock operations on farms in the area. Id.; Ford Aff., pp. 3-6.

However, Mr. Ford admits in his affidavit that the TVSS, BOD, CBOD and ammonia-nitrogen discharged by Hudson "may give rise to the stated concerns" of plaintiff's members, i.e., that these creeks are green, slimy, and smelly. Ford Aff., pp. 2-3. That admission is sufficient by itself to demonstrate traceability. Plaintiff need only show that there is a "substantial likelihood" that Hudson's conduct caused their injuries. PIRG v. Powell Duffryn Terminals, Inc., supra, 913 F.2d at 72.[4] This is established by showing that (1) Hudson discharged pollutants in violation of its permit into a waterway used by plaintiff and (2) the pollutants cause or contribute to the kinds of injuries alleged by plaintiff. Id. Hudson's DMRs admit the first proposition and Mr. Ford's affidavit admits the second.

Hudson's only remaining argument is that plaintiff must show that no other sources contributed to these creek conditions. That argument is erroneous as a matter of law. The "fairly traceable" requirement "is not equivalent to a requirement of tort causation" and "does not mean that plaintiffs must show to a scientific certainty that defendant's effluent, and defendant's effluent alone, caused the precise harm suffered by plaintiffs." PIRG v. Powell Duffryn

[4] Hudson cites this case with approval in its brief. Def. Resp. Br. 1, n. 1, and 5.

Terminals, Inc., supra, 913 F.2d at 72. As the court stated in SPIRG v. Tenneco Polymers, 602 F. Supp. 1394, 1397 (D.N.J. 1985):

> The effect of the defendant's argument would be to prohibit citizen suits against violations of the [Clean Water Act] unless the violation was so great or the waterway so small that the direct impact of the discharges could be pinpointed. This interpretation of the [Act] would be directly contrary to its intent.

Any requirement that plaintiffs must prove that its members' injuries are specifically traceable to Hudson's discharge "would virtually emasculate the citizen's suit provision by making it impossible for any plaintiff to demonstrate standing." Chesapeake Bay Foundation v. Bethlehem Steel Corp., 608 F. Supp. 440, 446 (D. Md. 1985). Accord, NRDC v. Outboard Marine Corp., supra, 692 F. Supp. at 808. In the recent Bekaert decision, Judge Waters cited these same cases and principles with approval. 791 F. Supp. at 776-777. Consequently, plaintiff's injury is fairly traceable to Hudson's effluent.

C. THE REQUESTED RELIEF WILL REDRESS THE MEMBERS' INJURIES

Hudson argues that plaintiff's injuries are not likely to be redressed by a favorable decision. Def. Resp. Br. 5. However, since Hudson's excessive discharges can harm water quality and fish populations, and plaintiff's members have environmental and recreational interests in the integrity of that water and those populations, a cessation of Hudson's excessive discharges will redress injuries to those interests. As the court stated in PIRG v. Powell Duffryn, supra, 913 F.2d at 73, "[w]here a plaintiff complains of harm to water quality because a defendant exceeded its permit limits, an injunction will redress that injury at least in part." Plaintiff's injuries are redressed "even though the impact of a favorable decision may not by itself be readily noticeable." PIRG v. Yates Industries, 757 F. Supp. 438, 444 (D.N.J. 1991). In addition, civil penalties will redress that injury by deterring Hudson specifically and other permit

holders generally from violating their permits. PIRG v. Powell Duffryn, supra, 913 F.2d at 73; Bekaert, supra, 791 F. Supp. at 777.

D. PLAINTIFF HAS STANDING TO PROSECUTE HUDSON'S MONITORING, REPORTING AND RECORD-KEEPING VIOLATIONS

Hudson's monitoring, reporting and record-keeping violations have injured the environmental and informational interests of plaintiff and its members in two ways. First, absent accurate and complete monitoring and reporting by Hudson of its discharges of pollutants, government agencies are not informed of discharges which are actually or potentially harmful to the environment and human health. As a result, they are impeded from acting in ways to mitigate or prevent such harm. Since plaintiff's members use areas which are within the scope of harm from such discharges, they are injured by a failure to monitor or report such dis-charges. Sierra Club v. Simkins Industries, Inc., 847 F.2d 1109, 1112-1113 (4th Cir. l988), cert. denied, 491 U.S. 904 (1989).

Second, Hudson's violations have prevented plaintiff from using monitoring information to inform its members of the magnitude of the threat posed by Hudson's discharges to human health and the environment, to review and evaluate the effectiveness of enforcement measures by government agencies, and to provide such information and evaluations to its members through its newsletter. Moreland Aff., Pl. Ex. 21. Injuries to informational interests have been held to confer standing. Public Citizen v. U.S. Department of Justice, 491 U.S. 440 (1989); Competitive Enterprise Institute v. NHTSA, 901 F.2d 107, 122 (D.C. Cir. 1990); Colorado Environmental Coalition v. Lujan, 803 F. Supp. 364, 367 (D. Colo. 1992).[5]

[5] Hudson's reliance on Foundation on Economic Trends v. Lyng, 943 F.2d 79, 84-85 (D.C. Cir. 1991), is misplaced. Def. Resp. Br. 6. In that case, the court stated that "[t]he issues

* * * presented by the Foundation's claim of [informational] standing are * * * unnecessary to decide * * *." Id. at 85. In any event, the dissenting opinion in that case states the correct view that an agency's alleged failure to prepare and issue a document required under a federal environmental statute creates cognizable informational injury. Id. at 88.

In any event, the courts, including this Court, have allowed citizens to enforce monitoring and reporting requirements under the Clean Water Act without making separate assessments of standing to enforce those requirements and standing to enforce discharge limits. Bekaert, supra, 791 F. Supp. at 775-777, 785 (enjoining defendant to comply with its monitoring and reporting requirements); International Union v. Amerace Corp., 740 F. Supp. 1072, 1079-1080 (D.N.J. 1990); PIRG v. GAF Corp., 770 F. Supp. 943, 954 (D.N.J. 1991); PIRG v. Star Enterprise, 771 F. Supp. 655, 669 (D.N.J. 1991); PIRG v. U.S. Metals Refining Co., 681 F. Supp. 237, 240 (D.N.J. l987); PIRG v. Witco Chemical Corp., 31 ERC 1571, 1581 (D.N.J. 1990); PIRG v. Yates Industries, Inc., supra, 757 F. Supp. at 451-452. Since plaintiff has standing to enforce Hudson's discharge limits, it also has standing to enforce Hudson's monitoring, reporting, and record-keeping requirements.

II

PLAINTIFF COMPLIED WITH STATUTORY NOTICE REQUIREMENTS

Hudson argues that 2716 of the 4238 violations listed in plaintiff's motion for partial summary judgment should be dismissed because they were not listed in plaintiff's notice letter. Def. Resp. Br. 9-12. Specifically, Hudson argues that all of the reporting and record-keeping violations and 50 of the 58 monitoring violations should be dismissed. Id. at 12.

In support of this argument, Hudson relies entirely on the March 31, 1993 decision in PIRG v. Hercules, Inc., D.N.J., Civil No. 89-2291, Def. Addendum 1. However, that case is readily distinguishable, since the plaintiffs' notice letter "did not make any mention whatsoever of monitoring, reporting, or record-keeping violations" (emphasis in original). Slip op. at 11. Here, plaintiff's notice letter did list specific monitoring violations. Def. Ex. C, List, Nos. 30-

31, 42-43.[6] Furthermore, that letter stated (id., p. 2):

> In addition to the violations listed on the enclosed list, Hudson has violated its permit by failing to comply with the reporting requirements in its permit by failing to report all of its violations of its maximum discharge limitations. It also appears that Hudson has violated the monitoring requirements of its permit by failing to monitor its discharges with the frequency required by its permit.

The letter also noted many instances in which the number of violations was uncertain because of "incomplete data." Id., List, p. 3, note *.[7]

The monitoring, reporting and record-keeping violations listed in plaintiff's motion for partial summary judgment are within the scope of this notice. Hudson's first major error is its failure to report at least 238 measured values on its DMRs. As a direct result of that misconduct, Hudson underreported its frequency of sampling, underreported the number of values which exceeded its maximum discharge limits, miscalculated its monthly averages, and underreported the number of exceedances in the "No. Ex." column on its DMRs. Pl. SJ Br. 22-23. All of these violations are interdependent, and they all relate to plaintiff's allegation in its notice letter that Hudson had underreported its data.

Hudson's second error is its failure to monitor with the frequency required by its permit.

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[6] Plaintiff's motion for partial summary judgment lists 8 monitoring violations that correspond to these allegations in the notice letter. Pl. Ex. 5, Table 11, line 15.

[7] The present case is also distinguishable because plaintiff's complaint contains far more specific allegations of monitoring and reporting violations than did the complaint in Hercules. Complaint, paras. 1, 17, 18, 24, 28.C, and Appendix A, Nos. 20-30, 32, 34, 38, 53, 56-59, 63, 70, 74, 78, 80, 85, 97, 101, 108, 113-115, 118, 129, 133, 141, 146-148, 155, 168, 174, 176, 186, 200, 216, 225, 235, 274-275, 307, 327, 336, 340-342, 347, 370, 386, 400, 440, 453, 476, and 479. In Hercules, plaintiff made a general allegation of improper monitoring but listed only discharge violations. Slip op. at 5. Plaintiff's complaint in this case was served on EPA and the Department of Justice pursuant to 33 U.S.C. § 1365(c)(3).

All 58 of the monitoring violations alleged by plaintiff are in this same category. Pl. SJ Br. 23-24.

Hudson's third major error is the incompleteness and inaccuracy of its monitoring records. Plaintiff discovered these record-keeping violations as a direct result of its investigation of the first two errors. Plaintiff cannot prove a failure to report or monitor except through Hudson's own records. When Hudson has no records to show that it monitored its discharge, plaintiff is prevented from proving a discharge or reporting violation. That is what happened here. Pl. SJ Br. 24; PSF ¶ 25.

Plaintiff admits that the exact date and specific identity of most of Hudson's violations of its monitoring, reporting and record-keeping requirements were not listed in the notice letter. However, if the Act and EPA regulations were construed to require placement of that information in notice letters, those permit requirements would become unenforceable.[8] Plaintiff obtained that specific information only after eight months of discovery into Hudson's thousands of pages of internal monitoring records, including multiple document requests and depositions of six of Hudson's employees. As Hudson admits, "[t]he Federation has no right to inspect any of these private records * * *." Def. Opp. Br. 6, n. 2. In some instances, the deposition testimony of Hudson's employees is in direct conflict on how to interpret its own monitoring records. PSF ¶s 23-25. In short, Hudson's position would require plaintiff to do the impossible--allege the specific date and identity of violations, even though the facts are unknowable because Hudson

[8] The Hercules court suggested that plaintiffs could still enforce the unlisted violations by filing a new notice letter. Slip op. at 19. But the court failed to recognize that its decision will lead future defendants to refuse to allow discovery of any violations not listed in the notice letter.

refuses access to them.

Indeed, if plaintiff attempted to allege such facts based on speculation, it would risk a violation of Rule 11 and be subject to sanctions. Plaintiff complied with the notice requirement the most that can realistically be expected.[9]

Plaintiff's position makes notice of monitoring, reporting and record-keeping requirements somewhat uncertain and non-specific. But as the Supreme Court has stated (Bigelow v. RKO Pictures, Inc., 327 U.S. 251, 265 (1946)):

> The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created. That principle is an ancient one * * *. * * * [T]he wrongdoer may not object to the plaintiff's reasonable estimate of the cause of the injury and of its amount, supported by the evidence, because not based on more accurate data which the wrongdoer's misconduct has rendered unavailable. [citations omitted]

"The NPDES program fundamentally relies on self-monitoring." Sierra Club v. Union Oil Co., 813 F.2d 1480, 1491 (9th Cir. l987), vacated and remanded, 485 U.S. 931 (l988), judgment reinstated and remanded, 853 F.2d 667 (9th Cir. l988). Hudson should not reap the benefit of its own concealment and inadequate self-monitoring.

Courts have interpreted the notice requirements of the Clean Water Act and similar statutes prior and subsequent to Hallstrom without the rigid literalism set forth in the Hercules decision.[10] In Dague v. City of Burlington, 733 F. Supp. 23, 27-28 (D.Vt. 1990), affirmed, 935

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[9] What plaintiff did is to infer monitoring violations from the absence of data on some of Hudson's plant DMRs (Pl. Ex. 8), and infer reporting violations from inconsistencies between plant and NPDES DMRs (Pl. Exs. 7, 8). However, there was no way for plaintiff to know that Hudson reported only two of its five samples per week until Hudson produced its internal monitoring records and Mr. Sigman admitted it at his deposition.

[10] Several pre-Hallstrom decisions upheld notice letters that did not strictly comply with the content requirements in EPA's regulation on notice letters. National Wildlife Federation v.

F.2d 1343, 1354 (2d Cir. 1991), reversed in part on other grounds, 112 S.Ct. 2638 (1992), the court upheld a notice letter even though it failed to allege a specific statutory violation, because literal application of the regulatory requirements "would produce a result 'demonstrably at odds with the intention of its drafters." See also Klickitat County v. Columbia River Gorge Comm'n, 770 F. Supp. 1419, 1423-1424 (E.D. Wash. 1991). Similarly, here, literal application of the regulatory requirements would undermine Congressional intent that "the reporting and records retention requirements of the NPDES permit * * * are central to adequate administration and enforcement of limits on substantive discharges under the Clean Water Act." Sierra Club v. Simkins Industries, supra, 847 F.2d at 1115.

Even if Hercules is followed in this case, that decision allows prosecution of unlisted post-complaint violations if they are of the same type as those listed in the notice letter. Slip op. at 21-22. See also Simkins, supra, 847 F.2d at 1114, n. 6. For similar reasons, unlisted violations which occurred in the 60-day notice period prior to the filing of the complaint should be actionable. Chesapeake Bay Foundation v. Bethlehem Steel Corp., supra, 608 F. Supp. at 450-451. Many violations fall in these categories. Pl. Ex. 5, Table 4, Nos. 233-238; Table 6, Nos. 581-650; Table 7, Nos. 67-78; Table 11, No. 18.

In any event, regardless of Hudson's liability for unlisted violations, plaintiff is entitled to present evidence of those violations at the relief stage of this case. The Act provides that this

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Consumers Power Co., 657 F. Supp. 989, 998 (W.D. Mich. l987), reversed on other grounds, 862 F.2d 580 (6th Cir. l988); Fishel v. Westinghouse Electric Corp., 6l7 F. Supp. 1531, 1536 (M.D. Pa. l985)(dates of violations not listed); Comite Pro Rescate de La Salud v. Prasa, 693 F. Supp. 1324, 1333-1334 (D.P.R. l988), vacated and remanded in part on other grounds, 888 F.2d 180 (1st Cir. 1989), cert. denied, 494 U.S. 1029 (1990).

Court, in determining civil penalties, "shall consider * * * any history of such violations, any good-faith efforts to comply with the applicable requirements, * * * and such other matters as justice may require." 33 U.S.C. § 1319(d). In a closely analogous situation, the Eighth Circuit has ruled that evidence of prior violations is admissible to show knowledge and culpability even if liability for those violations is barred by a statute of limitations. EPA v. City of Green Forest, 921 F.2d 1394, 1408-1409 (8th Cir. 1990), cert. denied, 112 S.Ct. 414 (1991).

III

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

Hudson continues to insist that Gwaltney requires proof of a post-complaint violation in order to prevail at trial. Def. Resp. Br. 13, 17-19. This is just plain wrong. On remand, the Fourth Circuit in Gwaltney affirmed the district court's award of penalties despite the absence of any post-complaint violations, and based instead on an affirmative answer to the question of "whether, at the time suit was brought, there was a reasonable likelihood that this past polluter would continue to pollute in the future." Chesapeake Bay Foundation v. Gwaltney of Smithfield, 890 F.2d 690, 693-695 (4th Cir. 1989).

Without submitting any supporting documents from PC&E, Hudson argues that all of its post-complaint discharge violations are shielded by the bypass defense. Def. Resp. Br. 14-15. Plaintiff deposed Randall Oberlag, the PC&E engineer responsible for enforcing Hudson's permit, on May 3, 1993. Pl. Ex. 27. Mr. Oberlag could not recall any document from PC&E that specifically authorized a bypass. Oberlag Dep. 4-7, 11-14. He never authorized Hudson to bypass its discharge or to violate its permit, including the violations reported in March 1993. Id. at 15-16, 21, 40. Hudson's bypass defense is therefore still baseless.

Mr. Oberlag also reinforced plaintiff's claim that, at the time plaintiff's complaint was filed, Hudson was likely to have continuing permit violations. He anticipated that Hudson would continue to violate its permit after June 1992 until its treatment system was upgraded. Id. at 17. He said that the nitrogen uptake of bermuda grass, which Hudson is only now installing, is greater than the nitrogen uptake of the rye grass that Hudson installed in late 1992 as a temporary measure. Id. at 18-19. He was also not aware until several weeks ago in 1993 that Hudson was underreporting its monitoring data, and he considers that a serious matter. Id. at 21-25.[11]

Contrary to Hudson's argument (Def. Resp. Br. 15-17), Hudson has committed post-complaint monitoring, reporting, and record-keeping violations. See Pl. SJ Opp. Br. 2, 11-12. Hudson only monitored its discharges for CBOD once during the third week in September 1992. Pl. Ex. 5, Table 11, No. 18. Hudson discharged wastewater on four days that week--Monday, Tuesday, Wednesday and Friday, but sampled only on Wednesday. Pl. Ex. 8, p. 2-0785 (Sept. 14-18). Hudson argues that it did all it could because, when it tried to sample again on Thursday, there was no flow. Def. Resp. Br. 15-16; Starkey Supp. Aff., para. 8. However,

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[11] The supplemental Starkey affidavit (Def. Ex. A, para. 10) claims this meeting occurred on April 15, 1992. This must be a typographical error and refer instead to 1993. Mr. Starkey testified at his deposition on April 14, 1993 that he had still not informed PC&E of the reporting violations. Pl. Ex. 2, p. 263.

Hudson cites Judge Waters' statement in the Bekaert decision that a reporting violation does not continue until a corrected DMR is filed. Def. Resp. Br. 17; 791 F. Supp. at 781. Plaintiff submits that Judge Waters was mistaken on this point. Otherwise, permittees could conceal their violations indefinitely, even after a citizen suit was filed, with no liability for penalties. However, the Court need not reach that issue here, since Hudson has reporting violations both before and after the filing of plaintiff's complaint. Once a continuing violation is shown, the Court can impose penalties for both pre-complaint and post-complaint violations. PIRG v. Carter-Wallace, 684 F. Supp. 115, 118-119 (D.N.J. 1988).

Hudson's regular monitoring days were Wednesday, Thursday and Friday, and it occasionally monitored on Monday and Tuesday. Pl. Ex. 1, pp. 169-170; Pl. Ex. 2, pp. 264-265. Hudson gives no reason why it could not have monitored on Monday, Tuesday or Friday of that week, when it discharged wastewater on each of those days.

Hudson next argues that it kept accurate records of the location of sampling on August 24 and 25 and September 8 and 9, 1992. Def. Resp. Br. 16; Def. Statement of Material Facts as to Which There is a Genuine Issue ("DSF"), paras. 24-25. However, the only records it cites for these dates (Pl. Ex. 14, 2-0144, and Pl. Ex. 8, 2-0785) are weekly and monthly summaries which contain no information on sampling location. Starkey Supp. Aff., para. 9. Instead, Mr. Starkey's supplemental affidavit confirms that his litmus test for determining whether samples were taken at the monitoring site is whether a CBOD result appears on these summaries, even if Mr. Hurd's contemporaneous written record of where he took the sample, i.e., his diary, says something completely different. Id., para. 3. This is historical revisionism, not accurate record-keeping.

Hudson further argues that it has monitoring records to pinpoint the "when" and "who" for its sampling and analysis. Def. Resp. Br. 16-17; Starkey Aff., p. 12. However, Hudson's position is that it is sufficient if it has to consult two or three documents, including its employment, vacation, and leave records, to determine who was on duty at what time and then infer that that was the person who took or analyzed the sample. Id.; Pl. Ex. 2, pp. 233-234, 236-242, 244-245; PSF ¶ 43. This is historical reconstruction, not accurate record-keeping.

In its brief in opposition to defendant's motion for summary judgment, plaintiff identified new post-complaint monitoring and reporting violations based on recently-produced monitoring

records. Pl. SJ Opp. Br. 2. Two days after that brief was filed, Hudson sent plaintiff, for the first time, plant DMRs for September, November and December 1992. Pl. Ex. 28. Those records are inconsistent in several ways with the weekly summaries that plaintiff analyzed in its prior brief: they show additional sampling for TVSS and O&G in November and December 1992, and the ammonia-nitrogen values for December 28 and 29, 1992 (which appear to have been erased or whited-out and then corrected on our copy) show permit compliance, rather than the violations shown on the weekly summary.

It is, of course, outrageous that Hudson did not disclose this material earlier and prior to plaintiff's deposition of Hudson's employees. That delay made it impossible for plaintiff to verify these new documents. Nevertheless, the conflicts between these documents show that Hudson is still not keeping accurate records. Furthermore, even if we accept the new documents at face value, they still show monitoring violations. Hudson monitored for O&G once in the first 17 days of November 1992 and twice in the first 27 days of December 1992. No matter how you slice those weeks, that is not the once-a-week sampling that Hudson's permit requires, or that Hudson reported performing on its DMRs for those months. Def. Exs. 19, 20.[12]

Finally, Hudson argues that jurisdiction must be viewed on a parameter-by-parameter basis. Def. Resp. Br. 19-21. While the courts are split in more than two ways on this issue,[13]

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[12] Hudson also underreported on its December 1992 DMR that its maximum TVSS reading in that month was 14 mg/l, because the weekly summary shows a TVSS value of 25 mg/l on December 23. Compare Def. Ex. 20 with Pl. Ex. 22, p. L7.

[13] Compare Sierra Club v. Port Townsend Paper Corp., 28 ERC 1676, 1678 (W.D. Wash. 1988)(no parameter-by-parameter analysis required), with Allen County Citizens v. BP Oil Co., 762 F. Supp. 733, 739-741 (N.D. Ohio 1991)(such analysis is required), with Arkansas Wildlife Federation v. Bekaert Corp., supra, 791 F. Supp. at 780 (taking a compromise approach).

Hudson's argument is not supported by any of those decisions. First, Hudson admits that it has had post-complaint discharge violations for TVSS, Am/N and CBOD, and those parameters comprise 83% of its violations. Def. Resp. Br. 21; Pl. SJ Br. 21-22. Second, even courts that have adopted a parameter-by-parameter approach have applied it pragmatically, and have evaluated whether different violations "were due to distinct equipment and operational failures, and were corrected by distinct engineering solutions" (Gwaltney, 890 F.2d at 698), or whether different violations "are related to the [same] basic underlying problem" (NRDC v. Texaco, 800 F. Supp. 1, 14 (D. Del. 1992)). Here, Hudson's upgraded system affected all pollutant parameters, because Hudson has only one treatment system with one outfall. For example, while there have not been post-complaint BOD violations, Mr. Starkey admitted that a high Am/N can cause a high BOD, and that the center pivot system is designed to address both BOD and Am/N levels. Pl. Ex. 2, pp. 39, 64, 106-108, 298-299. In addition, as we have shown, Hudson's repeated and continuing failure to comply with its self-monitoring obligations creates a continuing risk of monitoring, reporting and record-keeping violations. Pl. SJ Opp. Br. 11-18. This Court therefore has jurisdiction over all of Hudson's permit violations.

IV

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

Hudson has raised no factual defenses to the overwhelming majority of plaintiff's alleged violations. The few factual and legal defenses it has raised are erroneous. Hudson's strategy is

to challenge a few numbers and then say plaintiff's whole analysis is tainted.[14]

A. PLAINTIFF HAS NOT "DOUBLE-COUNTED" ANY PERMIT VIOLATIONS

Hudson argues that plaintiff has "double-counted" violations by treating daily maximum and monthly average violations for the same parameter in the same month as separate violations. Def. Resp. Br. 22-23. While the courts are split on this issue,[15] plaintiff's method is squarely supported by the plain language and legislative history of the Act. The Act authorizes a civil penalty up to $25,000 "per day of each violation." 33 U.S.C. § 1319(d). The terms "per day" and "each violation" refer to two different measures, both of which must be given meaning. To do so, this phrase must be interpreted as authorizing a separate penalty, up to $25,000, for each day on which each violation of a permit limitation occurs. The legislative history of this phrase confirms that it was intended "to clarify that each distinct violation is subject to a separate daily penalty assessment of up to $25,000." S. Rep. No. 50, 99th Cong., 1st Sess. 25 (1985).

Maximum and average limits serve different purposes. U.S. v. Amoco Oil Co., 580 F. Supp. 1042, 1051 n. 3 (W.D. Mo. l984). The setting of maximum limits at twice the level of average limits recognizes that environmental damage can occur both from large, discrete discharges of pollutants in the short term and from discharges of lower average volume occurring over the long term. Chesapeake Bay Foundation v. Gwaltney of Smithfield, 791 F.2d 304, 307

[14] For example, Hudson takes a minor typographical error in a subheading of plaintiff's brief (which misstated the total number of violations) and inflates it into a condemnation of plaintiff's entire analysis. Def. Resp. Br. 22, n. 18.

[15] Compare ASLF v. Tyson Foods, 897 F.2d 1128, 1140 (11th Cir. 1990)(supporting Hudson's position), with PIRG v. Powell Duffryn Terminals, supra, 913 F.2d at 77, n. 22 and 78, and NRDC v. Texaco, supra, 800 F. Supp. at 22 (supporting plaintiff's position).

n. 6, 315 n. 17 (4th Cir. 1986). Therefore, where a single sample is taken in a month and it causes an exceedance of both the average and maximum limits, two separate violations are established. PIRG v. Powell Duffryn Terminals, supra, 913 F.2d at 78; NRDC v. Outboard Marine Corp., supra, 692 F. Supp. at 820-821; NRDC v. Texaco, supra, 800 F. Supp. at 22; PIRG v. Yates Industries, supra, 757 F. Supp. at 452 n. 8.

B. PLAINTIFF'S CALCULATION OF DISCHARGE VIOLATIONS IS CORRECT

Hudson admits that it has violated its discharge limits. Starkey Aff., pp. 2-4; Starkey Supp. Aff., para. 6. Hudson's only fact-based challenge to plaintiff's calculation of 728 maximum and average discharge violations is that its measured values for April 6, 14, and 20 and September 11, 1992 represent field sample data that did not have to be reported. DSF 21-23, 37-40; Starkey Supp. Aff., paras. 2, 7. Even if Hudson's claim were correct, it would only affect 12 maximum violations (Pl. Ex. 5, Table 6, Nos. 447-448, 462-465, 477-480 and 647-648). It could not affect any average violations, because plaintiff has used the average that Hudson certified under penalty of perjury as accurate on its NPDES DMRs for these two months. Pl. Ex. 5, Table 7, Nos. 56-60, 77-78.

Mr. Starkey's evidence of field samples on these dates is insufficient as a matter of law. First, Mr. Hurd, Hudson's sample-taker on these dates, testified, and his contemporaneous diary confirms, that April 6, 14 and 20 were monitoring site samples. Pl. Ex. 12, pp. 44-47; Pl. Ex. 29, pp. 2-0825, 2-0827, 2-0829. Mr. Starkey's contrary conclusion, which is inconsistent with his deposition testimony (Pl. Ex. 2, pp. 208-209), is based entirely on an inference drawn from Hudson's alleged "established company policy" of not running CBOD analysis on field samples and the absence of a record of CBOD analysis on those dates. Starkey Supp. Aff., para. 3.

However, Mr. Starkey admitted at his deposition that this policy was subject to "exceptions," "error," and "confusion." Pl. Ex. 2, pp. 178-179, 181, 189. Second, Hudson reported to EPA and PC&E that it took one of its two required weekly Am/N readings during the second week of April 1992 on April 6. Pl. Ex. 8, p. 1-0231 (26.50 mg/l). If that was a field sample, Hudson misrepresented the data on its DMR and failed to take the required two samples for Am/N that week. Third, Hudson reported to EPA and PC&E that it took one of its two required weekly readings for CBOD, TVSS and Am/N on September 11, 1992. Pl. Ex. 8, p. 2-0785. By Mr. Starkey's own admission, if a CBOD sample was taken, it must be a monitoring site sample. Starkey Supp. Aff., para. 3. In these circumstances, there is no genuine issue for trial, because "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

C. PLAINTIFF'S CALCULATION OF REPORTING VIOLATIONS IS CORRECT

Hudson admits that it did not report all of its monitoring data. Starkey Aff., pp. 13-14; Starkey Supp. Aff., para. 6. Hudson makes only three arguments. First, Hudson repeats the erroneous argument that plaintiff's data base is corrupted by field sample data for three days in April 1992. Def. Resp. Br. 23; DSF ¶s 29, 33, 35, 37-40; Starkey Supp. Aff., paras. 7, 11. In any event, that argument would affect only 19 violations. Pl. Ex. 5, Table 3, Nos. 39-40 (still violations, but actual frequency reduced from 5/7 to 4/7); Table 4, Nos. 208, 216-217, 223-224; Table 8 (12 fewer unreported maximum violations in 4/92). Second, Hudson correctly points out some transcription errors that have no effect on the number of violations. DSF ¶s 29-31.[16]

[16] Plaintiff mistranscribed the TVSS value for June 18 and 25 in its statement of facts. PSF ¶ 29 bv. and bw; DSF ¶ 29. However, regardless of what the correct value is, it was still not reported or used by Hudson to calculate its DMRs. Plaintiff also agrees that it

Third, Hudson complains that plaintiff has not sufficiently explained its calculations. Def. Resp. Br. 23; Starkey Supp. Aff., para. 11. This vague complaint does not raise any issue of fact. Plaintiff stands by its detailed explanation. PSF ¶s 27-37; Pl. Ex. 5, paras. 9-13, 17.

D. PLAINTIFF'S CALCULATION OF MONITORING VIOLATIONS IS CORRECT

Hudson contests only seven of the 58 monitoring violations calculated by plaintiff. Def. Resp. Br. 23-24; Starkey Supp. Aff., para. 8. Hudson's argument raises no issue of fact. Hudson's permit requires certain frequencies of sampling per "week." Pl. Ex. 3, Part I, pp. 1-2. The definition section of the permit refers to a "calendar week." Def. Ex. 1, Part IV, p. 2, para. A.18.[17] Plaintiff's calculations are based on a calendar week, i.e., Sunday through Saturday. As Mr. Starkey explained at his deposition, his calculations are not. Pl. Ex. 2, pp. 267-277. In his words, "I am saying that we have the right to define our week any way we choose to." Id. at 270. The interpretation of NPDES permit terms is purely a question of law. E.g., SPIRG v. AT&T Bell Laboratories, 617 F. Supp. 1190, 1205 (D.N.J. 1985). Plaintiff's interpretation is the correct one.[18]

E. EXCEPT FOR 2 VIOLATIONS, PLAINTIFF'S CALCULATION OF RECORD-KEEPING VIOLATIONS IS CORRECT

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mistranscribed the dates in PSF ¶ 30 i. (should be 11/29/91) and ¶ 31 q. (should be 12/19/91). DSF ¶s 30, 31. Again, this error was harmless since the measured values were still not reported. These errors also did not affect plain-tiff's calculation of discharge violations because the correct values were used in Pl. Ex. 5, Table 2, Nos. 167, 182, 307, and 312, and Table 2 was the basis for plaintiff's calculations.

[17] Plaintiff's copy of the permit is missing this page.

[18] Mr. Starkey also argues that sufficient monitoring was performed from September 14-18, 1992. Starkey Supp. Aff., para. 9. We have shown above (p. 16) that this is incorrect.

Mr. Starkey admitted at his deposition that Hudson did not have hundreds of monitoring records for specific dates listed in plaintiff's requests for admission. PSF ¶s 41-42; Pl. Ex. 2, pp. 250-253. Despite that admission, Hudson now makes a blanket denial of record-keeping violations. Def. Resp. Br. 24; Starkey Supp. Aff., para. 9. With a very few exceptions, that denial is not supported by any evidence and therefore cannot defeat a motion for summary judgment. The only exceptions relate to five days. Plaintiff agrees that Hudson has records for CBOD analysis on May 20-21, 1992, and therefore drops the 2 violations listed in Pl. Ex. 5, Table 10, No. 7. Starkey Supp. Aff., para. 9.a.; Def. Ex. 1. Plaintiff disagrees that Hudson's weekly and monthly summaries of TVSS results for June 3-6, 1992 meet the permit requirement for retention of "records of all monitoring information" (Pl. Ex. 3, Part II, p. 9, para. C.7.), since those summaries are not in the form used by Hudson's laboratory to record TVSS measurements. Compare Starkey Supp. Aff., para. 9.b. and Def. Ex. 2 with Pl. Ex. 14, pp. 2-1278 to 2-1289. Again, this issue of permit interpretation and application is purely a question of law.

CONCLUSION

For these reasons, and except for the 2 violations deleted above, plaintiff's motion for partial summary judgment should be granted.

Respectfully submitted,

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