UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI

GULF RESTORATION NETWORK,	)	
Plaintiff,	)	Case No.: 2:12-cv-36-KS-JMR
v.	)	Judge: Keith Starrett
CITY OF HATTIESBURG,	)	Magistrate: John M. Roper
Defendant.	)	
	)	

PLAINTIFF GULF RESTORATION NETWORK'S MEMORANDUM IN SUPPORT OF ITS PARTIAL MOTION FOR SUMMARY JUDGMENT ON LIABILITY

Plaintiff Gulf Restoration Network ("GRN") respectfully submits this Memorandum in Support of its Partial Motion for Summary Judgment that there is no genuine dispute of fact that Defendant City of Hattiesburg ("the City") is liable for at least 5,464 violations of the Clean Water Act under 33 U.S.C. § 1311(a) ("Except as in compliance with [a permit issued under the Act and other exemptions not at issue here], the discharge of any pollutant by any person shall be unlawful."). GRN will ultimately seek an order compelling the City to comply with its Clean Water Act permits and pay an appropriate civil penalty for its violations. In this motion, GRN seeks summary judgment on the issue of liability for the violations detailed below.[1]

INTRODUCTION

Despite multiple Agreed Orders between the Mississippi Commission on Environmental Quality ("MCEQ") and the City since 1992, the City's discharges from its sewage and wastewater treatment lagoons to the Leaf and Bouie rivers continue to violate limits set in the

[1] The violations at issue in this motion compose the bulk of the violations at issue in the case. GRN may address liability for the "narrative violations" by subsequent motion or at the trial scheduled for October 2014. The issue of the appropriate remedies for any violations for which this Court finds the City liable is reserved for trial.

City's Clean Water Act permits. Between March 2007 and August 2013, the City's unlawful discharges to these rivers totaled 5,464 violations of the Clean Water Act. These violations include illegal concentrations of fecal coliform, a bacterium indicating fecal contamination, which the City has discharged in concentrations *eight times* the permitted limit. Other violations involve high biological oxygen demand, which reduces the amount of oxygen for aquatic organisms, and high concentrations of total suspended solids, which block light to submerged vegetation. Indeed, MDEQ inspectors have described the City's discharges as "dark brown in appearance." *See, e.g.*, GRN's Mot. for Summ. J. Ex. A, MDEQ Water Compliance Inspection Report, 7/8/08.

Like its earlier enforcement efforts, MCEQ's most recent effort—an October 5, 2011 Agreed Order (amended on February 13, 2012)—fails to assure that the City will meet its obligations under the Clean Water Act. *See* Amended Agreed Order (ECF No. 8-5). The Amended Agreed Order relaxes and suspends various permit requirements until 2017 while the City decides on and implements a possible solution to its wastewater treatment problems at the South Lagoon. Further, it imposes no penalties for the City's failure to meet important decision, design, and construction milestones for a new wastewater treatment process, and imposes only a $100 per day penalty if the City fails to demonstrate compliance with its permit limits by May 31, 2017. Amended Agreed Order ¶¶ 4-5 (ECF No. 8-5).

To illustrate the ineffectiveness of the Amended Agreed Order, that order established a "milestone deadline[ ]" that required the City to decide on an engineering solution for its wastewater treatment problems at the South Lagoon "[o]n or before May 31, 2013." Amended Agreed Order ¶ 4 (ECF No. 8-5). But recently the City told this Court that it "believes that a final decision regarding [the engineering solution, whether mechanical plant or land application

system] will be made by March 31, 2014." City's Mot. to Amend Case Mgmt. Order, Nov. 5, 2013, 3 (ECF 47). The City's decision on May 31, 2013, therefore, did not meet the "milestone deadline" as the Amended Agreed Order required because it is still deciding, and the City does not expect to have a firm plan for at least another four months. This puts the City at least ten months behind the ordered schedule—but there is no mechanism in the Amended Agreed Order by which MCEQ can do anything about the City missing its deadline.

GRN filed this suit because over the past 20 years MCEQ action has failed to force the City to comply with the Clean Water Act—allowing the City's illegal discharges to continue to foul the Bouie and Leaf rivers with inadequately-treated sewage and industrial wastewater. "The citizen-suit provision is a critical component of the CWA's enforcement scheme, as it 'permit[s] citizens to abate pollution when the government cannot or will not command compliance.'" *Envtl. Conservation Org. v. City of Dallas*, 529 F.3d 519, 526 (5th Cir. 2008) (quoting *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 62 (1987)); *see also Atl. States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1136 (11th Cir. 1990) ("[C]itizen suits are an important supplement to government enforcement of the Clean Water Act, given that the government has only limited resources to bring its own enforcement actions."). Here, the City's violations are chronic, numerous, and ongoing. The City's own reports show ongoing violations from April 2012 through August 2013—well after GRN filed this lawsuit on March 2, 2012, thus establishing this Court's jurisdiction and the City's undisputed liability under the Act. 33 U.S.C. § 1311(a). As this Court also acknowledged: "It is undisputed that the violations are ongoing, and that they will be for some time." Mem. Op. & Order, Nov. 6, 2012, 7 (ECF 23).

STATUTORY FRAMEWORK

Congress enacted the Clean Water Act "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To meet this objective, the Act prohibits "the discharge of any pollutant by any person" except as authorized by certain provisions of the Act. *Id.* § 1311(a). The provision relative to this case is the National Pollutant Discharge Elimination System ("NPDES"), which allows the Administrator of the Environmental Protection Agency ("EPA") or an authorized State to issue NPDES permits for the discharge of pollutants to regulated waterbodies. *Id.* § 1342. The Mississippi Commission on Environmental Quality administers the NPDES program for the State of Mississippi through the Mississippi Department of Environmental Quality. *See* MISS. CODE ANN. §§ 49-17-13, 49-17-29.

NPDES permits set forth "effluent limitation[s]," which are "any restriction . . . on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters . . . ." 33 U.S.C. § 1362(11). "NPDES permits impose limitations on the discharge of pollutants . . . in order to improve the cleanliness and safety of the Nation's waters." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 174 (2000). Further, "[n]oncompliance with a permit constitutes a violation of the Act." *Id.* (citation omitted)*; Texas Mun. Power Agency v. EPA*, 836 F.2d 1482, 1489 (5th Cir. 1988) ("The CWA is strong medicine. Section [1311(a)] prohibits the discharge by any person of any pollutant into the nation's waters except that which the EPA expressly allows in an NPDES permit.").

The Clean Water Act contains a citizen suit provision, which authorizes any citizen to file a civil action "against any person . . . who is alleged to be in violation of [ ] an effluent standard or limitation under [the Act] . . . ." 33 U.S.C. § 1365(a). Section 1365(f) defines "effluent

standard or limitation" to include "a permit or condition thereof issued under section 1342 of this title," *i.e.,* an NPDES permit. *Id.* § 1365(f)(6). "[D]istrict courts [ ] have jurisdiction . . . to enforce [ ] effluent standard[s] or limitation[s] . . . and to apply any appropriate civil penalties under section 1319(d)" of the Clean Water Act. *Id.* § 1365(a).

FACTS

The City owns and operates two wastewater treatment lagoons in Hattiesburg, Mississippi: the South Lagoon, located at 1903 East Hardy Street and the North Lagoon, located at 3401 Lakeview Road. MDEQ issued two NPDES permits to the City, which regulate wastewater discharges from these lagoons into the receiving waterbodies. NPDES Permit No. MS0020303 allows the City to discharge 20 million gallons a day from the South Lagoon into the Leaf River and NPDES Permit No. MS0020826 allows the City to discharge 4 million gallons a day from the North Lagoon into the Bouie River. *See* Mot. for Summ. J. on Liab. Ex. B, South Lagoon NPDES Permit No. MS0020303, at i of i and 1 of "Limits and Monitoring" & Ex. C, North Lagoon NPDES Permit No. MS0020826, at i of i and 1 of "Limits and Monitoring."

These permits allow these discharges subject to effluent limitations. The South Lagoon NPDES Permit No. MS0020303 mandates the following effluent limitations:

Pollutant	Effluent Limitation	Type of Limitation
Fecal Coliform	200 colonies/100 mL (May-Oct.)	Monthly Average Concentration
	2000 colonies/100 mL (Nov.-April)	
	400 colonies/100 mL (May-Oct.)	Weekly Average Concentration
	4000 colonies/100 mL (Nov.-April)	
Biological Oxygen Demand "BOD"	5007 lbs/day	Monthly Average Quantity
	7511 lbs/day	Weekly Average Quantity

	30 mg/L	Monthly Average Concentration
	45 mg/L	Weekly Average Concentration
	65%	Minimum Removal Efficiency
Total Suspended Solids "TSS"	15021 lbs/day	Monthly Average Quantity
	22532 lbs/day	Weekly Average Quantity
	90 mg/L	Monthly Average Concentration
	135 mg/L	Weekly Average Concentration
	65%	Minimum Removal Efficiency
Residual Chlorine	0.134 mg/L	Monthly Average Concentration
	0.23 mg/L	Weekly Average Concentration

Mot. for Summ. J. on Liab. Ex. B, 1-2 of "Limits and Monitoring."

And the North Lagoon NPDES Permit No. MS0020826 mandates these effluent limitations:

Pollutant	**Effluent Limitation**	**Type of Limitation**
Fecal Coliform	200 colonies/100 mL (May-Oct.)	Monthly Average Concentration
	2000 colonies/100 mL (Nov.-April)	
	400 colonies/100 mL (May-Oct.)	Weekly Average Concentration
	4000 colonies/100 mL (Nov.-April)	
Biological Oxygen Demand "BOD"	1001 lbs/day	Monthly Average Quantity
	1502 lbs/day	Weekly Average Quantity
	30 mg/L	Monthly Average Concentration
	45 mg/L	Weekly Average Concentration

	80%	Minimum Removal Efficiency
Total Suspended Solids "TSS"	1001 lbs/day	Monthly Average Quantity
	1502 lbs/day	Weekly Average Quantity
	30 mg/L	Monthly Average Concentration
	45 mg/L	Weekly Average Concentration
	76%	Minimum Removal Efficiency
Residual Chlorine	0.35 mg/L	Monthly Average Concentration
	0.6 mg/L	Weekly Average Concentration

Mot. for Summ. J. on Liab. Ex. C, 1-2 of "Limits and Monitoring."

Both permits provide that "[a]ny permit noncompliance constitutes a violation of the Clean Water Act;" Mot. for Summ. J. on Liab. Ex. B & Ex. C, Condition T-27, and that "[a]ny person who violates a term, condition or schedule of compliance contained within this permit . . . is subject to the actions defined by law." Mot. for Summ. J. on Liab. Ex. B & Ex. C, Condition T-53. Furthermore, the Agreed Order does not change or supersede the requirements of either permit. *See U.S. v. Smithfield Foods., Inc.*, 191 F.3d 516, 524, 526 (4th Cir. 1999) (affirming a district court's decision that a state order failed to modify a Clean Water Act permit where "none of the Board's Special Orders and letters were issued in accordance with the permit modification procedures"); *St. Bernard Citizens for Envtl. Quality Inc. v. Chalmette Ref. L.L.C.*, 399 F. Supp. 2d 726, 734-35 (E.D. La. 2005) (holding in the context of the Clean Air Act, that an Administrative Order of Consent that set interim limits "represents no more than an understanding between the LDEQ and defendant that the LDEQ will forgo enforcing defendant's permit limits while defendant procures a new permit. Such representations by officials that a

permit will not be enforced, without formal modification in the permit, 'will not excuse the holder from the terms of that permit.'").

The NPDES permits require the City to monitor its discharges from the lagoons and submit monthly discharge monitoring reports to MDEQ that detail whether the discharges meet the effluent limitations in the permit. Mot. for Summ. J. on Liab. Ex. B & Ex. C, Condition S-3. Each report must be signed and contain a certification of the report's accuracy. *See* Mot. for Summ. J. on Liab. Ex. B & Ex. C, Conditions S-3, T-44. As shown below, the City's discharge monitoring reports show numerous violations of its permitted effluent limitations.

STANDARD OF REVIEW

"Summary judgment is proper if the pleadings and evidence show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Hernandez v. Yellow Transp., Inc.*, 670 F.3d 644, 650 (5th Cir. 2012) (citing Fed. R. Civ. P. 56(a)). "Summary judgment is appropriate on the issue of liability for violations of the [Clean Water] Act. . . . particularly since NPDES enforcement actions are based on strict liability," therefore good faith, intentions to comply, or lack of knowledge is not a defense. *Student Pub. Interest Research Grp. of N.J., Inc. v. Monsanto Co.*, 600 F. Supp. 1479, 1485 (D. N.J. 1985); *Kelly v. EPA*, 203 F.3d 519, 522 (7th Cir. 2000); *U.S. v. Gulf Park Water Co., Inc.*, 972 F. Supp. 1056, 1059 (S.D. Miss. 1997). "Courts have not hesitated to grant summary judgment as to liability in CWA cases based on the permittee's violations of the Act, the permit's conditions and limitations." *Gulf Park Water Co.*, 972 F. Supp. at 1061.

ARGUMENT

Between March 2007 and August 2013, the City's unlawful discharges from its wastewater treatment lagoons to the receiving rivers violated the Clean Water Act 5,464 times.

The City has admitted to many of the violations in paragraphs 57-87 of its Answer (ECF 26) and has admitted to all of the violations in its discharge monitoring reports. *See* Mot. for Summ. J. on Liab. Ex. D, Discharge Monitoring Reports for NPDES Permit No. MS0020303 (showing violations at the South Lagoon) & Ex. E, Discharge Monitoring Reports for NPDES Permit No. MS0020826 (showing violations at the North Lagoon). The Clean Water Act authorizes GRN to enforce these violations. 33 U.S.C. § 1365(a) (authorizing "citizens" to commence a civil action "against any person . . . who is alleged to be in violation of an effluent standard or limitation under [the CWA,]" which includes the permits at issue in this suit).

I. GRN'S CLAIMS MEET ALL CITIZEN SUIT REQUIREMENTS.

A. GRN Met the Act's Notice Requirements.

Sixty days before commencing a citizen suit, the citizen must give notice of the alleged violation to the EPA, the alleged violator, and the State in which the alleged violation occurs. 33 U.S.C. § 1365(b)(1)(A); *see also* 40 C.F.R. § 135.3(a) (providing, in relevant part, that the notice "shall include sufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to have been violated"). "[T]he purpose of notice to the alleged violator is to give it an opportunity to bring itself into complete compliance with the Act and thus [ ] render unnecessary a citizen suit." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, Inc., 484 U.S. 49, 60 (1987).

On November 7, 2011, 117 days before GRN filed this suit, GRN gave notice of the violations at issue in this suit to the EPA, the Secretary of Mississippi Department of Environmental Quality ("MDEQ"), the U.S. Attorney General, the Mayor of the City of Hattiesburg, and the Director of Water and Sewer for the City of Hattiesburg. *See* Mot. for Summ. J. on Liab. Ex. F, Notice of Violations & Ex. G, Certified Mail Receipts/Proof of

Deliveries. The Notice gave GRN's "intent to sue the City of Hattiesburg under Clean Water Act § 505, 33 U.S.C. § 1365, for violations of Clean Water Act § 301, 33 U.S.C. § 1311(a), and Water Pollution Control Permits Nos. MS0020826 and MS0020303 at the City's wastewater treatment lagoons." Mot. for Summ. J. on Liab., Ex. F, at 1.

GRN notified the City of violations for each effluent limitation from its two outfalls (*i.e.*, South Lagoon Oufall 101 and North Lagoon Outfall 101) that are at issue in this suit. *See* Mot. for Summ. J. on Liab., Ex. F, at 3-8. Effluent limitation violations cited for the South Lagoon included: monthly fecal coliform (200 colonies/100 mL and 2000 colonies/100 mL permit limits), weekly fecal coliform (400 colonies/100 mL and 4000 colonies/100 mL permit limits), monthly BOD (35 mg/L, 30 mg/L and 5007 lbs/day permit limits), weekly BOD (53 mg/L, 45 mg/L and 7511 lbs/day permit limits), BOD percent removal (65% permit limit), monthly TSS (90 mg/L permit limits), weekly TSS (135 mg/L permit limits), TSS percent violations (65% permit limit), monthly residual chlorine (0.14 mg/L and 0.134 mg/L permit limits), and weekly residual chlorine (0.23 mg/L permit limit). *See* Mot. for Summ. J. on Liab., Ex. F, at 3-8. Effluent limitation violations cited for the North Lagoon included: monthly fecal coliform (200 colonies/100 mL permit limit), weekly fecal coliform (400 colonies/100 mL and 4000 colonies/100 mL permit limits), monthly BOD (30 mg/L and 1000 lbs/day permit limits), weekly BOD (45 mg/L and 1500 lbs/day permit limits), BOD percent removal (80% permit limit), monthly TSS (30 mg/L and 1001 lbs/day permit limits), weekly TSS (45 mg/L and 1500 lbs/day permit limits), TSS percent removal, (76% permit limit), monthly residual chlorine (0.35 mg/L permit limit), and weekly residual chlorine (0.6 mg/L permit limit). *See* Mot. for Summ. J. on Liab., Ex. F, at 3-8. GRN stated that "the City repeatedly violates [these] limits." Mot. for Summ. J. on Liab., Ex. F, at 3, 5. *See Atl. States Legal Found., Inc. v. Stroh Die Casting Co.*, 116

F.3d 814, 819 (7th Cir. 1997) ("[T]he notice must be sufficiently specific to inform the alleged violator about what it is doing wrong, so that it will know what corrective actions will avert a lawsuit."). Furthermore, GRN told the City that these violations "are ongoing" and that it "reserves the right to include in its lawsuit additional violations as those violations are discovered." Mot. for Summ. J. on Liab., Ex. F, at 9. *See PIRG of N.J. v. Hercules, Inc.*, 50 F.3d 1239, 1250 (3d Cir. 1995) (finding that "as long as a post-complaint discharge violation is of the same type as a violation included in the notice letter (same parameter, same outfall), no new 60-day notice letter is necessary to include these violations in the suit"); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 629 F.3d 387, 401 (4th Cir. 2011) (affirming the district court's finding that facility was liable for permit limit violations that occurred after notice letter and complaint because "plaintiffs' notice letter sufficiently alleged ongoing violations relating to [the same] pollutants"). GRN's Notice, thus, satisfies the requirements of 33 U.S.C. § 1365(b)(1)(A) and 40 C.F.R. § 135.3(a).

B. Government Action Does Not Bar this Suit.

Congress "specifically delineate[d] the narrow circumstances in which agency actions may interfere with citizen enforcement" through the Clean Water Act's two diligent prosecution bars. *See St. Bernard Citizens for Envtl. Quality, Inc. v. Chalmette Ref., L.L.C.*, 348 F. Supp. 2d 765, 767 (E.D. La. 2004). Neither applies here.

1. The Diligent Prosecution Bar in 33 U.S.C. § 1365(b)(1)(B) Does Not Apply Because Neither EPA nor the State Has Brought an Action in Court to Enforce Any of the Violations at Issue in this Suit.

The Clean Water Act citizen suit provision bars a citizen suit only if the EPA or the State "has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order." 33 U.S.C. §

1365(b)(1)(B). Both the Southern District of Mississippi and Fifth Circuit interpreted this provision to "only bar[ ] citizen lawsuits when the EPA or State government has brought a civil or criminal lawsuit in federal or state court." *Gulf Restoration Network v. Hancock Cnty. Dev., L.L.C*, 2009 WL 3841728, *2 (S.D. Miss. Nov. 16, 2009); *see also Lockett v. EPA*, 319 F.3d 678, 683 (5th Cir. 2003) (quoting 33 U.S.C. § 1365(b)(1)(B)). Here, MCEQ never commenced suit or litigated any claims against the City's alleged NPDES permit violations at issue in this case. Therefore, claims of diligent prosecution under the citizen suit provision do not bar the present suit because "[i]t is undisputed that . . . [MCEQ] . . . has [not] commenced a civil or criminal action in court concerning the alleged violations . . . ." *Hancock Cnty. Dev*., 2009 WL 3841728 at *2.

2. The Administrative Penalty Provision of the Clean Water Act, 33 U.S.C. § 1319(g)(6)(A), Does Not Bar GRN's Claims because the Mississippi Enforcement Scheme is Not Comparable subsection 1319(g) of the Act.

Section § 1319(g)(6)(A), which is under the "Administrative Penalty" provision of the government enforcement section of the Clean Water Act, precludes citizen's claims for civil penalties for any violation "with respect to which a State has commenced and is diligently prosecuting an action under a State law *comparable* to this subsection," 33 U.S.C. § 1319(g)(6)(A)(ii) (emphasis added), or where "the State has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under . . . *comparable* State law." *Id.* § 1319(g)(6)(A)(iii) (emphasis added).

According to documents obtained by GRN through public records requests, MCEQ never commenced enforcement actions for hundreds of violations at issue in this matter, which GRN identifies in the tables below with an asterisk. Section 1319(g)(6)(A), therefore, could not preclude GRN's claims with regard to those violations—each of which is subject to a maximum

federal penalty of up to $37,500 where the violation occurred after January 12, 2009, and up to $32,500 if the violation occurred between March 15, 2004 and January 12, 2009. *See id.* § 1319(d).[2] Moreover, by its plain language, § 1319(g)(6)(A) can only bar claims for civil penalties, not claims for injunctive relief. *See also Gulf Restoration Network v. Hancock County Dev.*, 2009 WL 3841728, *3 (S.D. Miss. 2009) ("Section 1319(g)(6) . . . . only bars a citizen from seeking civil penalties."). Therefore, § 1319(g)(6)(A) could have no effect on GRN's claim for injunctive relief.

Furthermore, with respect to the violations for which MCEQ has commenced an enforcement action, for 1319(g)(6)(A) to bar any of the violations at issue in this suit, the statutory scheme under which MCEQ prosecuted the violations must be "*comparable"* to 33 U.S.C. § 1319(g). 33 U.S.C. § 1319(g)(6)(A)(ii)-(iii) (emphasis added). MCEQ's enforcement scheme, however, is not comparable to that used by EPA pursuant to the Clean Water Act. Subsection 1319(g)(4) of the Clean Water Act provides for the rights of "interested persons" to notice of and comment on civil penalties proposed by the EPA. *Id.* § 1319(g)(4). Under this subsection, before issuing an order assessing a civil penalty, the EPA "shall provide public notice of and reasonable opportunity to comment on" the proposed order. *Id.* § 1319(g)(4)(A). "Any person who comment[ed] . . . shall be given notice" of any hearing on the proposed assessment and a "reasonable opportunity to be heard and to present evidence." *Id.* § 1319(g)(4)(B). If the assessed party does not elect for a hearing, "any person who commented on the proposed assessment may petition" for a hearing. *Id.* § 1319(g)(4)(C). "If the evidence presented . . . in support of the petition is material and was not considered in the issuance of the order," the order

[2] The Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, has increased the maximum civil penalty per day for each violation of the Clean Water Act from the original maximum of $25,000 in the Act. *See* Civil Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. pts. 19, 27.

shall be set aside and a hearing provided. *Id.* If the petition for a hearing is refused, the EPA "shall provide to the petitioner, and publish in the Federal Register, notice of and the reasons for such denial." *Id.* This procedure under § 1319(g) "ensures that the public has notice of any proposed assessment, and that any 'interested person' has an opportunity to comment, an opportunity to participate in any hearing, and the right to a hearing if the assessed party opts not to have one when they have material evidence not considered by the EPA." *Lockett v. EPA*, 319 F.3d 678, 685 (5th Cir. 2003).

When determining whether a state enforcement scheme is comparable to subsection 1319(g) of the Clean Water Act, the Fifth Circuit found that a keystone consideration is whether the state statute "affords significant citizen participation and provides interested citizens a meaningful opportunity to participate at significant stages of the decision-making process." *Id.* at 684 (internal quotation marks omitted). Applying this rule, the Fifth Circuit in *Lockett* concluded that "[t]he Louisiana statute provides comparable opportunity for interested citizens to participate in the agency action," even though it does not require the Louisiana Department of Environmental Quality to provide public notice before issuing any compliance order or penalty assessment. *Id.* at 685. The Fifth Circuit found that the Louisiana scheme is comparable because it requires "the secretary of the DEQ [ ] to maintain a [monthly updated] list 'of all notices of violations, compliance orders, and penalty assessments issued in the preceding three months.'" *Id.* (quoting La. R.S. § 30:2050.1.B). The Fifth Circuit also pointed out that "[o]n a 'periodic basis' a copy of this list shall be mailed separately or as part of a department publication, to persons who request to be on the mailing list." *Id.* (quoting La. R.S. § 30:2050.1.B).

Having provided "public notification of agency enforcement actions," the court concluded that interested persons have "an opportunity to participate before the action becomes

final" because Louisiana statutes offer further opportunities for public involvement. *Id.* For instance, the court explained that Louisiana statutes require "that the public be given an opportunity to submit comments" if the alleged violator "elects to have an adjudicatory hearing" and "[a]ny 'aggrieved party' has the 'right to intervene as a party' in the hearing when the intervention is 'unlikely to unduly broaden the issues or unduly impede the resolution of the matter.'" *Id.* at 685-86 (quoting La. R.S. § 30:2050.11.B.) (citing La. R.S. §§ 30:2025.E(5), 2050.4). Furthermore, the court recognized that "when a settlement or compromise is proposed, the DEQ is required to take public comment before signing[,] . . . . notice must be given to 'a person who has requested notice' and the respondent is required to publish notice of the proposed settlement in the official journal of the parish. [And t]he DEQ may hold a public hearing [on the proposed settlement] if either twenty-five people have filed a written request for a public hearing, or there is 'a significant degree of public interest.'" *Id.* at 686 (quoting La. R.S. §§ 30: 2050.7.B-D.).

Unlike the Louisiana enforcement scheme, Mississippi statutes do not "afford[ ] significant citizen participation" and do not "provide[ ] interested citizens a meaningful opportunity to participate at significant stages of the decision-making process." *Id.* The Mississippi statutes do not require public notice of agency enforcement actions, thus the public has no opportunity to participate. Specifically, Mississippi statutes require MCEQ to serve a written complaint to an alleged violator that "require[s] that the alleged violator appear before the commission at a time and place specified in the notice and answer the charges complained of," MISS. CODE ANN. § 49-17-31(a), at which time and place "[t]he commission shall afford [the alleged violator] an opportunity for a fair hearing." *Id.* at § 49-17-31(b). But the statute does not require MCEQ (or anyone) to notify the public about the complaint or the time and place for the

hearing, unlike the Louisiana statute which mandates that "[t]he secretary shall maintain a list of all notices of violations, compliance orders, and penalty assessments issued in the preceding three months[, which] shall be updated monthly." La. R.S. § 30:2050.1.B. Then, "[based on] the evidence produced at the hearing," the Mississippi statute requires "the commission [to] make findings of fact and conclusions of law and enter [an] order." MISS. CODE ANN. § 49-17-31(b). The statute requires MCEQ to "give written notice of such order to the alleged violator and to such other persons as shall have appeared at the hearing or made written request for notice of the order." *Id.* But since the agency is not required to give public notice of its enforcement hearings, the public has no way of knowing that it can make a "written request for notice of the order" that results from such hearings.

Furthermore, unlike the Louisiana statute, La. R.S. § 30:2050.7, Mississippi statutes do not require MCEQ to notify the public of any settlement or compromise that an alleged violator may opt for in lieu of a hearing, nor is there a requirement that MCEQ invite public comment prior to finalizing any settlement. Although "any person . . . aggrieved by any order of the commission" can appeal an order within 30 days of its issuance, "provided that no hearing on the same subject matter shall have been previously held," lack of public notice renders this potential opportunity for public involvement meaningless. MISS. CODE ANN. § 49-17-41.[3]

Mississippi statutes, therefore, not only fail to give the public an opportunity to participate before the enforcement action becomes final, as the Louisiana statutes do, but they do not even give the public a fair opportunity to challenge a final enforcement action. Mississippi statutes are, thus, not comparable to subsection 1319(g) of the Clean Water Act. Subsection 1319(g)(6)(A), therefore, cannot act to bar any of the violations at issue in this suit. Indeed,

[3] Furthermore, an interested party must "pay a bond" to appeal final orders that result from hearings under MISS. CODE ANN. § 49-17-41.

federal circuit courts have found that subsection 1319(g)(6)(A) cannot bar citizen suit claims for penalties because, applying various standards, the state statutory schemes at issue were not comparable to subsection 1319(g) of the Clean Water Act. *See e.g.*, *McAbee v. Fort Payne*, 318 F.3d 1248 (11th Cir.2003); *Jones v. City of Lakeland*, 224 F.3d 518 (6th Cir. 2000).

II. THIS COURT HAS JURISDICTION OVER GRN'S CLAIMS BECAUSE THE VIOLATIONS ARE ONGOING

The Clean Water Act citizen suit provision authorizes citizen suits "against any person . . . who is alleged to be *in violation* of an effluent standard or limitation under [the CWA.]" 33 U.S.C. § 1365(a)(1) (emphasis added). The Supreme Court explained that the phrase "alleged to be in violation" showed that the provision was meant to apply only where an *ongoing* violation is alleged. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 59 (1987). A citizen-plaintiff may prove that violations are ongoing 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." *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield*, 844 F.2d 170, 171-72 (4th Cir. 1988) (adopted by the Fifth Circuit in *Carr v. Alta Verde Indus., Inc.*, 931 F.2d 1055, 1062 (5th Cir. 1991)).

After GRN filed this suit on March 2, 2012, the City continued to violate the effluent limitations at issue in both NPDES permits. *See* Mot. for Summ. J. on Liab., Ex. D, Discharge Monitoring Reports for NPDES Permit No. MS0020303 (showing violations at the South Lagoon) & Ex. E, Discharge Monitoring Reports for NPDES Permit No. MS0020826 (showing violations at the North Lagoon). GRN identifies violations that occurred after March 2, 2012 in the tables below on pp 20-28. Therefore, the City is "*in violation* of . . . effluent standard[s] or limitation[s]" under the Clean Water Act, 33 U.S.C. § 1365(a)(1), and this Court is the

appropriate authority to rule on the City's continuous and egregious permit violations. Moreover, this Court already opined in denying the City's Motion to Dismiss on mootness and standing grounds that "[i]t is undisputed that the violations are ongoing, and that they will be for some time." *See* Mem. Op. & Order, Nov. 6, 2012, 7 (ECF 23).

III. THE CITY IS LIABLE FOR AT LEAST 5,464 VIOLATIONS OF THE CLEAN WATER ACT.

A. Citizen Suit Plaintiffs Can Prove Liability for Clean Water Act Violations by Relying on Discharge Monitoring Reports as Undisputed Evidence.

A citizen group may use discharge monitoring reports as evidence of a defendant's effluent limitation violations. "In an enforcement action, a defendant's [discharge monitoring reports] constitute admissions regarding the levels of effluent that the defendant has discharged," and "the Act makes [a] party liable whenever the party discharges effluent that violates its permit." *United States v. City of Hoboken*, 675 F. Supp. 189, 192, 198 (D.N.J. 1987); *see also United States v. Murphy Oil USA, Inc.*, 143 F. Supp. 2d 1054, 1112 (W.D. Wis. 2001); *United States v. Aluminum Co. of Am.*, 824 F. Supp. 640, 648 (E.D. Tex. 1993) (explaining that discharge monitoring reports were "virtually unassailable" admissions of violations of the defendant's Clean Water Act permit). "[Discharge monitoring reports] and other documents filed by the defendant under penalty of perjury with [the Department of Health] are binding admissions usable for summary judgment purposes." *Save Our Bays & Beaches v. City of Honolulu*, 904 F. Supp. 1098, 1124 n. 42 (D. Haw. 1994). The City's discharge monitoring reports from March 2007 through August 2013 "constitute admissions regarding the levels of effluent[s] that [the City] has discharged" in that time period. *City of Hoboken*, 675 F. Supp. at 192. Ultimately, the City's discharge monitoring reports are "binding admissions usable for summary judgment purposes." *City of Honolulu*, 904 F. Supp. at 1124 n. 42.

B. The City Is Strictly Liable for Violations of the Clean Water Act In Its Discharge Monitoring Reports from March 2007 through August 2013

The City has admitted to violations in its certified discharge monitoring reports that it submitted to MDEQ, thus establishing undisputed liability under the Clean Water Act. "[The Clean Water] Act creates a scheme of strict liability for exceeding effluent limitations." *United States v. City of Hoboken*, 675 F. Supp. 189, 198 (D.N.J. 1987). As one court noted, "the fact-finding process for determining compliance is a simple one—it involves comparing the reported discharges to the applicable effluent limitations to determine in which instances the discharges exceeded the allowable limits." *Conn. Fund for Env't, Inc. v. Upjohn Co.*, 660 F. Supp. 1397, 1409 (D. Conn. 1987). Further, "[i]f an entity reports a pollution level in excess of the Permit limits, it is strictly liable, as Congress has manifested an intention that the courts not reconsider the effluent discharge levels reported." *Id.* at 1417.

Thus, the City's certified and signed discharge monitoring reports, as compared to its permit limits, establish ongoing violations of the effluent limits between March 2007 and August 2013 as shown in the tables below on pp 20-28. *See City of Hoboken*, 675 F. Supp. at 192 ("If the [discharge monitoring reports] show that the defendant has exceeded its NPDES permit limitations, then permit violations are established."). The discharge monitoring reports thus "constitute admissions regarding the levels of effluent [the City] [ ] discharged," and the violations establish that the City's strictly liable under the Clean Water Act. *Id*. Additionally, in its Answer, the City admitted to all permit violations occurring between March 2007 and February 2012, amounting to at least 2,876 violations. *See* Answer ¶¶ 57-87 (ECF 26).

C. The City's Discharge Monitoring Reports Detail the Violations.

The City's discharge monitoring reports show that its discharges from the South Lagoon to the Leaf River repeatedly violated several different effluent limitations established in NPDES

Permit No. MS0020303 for Fecal Coliform, BOD, TSS, Residual Chlorine between March 2007 and August 2013. *See* Mot. for Summ. J. on Liab. Ex. D, Discharge Monitoring Reports for NPDES Permit No. MS0020303 (showing violations at the South Lagoon). The City's discharge monitoring reports also show that its discharges from the North Lagoon to the Bouie River repeatedly violated several different effluent limitations established in NPDES Permit No. MS0020826 for Fecal Coliform, BOD, TSS, Residual Chlorine between January 2008 and August 2013. *See* Mot. for Summ. J. on Liab. Ex. E, Discharge Monitoring Reports for NPDES Permit No. MS0020826 (showing violations at the North Lagoon). GRN summarizes the effluent violations as shown in the discharge monitoring reports in the following tables. An asterisk means MDEQ has not addressed the violation in any enforcement effort, but GRN maintains that none of its claims for any of the violations could be precluded by any of MDEQ's enforcement efforts.

Month	**SOUTH LAGOON Fecal Coliform Monthly Maximum average (col/100 mL) Permit Limit**	**Reported Value from City's DMR (col/100 mL)**
September 2007	200	310*
November 2007	2000	16000*
September 2008	200	2200*
October 2012	200	240*
June 2013	200	600*

Month	**SOUTH LAGOON Fecal Coliform Weekly Maximum Average (col/100 mL) Permit Limit**	**Reported Value from City's DMR (col/100 mL)**
September 2007	400	2400*
November 2007	4000	16000*
May 2008	400	700*
August 2008	400	1600*
September 2008	400	2200*
November 2010	4000	9000
February 2011	4000	16000

November 2011	4000	16000
October 2012	400	1700
June 2013	400	9000
August 2013	400	9000

Month	**SOUTH LAGOON BOD Maximum Monthly Average Quantity (lbs/day) Permit Limit**	**Reported Value from City's DMR (lbs/day)**
March 2007	5007	6113*
June 2010	5007	7756*
December 2010	5007	5994
January 2011	5007	7229
February 2011	5007	6305
March 2011	5007	13179
July 2011	5007	5818
January 2012	5007	8719
February 2012	5007	15904
April 2012	5007	6295
January 2013	5007	10300
February 2013	5007	10300
March 2013	5007	10300
April 2013	5007	6495
May 2013	5007	7401

Month	**SOUTH LAGOON BOD Maximum Weekly Average Quantity (lbs/day) Permit Limit**	**Reported Value from City's DMR (lbs/day)**
March 2007	7511	8381*
June 2010	7511	8512*
December 2010	7511	9743
January 2011	7511	7625
March 2011	7511	14935
January 2012	7511	8719
February 2012	7511	19201
January 2013	7511	10301
February 2013	7511	11834
March 2013	7511	13568

Month	SOUTH LAGOON BOD Monthly Average Concentration (mg/L) Permit Limit	Reported Value from City's DMR (mg/L)
March 2007	35	90*
June 2007	35	67*
July 2007	35	49.9*
September 2007	35	55*
June 2010	35	56*
September 2010	30	33*
October 2010	30	57
November 2010	30	46
December 2010	30	88
January 2011	30	76
February 2011	30	63
March 2011	30	106
April 2011	30	45
June 2011	30	43
July 2011	30	64
January 2012	30	108
February 2012	30	127
March 2012	30	35
April 2012	30	51
June 2012	30	35
July 2012	30	48
August 2012	30	35
October 2012	30	36
November 2012	30	45
December 2012	30	65
January 2013	30	69
February 2013	30	80
March 2013	30	77
April 2013	30	66
May 2013	30	51
June 2013	30	39

Month	SOUTH LAGOON BOD Weekly Average Concentration (mg/L) Permit Limit	Reported Value from City's DMR (mg/L)
April 2007	53	76*
March 2007	53	129*

June 2007	53	89*
July 2007	53	93*
September 2007	53	75*
June 2010	53	8512*
October 2010	45	81*
November 2010	45	65
December 2010	45	132
January 2011	45	80
February 2011	45	63
March 2011	45	121*
May 2011	45	47
June 2011	45	52
July 2011	45	64
January 2012	45	108
February 2012	45	143
April 2012	45	51
July 2012	45	48
December 2012	45	65
January 2013	45	69
February 2013	45	83
March 2013	45	87
April 2013	45	66
May 2013	45	51

Month	**SOUTH LAGOON BOD Average Minimum % Removal Efficiency Requirement**	**Reported Value from City's DMR (%)**
March 2007	65	44*
February 2012	65	61
August 2012	65	33
October 2012	65	48
February 2013	65	32

Month	**SOUTH LAGOON TSS Monthly Average Concentration (mg/L) Permit Limit**	**Reported Value from City's DMR (mg/L)**
March 2011	90	114
April 2011	90	122
January 2012	90	164
February 2012	90	145
March 2012	90	130
April 2012	90	124

June 2012	90	100
July 2012	90	98
August 2012	90	132
November 2012	90	96
December 2012	90	136
January 2013	90	144
February 2013	90	167
March 2013	90	166
April 2013	90	142
May 2013	90	96
June 2013	90	104
August 2013	90	130

Month	**SOUTH LAGOON TSS Weekly Average Concentration (mg/L) Permit Limit**	**Reported Value from City's DMR (mg/L)**
March 2011	135	165
January 2012	135	145
February 2012	135	145
December 2012	135	136
January 2013	135	144
February 2013	135	184
March 2013	135	178
April 2013	135	165
August 2013	135	144

Month	**SOUTH LAGOON TSS Average Minimal % Removal Efficiency Requirement**	**Reported Value from City's DMR (%)**
September 2010	65	39*
October 2010	65	45*
November 2010	65	44
December 2010	65	57
February 2011	65	59
March 2011	65	42
April 2011	65	41
June 2011	65	48
July 2011	65	50
January 2012	65	22
February 2012	65	17

March 2012	65	8
April 2012	65	32
June 2012	65	30
July 2012	65	62
August 2012	65	33
October 2012	65	8
December 2012	65	48
February 2013	65	-96
March 2013	65	-75
April 2013	65	57
May 2013	65	37
June 2013	65	60
July 2013	65	31
August 2013	65	60

Month	**SOUTH LAGOON Residual Chlorine Monthly Average concentration (mg/L) Permit Limit**	**Reported Value from City's DMR (mg/L)**
June 2010	0.14	0.16*
July 2010	0.134	0.15*
February 2011	0.134	0.43
March 2011	0.134	0.33
December 2012	0.134	0.18
February 2013	0.134	0.16
March 2013	0.134	0.18
August 2013	0.134	0.14

Month	**SOUTH LAGOON Residual Chlorine Weekly Average Concentration (mg/L) Permit Limit**	**Reported Value from City's DMR (mg/L)**
February 2011	0.23	0.74
March 2011	0.23	0.62
March 2013	0.23	0.28
August 2013	0.23	0.30

Month	**NORTH LAGOON Fecal Coliform Weekly Maximum Average (col/100 mL) Permit Limit**	**Reported Value from City's DMR (col/100 mL)**
October 2008	400	800*

January 2009	4000	16000*
October 2009	400	16000*
May 2010	400	1700
June 2010	400	500*
October 2010	400	1700
January 2011	4000	16000
February 2011	4000	16000
July 2011	400	1100
June 2012	400	5000
July 2012	400	5000
December 2012	4000	5000

Month	**NORTH LAGOON BOD Monthly Average Concentration (mg/L) Permit Limit**	**Reported Value from City's DMR (mg/L)**
January 2008	30	40
February 2008	30	52
March 2009	30	36*
January 2010	30	41.1*
January 2011	30	42
March 2012	30	39
April 2012	30	38
July 2012	30	34

Month	**NORTH LAGOON BOD Weekly Average Concentration (mg/L) Permit Limit**	**Reported Value from City's DMR (mg/L)**
February 2008	45	52
January 2010	45	132*
April 2010	45	49*
December 2010	45	48
July 2012	45	52

Month	**NORTH LAGOON BOD Average Minimum % Removal Efficiency Requirement**	**Reported Value from City's DMR (%)**
January 2008	80	79*
March 2009	80	75*
March 2012	80	76*
July 2012	80	76*

Month	NORTH LAGOON TSS Maximum Monthly Average Quantity (lbs/day) Permit Limit	Reported Value from City's DMR (lbs/day)
April 2008	1001	1024.3*
December 2010	1001	1061
February 2011	1001	1101
February 2012	1001	1017
March 2013	1001	1029

Month	NORTH LAGOON TSS Monthly Average Concentration (mg/L) Permit Limit	Reported Value from City's DMR (mg/L)
January 2008	30	32
February 2008	30	37
March 2008	30	44*
April 2008	30	44.5*
May 2009	30	32.5*
March 2010	30	48.3*
October 2010	30	35
November 2010	30	34.2
December 2010	30	46.7
January 2011	30	42
February 2011	30	60
March 2011	30	32
April 2011	30	36
June 2011	30	40
November 2011	30	52
February 2012	30	53
March 2012	30	48
April 2012	30	39
May 2012	30	36
June 2012	30	42
December 2012	30	31
March 2013	30	31
April 2013	30	33
August 2013	30	36

Month	NORTH LAGOON TSS Weekly Average Concentration (mg/L) Permit Limit	Reported Value from City's DMR (mg/L)
April 2008	45	48*

March 2010	45	76*
December 2010	45	53
February 2011	45	60
June 2011	45	49
November 2011	45	62
February 2012	45	54
March 2012	45	58

Month	**NORTH LAGOON TSS Average Minimal % Removal Efficiency Requirement**	**Reported Value from City's DMR (%)**
March 2008	76	74*
April 2008	76	74*
May 2009	76	45*
March 2010	76	72*
January 2011	76	71
February 2011	76	63
April 2011	76	66
February 2012	76	68
March 2012	76	41
May 2012	76	66
October 2012	76	73
August 2013	76	50

Month	**NORTH LAGOON Residual Chlorine Weekly Average Concentration (mg/L) Permit Limit**	**Reported Value from City's DMR (mg/L)**
February 2011	0.6	0.8
March 2011	0.6	0.9
March 2013	0.6	0.68

D. The City's Permit Violations Total 5,464 Days of Violations for the Clean Water Act.

The tables above show the instances where the City violated its monthly and weekly permit requirements for the North and South lagoons. These violations total 5,464 days of violations between March 2007 and August 2013. This is because the Clean Water Act imposes a maximum penalty "per day for each violation." 33 U.S.C. § 1319(d). And "where a violation is

defined in terms of a time period longer than a day, the maximum penalty assessable for that violation should be defined in terms of *the number of days in that time period*," rather than treated as one day of violation. *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 791 F.2d 304, 314 (4th Cir. 1986), *vacated on other grounds*, 484 U.S. 49 (1987) (emphasis added); *see also Oregon State Pub. Interest Research Grp., Inc. v. Pac. Coast Seafoods Co.*, 361 F. Supp. 2d 1232, 1241 (D. Or. 2005) (holding that it "must construe a violation of a monthly average discharge limit as a violation for each day during that month that discharge occurred . . . ."); *Save Our Bays and Beaches v. City of Honolulu*, 904 F. Supp. 1098, 1125 (D. Haw. 1994) (assuming that "violation of a 30–day average counts as a violation for every day of that month (*i.e.*, there will be 31 violations if the month has 31 days, 30 violations if the month as 30 days, etc.) and that the violation of a 7–day average counts as 7 violations."). The Fourth Circuit reasoned that it did not make sense to treat a monthly violation as one day of violation because such approach is inconsistent with the language of section 1319(d) since it would set a maximum penalty per violation, rather than per day of violation. *Gwaltney*, 791 F.2d at 314.

In addition, permits set different limits for the same pollutant for "different reasons and [to] serve distinct purposes: daily maximum effluent limits protect the environment from acute effects of large, single releases, and monthly averages protect against chronic effects occurring at lower levels." *U.S. v. Smithfield Foods, Inc. (Smithfield II)*, 191 F.3d 516, 527 (4th Cir. 1999) (citing *United States v. Smithfield Foods, Inc.*, 972 F. Supp. 338, 340-42 (E.D. Va. 1997)). Thus, the weekly and monthly limits for the same pollutant are "separate requirements listed in the Permit and therefore represent distinct violations." *Smithfield II*, 191 F.3d at 527 (citing *Smithfield*, 972 F. Supp. at 341). Moreover, "[i]t is clear from the language of § [1319(d)] of the CWA that such a penalty structure was anticipated. . . . (providing for a 'civil penalty not to

exceed $25,000 per day *for each violation*,' rather than a statutory maximum of $25,000 per day.)" *Smithfield II,* 191 F.3d at 527.

By tallying the number of days for each of the City's violations of monthly and weekly limitations, the City is liable for 5,464 total days of separate violations of the Clean Water Act. That is, the City violated monthly fecal coliform effluent limitations at the South Lagoon for 151 days: [(31 days)*(1 month of violations)] + [(30 days)*(4 months of violations)] = 151 days of violations. The City violated weekly fecal coliform effluent limitations at the South Lagoon for 77 days: (11 months)*(7 days of violations) = 77 days of violations. The City violated monthly BOD effluent limitations at the South Lagoon for 1,545 days: [(31 days)*(28 months of violations)] + [(30 days)*(15 months of violations)] + [(29 days)*(3 months of violations)] + [(28 days)*(5 months of violations)] = 1,545 days of violations. The City violated weekly BOD effluent limitations at the South Lagoon for 245 days: (35 months)*(7 days of violations) = 245 days of violations. The City violated monthly TSS effluent limitations at the South Lagoon for 1,306 days: [(31 days)*(24 months of violations)] + [(30 days)*(14 months of violations)] + [(29 days)*(2 months of violations)] + [(28 days)*(3 months of violations)] = 1,306 days of violations. The City violated weekly TSS effluent limitations at the South Lagoon for 63 days: (9 months)*(7 days of violations) = 63 days of violations. The City violated monthly residual chlorine effluent limitations at the South Lagoon for 241 days: [(31 days)*(5 months of violations)] + [(30 days)*(1 month of violations)] + [(28 days)*(2 months of violations)] = 241 days of violations. The City violated weekly residual chlorine effluent limitations at the South Lagoon for 28 days: (4 months)*(7 days of violations) = 28 days of violations.

The City violated weekly fecal coliform effluent limitations at the North Lagoon for 84 days: (12 months)*(7 days of violations) = 84 days of violations. The City violated monthly

BOD effluent limitations at the North Lagoon for 369 days: [(31 days)*(10 months of violations)] + [(30 days)*(1 month of violations)] + [(29 days)*(1 month of violations)] = 369 days of violations. The City violated weekly BOD effluent limitations at the North Lagoon for 35 days: (5 months)*(7 weeks of violations) = 35 days of violations. The City violated monthly TSS effluent limitations at the North Lagoon for 1,243 days: [(31 days)*(23 months of violations)] + [30 days)*(11 months of violations)] + [(29 days)*(4 months of violations)] + [(28 days)*(3 months of violations)] = 1,243 days of violations. The City violated weekly TSS effluent limitations at the North Lagoon for 56 days: (8 months)*(7 days of violations) = 56 days of violations. The City violated weekly residual chlorine effluent limitations at the North Lagoon for 21 days: (3 months)*(7 days of violations) = 21 days of violations.

CONCLUSION

For the foregoing reasons, this Court should grant GRN's Partial Motion for Summary Judgment that the City is liable for the permit violations shown in the City's discharge monitoring reports, which total 5,464 separate Clean Water Act violations.

Respectfully submitted on January 7, 2014, by:

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing memorandum has been served upon all counsel of record by electronic means on January 7, 2014.

/s/ Corinne Van Dalen

Corinne Van Dalen

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DISTRICT AT HATTIESBURG

GULF RESTORATION NETWORK, *Plaintiff,* v. CITY OF HATTIESBURG, *Defendant.*	)	Case No.: 2:12-cv-36-KS-JMR Judge: Keith Starrett Magistrate: John M. Roper

PLAINTIFF GULF RESTORATION NETWORK'S REPLY IN SUPPORT OF ITS PARTIAL MOTION FOR SUMMARY JUDGMENT ON LIABILITY

Introduction

This Court has already ruled that the MDEQ Amended Agreed Order does not bar this lawsuit. Order at 4-6, (ECF 23). Nonetheless, the City and MDEQ recycle their arguments to the contrary. *See* City Opp. at 2, 13-14 (ECF 58); MDEQ Opp. at 7-9 (ECF 59). But they fail to raise any credible argument that the Amended Agreed Order fits within "the narrow circumstances in which agency actions may interfere with citizen enforcement." *See St. Bernard Citizens v. Chalmette Ref.*, 348 F. Supp. 2d 765, 767 (E.D. La. 2004). Indeed, this Court has already noted that citizen suits may be "based on the premise that the agreed order did not 'go far enough to ensure that [the defendant would] not violate federal emissions standards in the future.'" Order at 7 (quoting *Texans United v. Crown Cent. Pet. Corp.*, 207 F.3d 789, 794 (5th Cir. 2000)). The City's discharge monitoring reports from March 2007 through August 2013 demonstrate the Amended Agreed Order allowed ongoing violations. *See* GRN Mem. Supp., Ex. B & C (ECF 57)

This motion is for summary judgment that the City is liable for at least 5,396 Clean Water Act violations[1] (or alternatively, as explained below, 4,962 violations). It is not about remedy. In other words, GRN reserves for trial its arguments about what injunctive relief, if any,

[1] GRN acknowledges the City's denial of three permit violations. *See* City Opp. at 11 n.7.

is appropriate in this case and the amount of civil penalties needed to eliminate the benefit to the City from its years of violation. The City's reply, therefore, about the lack of "expert evidence" to meet GRN's nonexistent "burden" to prove that MDEQ's actions are "unreasonable" is wholly irrelevant. City Opp. at 2. GRN has met its burden by showing that this case is not barred by "diligent prosecution" in court and that its civil penalty claims are not barred by "diligent prosecution" of an administrative penalty action under a comparable state law.

The City's assertion that its agreement to minimal state-law penalties somehow *eliminates* the City's liability under federal law is untenable.[2] In fact the City's state-law penalties of $32,500 come to only about six dollars per violation.[3] Alternatively, if the City's argument about so-called "double counting" were to be accepted, the state-law penalty would come to about $6.55 per violation[4]—which is a mere .02 percent of the $37,500 maximum. 40 C.F.R. § 19.4. Such a minimal slap on the wrist is hardly an incentive to avoid future violations.

MDEQ argues that it has *addressed* various violations in its latest Agreed Order and has let the City slide on others as "an exercise of . . . enforcement discretion." MDEQ Opp. at 4. But MDEQ has been "addressing" violations with numerous orders for more than twenty years—all without achieving compliance. *See* GRN Opp. Mot. to Dismiss at 3 (ECF 12) (summarizing the long history of failed MDEQ action and showing that the City had already missed its new deadline to complete the North Lagoon expansion project.).

Argument

I. The City is liable for ongoing violations, including those that were continuous or intermittent as of the date GRN filed this lawsuit.

[2] The City incorrectly states that payment of the civil penalties under the Amended Agreed Order resolved **all** permit violations prior to February 2012. The Amended Agreed Order only resolves certain violations that occurred in 2010 and 2011. *See* City Opp., Ex. A at 1-2.

[3] $32,500 ÷ 5,396 = $6.02.

[4] $32,500 ÷ 4,962 = $6.55, *see* note 7 infra.

The City asserts that GRN is somehow barred from seeking penalties for violations that "pre-date the commencement of this suit." City Opp. at 12. The City purports to rely on *Gwaltney of Smithfield v. Chesapeake Bay Found.*, 484 U.S. 49, 60 (1987). But the City misinterprets *Gwaltney*, which held that the Clean Water Act "confers jurisdiction over citizen suits when the citizen-plaintiffs make a good-faith allegation of continuous ***or intermittent*** violation." *Id*. at 64 (emphasis added). "When a citizen suit is properly commenced . . . *Gwaltney* does not limit the relief which § 1319(d) affords the citizen group to only present and prospective penalties." *Atl. States Legal Found. v. Tyson Foods*, 897 F.2d 1128, 1136 (11th Cir. 1990); *see also Sierra Club v. Union Oil.*, 853 F.2d 667, 672 (9th Cir. 1988) (holding the defendant liable for past violations as long as the citizen-plaintiff proved "the existence of ongoing violations or the reasonable likelihood of continued violations in accordance with *Gwaltney*."). Here, GRN has shown that each type of violation at issue is *ongoing* consistent with the Supreme Court's use of the term "ongoing" to mean "continuous or intermittent" at the time of suit. *Gwaltney*, 484 U.S. at 64-65; *see* GRN Mem. Supp. at 17-18 (ECF 55).

II. The Interim Limits do not shield the City from liability for permit violations.

The overwhelming majority of decisions reject the City's argument that the Amended Agreed Order's "interim limits" could somehow trump its permit limits. *See* City Opp. at 11. For example, the court in *Frilling v. Village of Anna*, 924 F. Supp. 821, 844 (S.D. Ohio 1996), rejected the single case that the City has found to support its argument, explaining: "[t]his Court is simply not authorized to defer to the State's discretion in certain, select cases by denying citizens their right to enforce NPDES permit limitations where the government has failed to do so." The *Frilling* court explained "that the Consent Order entered into by the parties did not suspend the legal effect of the NPDES limitations. Therefore, any violation of those permit

limitations is actionable in this private lawsuit." *Id.*; *see also U.S. v. Smithfield Foods*, 191 F.3d 516, 522–24 (4th Cir.1999) (finding that permit limits remain in effect even though the state agency had assured the permittee that agreement to less stringent limits would take precedence); *Pa. Pub. Interest Research Grp., Inc. v. P.H. Glatfelter Co.*, 128 F. Supp. 2d 747, 759 (M.D. Pa. 2001) ("recogniz[ing] the value of public participation in the NPDES permit program," the court found that an agency could not modify the permitee's obligations under permit without following regulatory procedures governing permit modifications).

An agency cannot side-step the Clean Water Act's public-participation requirements by issuing a consent order. Federal regulations require that permit modifications involve generally the same notice-and-comment and hearing procedures used in the issuance of the original permit. *See* 40 C.F.R. §§ 122.62, 124.5, 124.6.[5] "An action alleging violations of the CWA cannot be dismissed where the state enforcement agency, acting without the benefit of public input, attempts to modify a permit. Rather, such suits proceed on the terms of original permits whenever an attempt to modify the permit failed to comply with the necessary public participation procedures." *Riverkeeper v. Mirant Lovett*, 675 F. Supp. 2d 337, 346 (S.D. N.Y. 2009). These public participation procedures "ensure that the standards embodied in an NPDES permit cannot be evaded with the cooperation of compliant state regulatory authorities." *Citizens for a Better Env't v. Union Oil*, 83 F.3d 1111, 1120 (9th Cir. 1996). Here, MDEQ did not follow the Clean Water Act's permit modification requirements when it established interim limits through an agreed order. Thus, the interim limits do "not revise defendant's permit" but instead "simply reflects the [state agency's] current enforcement intentions." *St. Bernard Citizens v. Chalmette Ref.*, 399 F. Supp. 2d 726, 734 (E.D. La. 2005). GRN may therefore enforce the permit limits in this suit. Further, the City is failing even to comply with its interim limits. The

[5] Adopted by MISS. CODE R. 11-6 § 1.1.5(c).

City falsely claims that in the last six months it "has had only one violation of the interim discharge limits contained in the Amended Agreed Order," City Opp. at 3. But the City's discharge monitoring reports show that in July and August 2013, the City had 107 violations of the interim limits for the South Lagoon and 62 violations of permit limits for the North Lagoon. *See* GRN Mem. Supp., Ex. D at 112-114 & Ex. E at 85-86 (ECF 55).

III. Payment of state penalties does not eliminate liability for additional penalties.

The City said that it "has **NOT** raised as a defense to GRN's claims either of the diligent prosecution bars contained in the CWA." City Opp. at 8. Nonetheless—with zero support—the City asserts that "the [CWA] may not be used by GRN … to impose additional penalties [when] the City already has … paid penalties." *Id.* at 1. The law is to the contrary: "plaintiffs are not barred from seeking imposition of additional penalties beyond those already assessed [by a state agency]." *Pub. Interest Research Grp. v. Hercules, Inc.*, 830 F. Supp. 1525, 1539-40 (D. N.J. 1993) (but reserving "until trial" the question of "whether the court will in fact impose additional penalties"), *aff'd in part & rev'd in part on diff. grounds*, 50 F.3d 1239 (3d Cir. 1995).[6]

IV. Monthly and weekly average limit violations for the same parameter are separate violations.

The City objects to GRN's tally of monthly and weekly average limit violations for the same parameters as separate violations. City Opp. at 8-11. But the court in *U.S. v. Smithfield Foods*, 191 F.3d 516, 527 (4th Cir. 1999) held that such limits for the same pollutant are

[6] *See also Sierra Club v. Powellton Coal Co.*, 2010 WL 454929, *13 (S.D. W.Va. Feb. 3, 2010) (declining "to preclude plaintiffs' [penalty] claims merely out of deference to a consent order that it has found lacks comparability under the Clean Water Act."); *Pub. Interest Research Grp. v. Elf Atochem North America*, 817 F. Supp. 1164, 1172 (D. N.J. 1993) ("The possibility that substantial additional penalties may be imposed . . . creates a sufficient case or controversy to avoid mootness.") (footnote omitted). The U.S. Supreme Court rejected a mootness argument where a state agency had already "requir[ed] Laidlaw to pay $100,000 in civil penalties" and the trial court had found that "Laidlaw had gained a total economic benefit of $1,092,581 [from] its extended period of noncompliance." *Friends of Earth v. Laidlaw*, 528 U.S. 167, 177-78 (2000).

"separate requirements listed in the Permit and therefore represent distinct violations." Similarly, *Pub. Interest Research Grp. v. Powell Duffryn Terminals*, 913 F.2d 64, 78-79 (3rd Cir. 1990) ruled that violating the seven-day average limit and thirty-day average limit of a single pollutant also constituted two separate violations.

The Fourth Circuit provided a careful and reasoned decision, explaining that this method of counting violations "gives courts considerable flexibility to tailor penalties to the unique facts of each case" since "a permittee who violates [only] a monthly average limit . . . causes less harm than a permittee who violates [both] daily maximum and monthly average limits in the same month." *Smithfield Foods*, 191 F.3d at 527. But GRN recognizes that *Atl. States Legal Found. v. Tyson Foods*, 897 F.2d 1128, 1140 (11th Cir. 1990) declined to treat daily and monthly violations of the same parameter as separate violations. Therefore, should this Court choose to follow the Eleventh Circuit, the total number of violations would be 4,962.[7] Contrary to the City's suggestion that "the Court should … reserve its ruling on the number of alleged violations

[7] That is, the City violated monthly fecal coliform effluent limitations at the South Lagoon for 151 days: [(31 days)*(1 month of violations)] + [(30 days)*(4 months of violations)] = 151 days of violations. The City violated weekly fecal coliform effluent limitations at the South Lagoon for 42 days: (6 months)*(7 days of violations) = 42 days of violations. The City violated monthly BOD effluent limitations at the South Lagoon for 1,514 days: [(31 days)*(27 months of violations)] + [(30 days)*(15 months of violations)] + [(29 days)*(3 months of violations)] + [(28 days)*(5 months of violations)] = 1,514 days of violations. The City violated weekly BOD effluent limitations at the South Lagoon for 14 days: (2 months)*(7 days of violations) = 14 days of violations. The City violated monthly TSS effluent limitations at the South Lagoon for 1,276 days: [(31 days)*(24 months of violations)] + [(30 days)*(13 months of violations)] + [(29 days)*(2 months of violations)] + [(28 days)*(3 months of violations)] = 1,276 days of violations. The City violated monthly residual chlorine effluent limitations at the South Lagoon for 241 days: [(31 days)*(5 months of violations)] + [(30 days)*(1 month of violations)] + [(28 days)*(2 months of violations)] = 241 days of violations. The City violated weekly fecal coliform effluent limitations at the North Lagoon for 84 days: (12 months)*(7 days of violations) = 84 days of violations. The City violated monthly BOD effluent limitations at the North Lagoon for 369 days: [(31 days)*(10 months of violations)] + [(30 days)*(1 month of violations)] + [(29 days)*(1 month of violations)] = 369 days of violations. The City violated weekly BOD effluent limitations at the North Lagoon for 14 days: (2 months)*(7 weeks of violations) = 14 days of violations. The City violated monthly TSS effluent limitations at the North Lagoon for 1,243 days: [(31 days)*(23 months of violations)] + [30 days)*(11 months of violations)] + [(29 days)*(4 months of violations)] + [(28 days)*(3 months of violations)] = 1,243 days of violations. The City violated weekly residual chlorine effluent limitations at the North Lagoon for 14 days: (2 months)*(7 days of violations) = 14 days of violations.

until after trial," there is no material dispute of fact about the number of violations—only a legal dispute that is proper for summary judgment. City Opp. at 10; *see also U.S. v. Gulf Park Water Co.*, 972 F. Supp. 1056, 1059-61 (S.D. Miss. 1997) ("Courts have not hesitated to grant summary judgment as to liability in CWA cases based on the permitee's violations of the Act, the permit's conditions and limitations.").

V. Proof of harm to the river is not an element of proof of the City's liability.

Contrary to the City's argument, GRN has no duty under the CWA to prove the City's illegal discharges harm the rivers. *See* City Opp. at 3-4. Rather, the City's "[Discharge Monitoring Reports] constitute admissions regarding the levels of effluent that [the City] has discharged. If the [Discharge Monitoring Reports] show that [the City] has exceeded its [National Pollutant Discharge Elimination System] permit limitations, then permit violations are established." *United States v. City of Hoboken*, 675 F. Supp. 189, 192 (D. N.J. 1987). Instead, the question of what permit limits are necessary to protect public health and the environment were determined upon the permit's issuance. In the context of the nearly identical Clean Air Act citizen-enforcement provision, Congress explained:

> An alleged violation of an . . . emissions requirement . . . would not require reanalysis of technological or other considerations at the enforcement stage. These matters would have been settled in the administrative procedure leading to an implementation plan or emission control provision.

Natural Res. Def. Council, Inc. v. Train, 510 F.2d 692, 723 (D.C. Cir. 1974) (reprinting S. Rep. No. 1196, 91st Cong. 2nd Sess. 36-39*).* Therefore, the City's ongoing violations of both the interim and permit effluent limits, as noted in its discharge monitoring reports, "are binding admissions usable for summary judgment purposes." *Save Our Bays & Beaches v. City of Honolulu*, 904 F. Supp. 1098, 1124 n. 42 (D. Haw. 1994); *see also Hudson River Fishermen's Ass'n v. Westchester Cnty.*, 686 F. Supp. 1044, 1048 (S.D.N.Y. 1988) ("[c]itizen suits are

expressly permitted under the [Act] when they seek to enforce '*an effluent standard limitation . . .* issued by . . . a State with respect to such standard or limitation . . . .'").[8]

V. The Amended Agreed Order Does Not Bar Citizen-Suit Claims.

"Congress has not provided that citizen suits are barred whenever an administrative action is underway or simply because there may be some duplication with a government proceeding," *Arkansas Wildlife Fed'n v. Bekaert Corp*., 791 F. Supp. 769, 775 (W.D. Ark. 1992). Section 1319(g)(6)(A) of the Act "expressly provides that citizen suits are barred only in circumstances where certain specified types of agency enforcement actions have been taken by state or federal enforcement agencies." *Citizens for a Better Env't v. Union Oil (Unocal)*, 861 F. Supp. 889, 902 (N.D. Cal. 1994). The *Unocal* court explained that allowing nonconforming agency action to block a citizen suit "would render superfluous the very specific requirements established by Congress for permit modifications and preclusion of citizen suits." *Id.* at 903; *see also Washington Pub. Interest Research Grp. v. Pendleton Woolen Mills*, 11 F.3d 883, 886 (9th Cir. 1993) ("[I]f Congress had intended to preclude citizen suits in the face of an administrative compliance order, it could easily have done so.").

Here, the Amended Agreed Order cannot bar GRN's claims because, as GRN explains in its opening brief, GRN Mem. Supp. at 12-17 (ECF 55), the statutory scheme under which MDEQ entered its order is not "comparable" to 33 U.S.C. § 1319(g). *See* 33 U.S.C. § 1319(g)(6)(A)(ii)-(iii). MDEQ challenges the 5th Circuit's "overall comparability" analysis by using the 10th Circuit's "rough comparability" analysis. *See* MDEQ Opp. at 10-13. MDEQ asserts that Mississippi's Open Meetings statute can somehow substitute for public participation

[8] For standing to sue purposes, GRN has already submitted proof of injury to its members. *See* GRN Complaint (ECF 1). This Court held "Plaintiff has standing to file a citizen suit, regardless of the agreed orders." Order at 7.

requirements in the state's environmental enforcement statutory scheme. But the *Lockett* court confined its review to the Louisiana environmental enforcement statutes under which the state prosecuted violations. *See Lockett v. EPA*, 319 F.3d 678, 685-87 (5th Cir. 2003); 33 U.S.C. § 1319(g)(6). Mississippi's environmental enforcement statutes do not reference or incorporate the Open Meetings statutes. *See* MISS. CODE ANN. §§ 49-31-43(2); 11-8:2.5.65. It is beyond dispute that the Mississippi environmental enforcement statutes under which MDEQ prosecuted the City's permit violations do not contain comparable notice and comment provisions to § 1319(g)(6). *See Lockett*, 319 F.3d at 684; GRN Mem. Supp. at 12-17 (ECF 57).[9]

Conclusion

For all of the foregoing reasons, this Court should enter Summary Judgment that the City of Hattiesburg is liable for at least 5,396 violations of the Clean Water Act. Alternatively, GRN requests judgment that the City is liable for at least 4,962 violations.

Respectfully submitted on February 3, 2014, by:

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[9] MDEQ also mistakenly asserts that EPA delegation of enforcement authority to Mississippi somehow refutes that Mississippi law is not comparable to subsection 1319(g). *See* MDEQ Opp. at 12-13. But the Clean Water Act criteria for state administered permit programs prescribed by 33 U.S.C. § 1342(b) does not require agency enforcement provisions to be comparable to 33 U.S.C. § 1319(g).

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing memorandum has been served upon all counsel of record by electronic means on February 3, 2014.

/s/ Corinne Van Dalen
_____
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