IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:19-cv-01464-NYW

CENTER FOR BIOLOGICAL DIVERSITY and
FOOD & WATER WATCH,

Plaintiffs,

v.

SWIFT BEEF COMPANY,

Defendant.

PLAINTIFFS' SURREPLY TO SWIFT BEEF'S REPLY BRIEF SUPPORTING ITS MOTION TO DISMISS

INTRODUCTION

Defendant Swift Beef Company has moved to dismiss Plaintiffs' Complaint on constitutional standing grounds. Swift Beef filed its Rule 12(b) Motion to Dismiss on December 6, 2020 (ECF Doc. 20), Plaintiffs filed an Opposition on January 21, 2020 (ECF Doc. 27), and Swift Beef filed a Reply on February 7, 2020 (ECF Doc. 35). The Court has scheduled an oral argument on the Motion to Dismiss for February 21, 2020.

Swift Beef's Motion to Dismiss presents a facial challenge to Plaintiffs' standing.[1] The Motion argues that Plaintiffs cannot allege traceability because, after five years of continuous

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[1] The nature of the Motion—a facial attack on jurisdiction—was unaffected by the Meza Declaration (ECF Doc. 20-1). The declaration asserts compliance with WET limits in March 2019, but is silent on whether violations are ongoing within the meaning of the Clean Water Act, *Gwaltney of Smithfield v. Chesapeake Bay Fdtn*, 484 US 49, 57 (1989). It does not offer facts disputing Plaintiffs' allegations that violations are likely to recur, ECF Doc. 1, ¶¶ 5, 35, 62, or assert Swift Beef has "put in place remedial measures that clearly eliminate the cause of the violation." *See Gwaltney*, 484 U.S. at 69.

violations, Swift Beef ceased reporting violations of its Clean Water Act permit in March 2019. ECF Doc. 20 (Motion at 1-2, 8). It also contends the Complaint does not identify a "type" of concrete injury. *Id*. at 1. The Motion does not contend the illegal salty wastewater discharges coming from the Treatment Plant have a minimal adverse effect on the South Platte River's environment and therefore Plaintiffs' members cannot be injured. But the Reply Brief does (ECF Doc. 35, Reply at 1), relying on an "Expert Report" (ECF Doc. 35-1) filed concurrently.[2]

In this sur-reply, Plaintiffs address Swift Beef's new argument and new evidence. If the Court finds the new argument and evidence appropriately raised, a January 24, 2020 decision by the Tenth Circuit, *Renewable Fuels Ass'n v. United States Envtl. Prot. Agency*, 2020 WL 401800 (10th Cir. Jan. 24, 2020), among others, refutes the relevance of Swift Beef's contention about minimal impacts.[3]

ARGUMENT

A reply brief is not the place to raise an argument for the first time. Swift Beef could have been this issue—that five years of continuous violations of its Clean Water Act permit and ongoing discharges of salty wastewater from the Treatment Plant result in minimal impact to the South Platte River and its streamside-riparian vegetation—in its Motion to Dismiss. It did not. The Court, therefore, should disregard this new argument. *See Pippin v. Burlington Res. Oil And Gas*, 440 F.3d 1186, 1192 (10th Cir. 2006); *EEOC v. Outback Steak House*, 520 F.Supp.2d 1250, 1260 (D. Colo. 2007).

Moreover, use of an Expert Report is improper at the motion-to-dismiss stage. At this time, the Court has not held a Scheduling Conference. There has been no discovery, no

[2] Though referred to as such, Plaintiffs do not mean to concede that Mr. Miles Smart submission is, in fact, an Expert Report.

[3] Plaintiffs notify the Court of this new Tenth Circuit authority, irrespective of the Court's ruling on Plaintiffs' Motion to File a Sur-reply.

exchange of expert witnesses or expert reports, and no depositions. Plaintiffs have not had the opportunity to contest the Expert Report, its predicate findings, or its conclusions. Plaintiffs have not had the chance to provide a rebuttal expert report or take Mr. Miles Smart's deposition. Swift Beef chose to facially challenge the Complaint through a Motion to Dismiss under Rule 12(b), contending Plaintiffs do not adequately allege standing. It must thus abide by the general rules governing such motions. In this posture, an expert report goes far beyond merely challenging the Complaint. Indeed, by submitting an Expert Report now with its Reply Brief, Swift Beef appears to concede that its Rule 12(b) Motion and arguments against the sufficiency of the pleadings are without merit.[4]

Nonetheless, even if the Court considers this new argument, it has no merit as a legal matter. Swift Beef is now arguing that although its contribution of salty wastewater to the South Platte River has an impact on the aquatic environment, that impact, according to the company's Reply Brief, is minimal and "negligible." Swift Beef's attempt to characterize the extent of environmental harm is a common refrain from polluters defending a citizen suit and one that courts routinely reject under fundamental and well-established standing principles.

First, as Plaintiffs argued in their Opposition Brief (ECF Doc. 27, Pls.' Opp. at 19), the inquiry for injury-in-fact purposes is injury to the *plaintiff*, not the environment. As the Supreme Court held: "The relevant showing for purposes of Art. III standing, however, is not injury to the environment but injury to the plaintiff. To insist upon the former rather than the latter as part of the standing inquiry is to raise the standing hurdle higher than the necessary showing for success

[4] If the Court does consider the Expert Report, Plaintiffs request that it deny the pending Motion to Dismiss and allow the case to proceed to discovery and dispositive motions. Had Swift Beef raised this argument in the original Motion to Dismiss and supported it with an expert report, Plaintiffs likely would have requested that the Motion be stayed to allow for discovery. *See* ECF Doc. 27, Pls.' Opp. at 5, n.3.

on the merits in an action alleging noncompliance with an NPDES permit." *Friends of the Earth v. Laidlaw Environmental Servs.*, 528 U.S. 167, 181 (2000). *See also Utah Physicians for a Healthy Environment v. Diesel Power Gear*, 374 F.Supp.3d 1124, 1132 (D. Utah 2019) (same); *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1151 (9th Cir. 2000) ("Requiring the plaintiff to show actual environmental harm as a condition for standing confuses the jurisdictional inquiry (does the court have power under Article III to hear the case?) with the merits inquiry (did the defendant violate the law?)").

Liability under the Clean Water Act is strict. *U.S. v. City of Colorado Springs*, 352 F. Supp.3d 1086, 1089 (D. Colo. 2018). To succeed, plaintiffs must show: "(1) a discharge permit was issued to the Defendants, (2) the permit had an effluent limit or other condition; and either (3) the discharge exceeded the effluent limit, or there was a violation of the permit condition." *Sierra Club v. Cripple Creek & Victor Gold Min.*, 2006 WL 2882491, at *12 (D. Colo. Apr. 13, 2006). "There is no need to prove a defendant's discharge of pollutants into a tributary caused any deleterious effect on the navigable waters downstream." *U.S. v. Hubenka,* 438 F.3d 1026, 1035 (10th Cir. 2006).[5] Otherwise, citizen suits would not be possible "unless the violation was so great or the waterway so small that the direct impact of the discharges could be pinpointed." *SPIRG v. Tenneco Polymers*, 602 F.Supp. 1394, 1397 (D.N.J. 1985).

Accordingly, Plaintiffs do not have to allege or prove, as is now mistakenly suggested, "that Swift Beef's discharge had a toxic effect on *this* freshwater ecosystem (the South Platte River)." Reply at 19 (emphasis in original). Requiring proof (especially at the motion to dismiss

[5] *See also U.S. v. Freedman Farms*, 2011 WL 2534114 (E.D. N.C. June 27, 2011) ("[E]nvironmental harm is not necessary to prove a knowing violation of the [Clean Water] Act."); *State of Georgia v. City of East Ridge, Tenn.*, 949 F. Supp. 1571, 1579 n. 7 (N.D. Ga. 1996) ("Because liability under the Clean Water Act is automatic once the trier of fact determines that a pollutant entered the water, a violator's arguments concerning minimal adverse impact to the affected waters are irrelevant.").

stage) of significant environmental harm to the South Platte River ignores that the standing inquiry is about Plaintiffs' concrete interests—injury to their members' recreational and aesthetic enjoyment. Accepting this ill-conceived contention would also impermissibly "raise the standing hurdle higher than the necessary showing for success on the merits." *Laidlaw*, 528 U.S. at 181.[6]

Second, the amount of injury to Plaintiffs, even if minimal, is not pertinent to either the injury or traceability elements of standing. For injury-in-fact, the question is whether Plaintiffs' members are or will be injured, not how much they suffer. *Am. Humanist Ass'n v. Douglas Cty. Sch. Dist.*, 859 F.3d 1243, 1253 (10th Cir. 2017) ("an injury [need not] meet some threshold of pervasiveness to satisfy Article III."), *quoting*, *U.S. v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689 n. 14 (1973). *See also Nat. Res. Def. Council v. Vilsack*, 2011 WL 3471011, at *4 (D. Colo. Aug. 5, 2011) ("The proper focus is on *whether* the plaintiff was harmed, not on the amount of harm to the environment.") (emphasis in original). "The Tenth Circuit has previously held there is no requirement that an alleged injury must meet some threshold of pervasiveness to satisfy Article III; rather, an identifiable trifle is enough for standing to fight out a question of principle." *Seay v. Oklahoma Bd. of Dentistry*, 2019 WL 167417, at *5 (W.D. Okla. Jan. 10, 2019). This court held almost twenty years ago that "[t]he quantity of the injury is not important; an 'identifiable trifle' will suffice." *Sierra Club v. El Paso Gold Mines,* 2002 WL 33932715, at *3 (D. Colo. Nov. 15, 2002). *See also Friends of the Earth v. Gaston Copper Recycling*, 204 F.3d 149, 156 (4th Cir. 2000) ("[The injury-in-fact] standard is one of kind, and not degree.); *Sierra Club v. Cedar Point Oil*, 73 F3d at 557 (5th Cir. 1996) (recognizing injury-in-fact test is "low threshold," "injuries need not be large, an identifiable trickle will suffice"); *PIRG v Powell Duffryn Terminals*, 913 F.2d 64, 71 (3d Cir. 1990) (same).

[6] The Supreme Court held standing existed even though the district court found the illegal discharges "did not result in any health risks or environmental harm." *Laidlaw*, 528 U.S. at 181.

Last month, when assessing economic injury, the Tenth Circuit reaffirmed the principle that the extent of injury is not relevant. As the court emphasized, "'[f]or standing purposes, a loss of even a small amount of money is ordinarily an 'injury.'" *Renewable Fuels Assn. v. EPA*, —F.3d—, 2020 WL 401800, *16 (10th Cir. Jan. 24, 2020), *quoting Czyzewski v. Jevic Holding Corp.*, —— U.S. ——, 137 S. Ct. 973 (2017). The court further cited, with approval, a similar holding from the D.C. Circuit: "A dollar of economic harm is still an injury-in-fact for standing purposes." *Id*. (citing, *Carpenters Indus. v. Zinke*, 854 F.3d 1, 5 (D.C. Cir. 2017). *See also Sprint Nextel v. Middle Man*, 822 F.3d 524, 528-29 (10th Cir. 2016) (finding injury element met for $1 nominal damages award); *Am. Humanist*, 859 F.3d at 1253 (highlighting stakes as small as "a fraction of a vote, a $5 fine and costs, and a $1.50 poll tax" are perfectly adequate).

Satisfying the traceability element is also not thwarted based on claims of minimal impact. The relevant question is whether the challenged conduct of defendant causes or *contributes* to plaintiffs' injuries. *WildEarth Guardians v. Colorado Springs Utilities Bd.*, 2018 WL 317469, at *7 (D. Colo. Jan. 8, 2018) ("In the context of an environmental pollution case, a plaintiff must merely show that a defendant discharges a pollutant that causes or contributes to the kinds of injuries alleged in the specific geographic area of concern."). *See also Gaston Copper*, 204 F.3d at 161-62 ("must merely show that a defendant discharges a pollutant that causes or contributes to the kinds of injuries alleged in the specific geographic area of concern") (internal quotations and citations omitted); *Cedar Point,* 73 F.3d at 558 (holding "it [was] sufficient for Sierra Club to show that [defendants'] discharge of produced water *contributes* to the pollution that impairs [plaintiff's] use of the bay") (emphasis in original).

In *Renewable Fuels*, the Tenth Circuit rejected a claim that the challenged action "constitute[s] only a tiny fraction" of the injury. *Renewable Fuels*, 2020 WL 401800, *17.

Explaining its decision, the Tenth Circuit highlighted *Massachusetts v. EPA*, 549 U.S. 497 (2007), a Supreme Court case that involved Environmental Protection Agency (EPA) regulations designed to reduce greenhouse gas emissions and mitigate climate change. The *Massachusetts* court noted that the casual connection between greenhouse gas emissions and global warming, thus finding EPA's challenged action "contributes to Massachusetts' injuries." 549 U.S. at 523. The court went on to address and reject EPA's argument that its "decision not to regulate emissions from new vehicles contributed insignificantly to petitioners' injuries and regulating said emission would be a drop in the worldwide bucket and immaterial to mitigating global climate change." *Renewable Fuels*, 2020 WL 401800, *17. The Supreme Court reasoned EPA's "argument rests on the erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum." 549 U.S. at 524.

Here, while seeking to dismiss the severity of the environmental impact, Swift Beef's new argument acknowledges that its salty wastewater discharges contribute some amount of salinity pollution to the South Platte River. Reply at 6 (Swift Beef contributed, on average, 0.87% of total dissolved solids to the South Platte River in 2015-18); Reply at 17 ("TDS load is also insignificant").[7] That is sufficient to demonstrate traceability to Plaintiffs-members' diminished recreation and aesthetic enjoyment of the South Platte River.

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[7] The Clean Water Act does not have an exception for *de minimis* violations. *Sierra Club v. Union Oil of Calif.*, 813 F.2d 1480, 1491 (9th Cir. 1987); *Puget Soundkeeper All. v. Cruise Terminals of Am.,* 216 F. Supp. 3d 1198, 1205 (W.D. Wash. 2015) ("Liability for a violation of the Clean Water Act is strict, *i.e.*, there is no *de minimis* defense.").

Respectfully submitted,

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