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' MOTION FOR LEAVE TO SUPPLEMENT AND/OR AMEND THE COMPLAINT

INTRODUCTION

Plaintiffs Center for Biological Diversity and Food & Water Watch move to supplement and/or amend their Complaint pursuant to Rule 15 of the Federal Rules of Civil Procedure.[1] Leave to supplement and amend is to be "freely granted" and Plaintiffs respectfully request that the Court do so here. Through their supplemental complaint, Plaintiffs intend to enforce Defendant Swift Beef's 2020 violations of its Clean Water Act (CWA) permit. These violations that occurred after Plaintiffs filed their May 23, 2019 Complaint and warrant additional relief. Plaintiffs specifically propose to add Swift Beef's 2020 violations of the Permit's effluent limits for Whole Effluent Toxicity (WET) and ammonia to their existing First Claim for Relief.

[1] Plaintiffs believe the complaint should be supplemented, as opposed to amended, because it is based on new information that arose since the operative Complaint was filed on May 23, 2019. *See* Fed. R. Civ. P. 15(d). To the extent the proposed complaint could be viewed alternatively as seeking an amendment, Plaintiffs are requesting leave to do so as well. For the purpose of this Motion, Plaintiffs refer to their proffered complaint as a supplemental complaint.

The supplemental complaint will also serve a related but separate purpose. By adding Swift Beef's post-complaint 2020 violations, Plaintiffs demonstrate that Swift Beef's permit violations at its Lone Tree Wastewater Treatment Plant are "ongoing violations." ECF Doc. 53 at 1, ECF Doc. 42 at 26, 28. As the Supreme Court has held, a party satisfies the "in violation" element of the CWA's citizen suit provision when violations continue after the complaint is filed. *Gwaltney of Smithfield v. Chesapeake Bay Foundation*, 484 U.S. 49, 57 (1989). While Swift Beef repeatedly argued to the Court in its Motion to Dismiss that its WET violations were "historic" and they were no longer "in violation" of the CWA, ECF Doc. 20, that proved to be incorrect, as Swift Beef committed more violations *after* this case was first filed and *after* Swift Beef filed its Motion to Dismiss representing that the unlawful discharges has ceased.

Plaintiffs' counsel consulted with Swift Beef's counsel about this Motion in accordance with D.C.Colo.L.Civ.R. 7.1 and Swift Beef stated it will object to a supplemental and/or amended complaint that addresses the 2020 violations. According to Swift Beef (ECF Doc. 52), supplementing a complaint cannot occur when violations of the same CWA permit and Permit effluent limit, at the same facility and discharge point, and by the same owner and operator may have allegedly different causes. The company's argument ignores the statute at issue. Liability under the CWA is strict: courts only ask whether defendant's discharge exceeds an effluent limit in the applicable permit, not why or how a facility is violating its permit limit. The cause of alleged violations is irrelevant when there are ongoing violations, as they are at the Lone Tree Wastewater Treatment Plant.

A copy of the proposed supplemented complaint, with underlines and strike throughs, is submitted as an Exhibit with this Motion, as required by D.C.Colo.L.Civ.R. 15.1(b).

BACKGROUND

The CWA prohibits point sources—like Swift Beef's Lone Tree Wastewater Treatment Plant—from discharging any pollutant into a navigable waterway unless that discharge complies with the terms of a National Pollutant Discharge Elimination System (NPDES) permit. 33 U.S.C. § 1311(a). *See also* 33 U.S.C. § 1362 (defining terms in Section 1311).[2] One key component of an NPDES permit is its effluent limitations. These effluent limits are informed by site-specific water-quality based limits, 33 U.S.C. §§ 1311(b)(1), 1312(a), and, if adopted by EPA, national standards for particular industries. *Waterkeeper Alliance*, 399 F.3d at 491-92. As required by the CWA, NPDES permit holders are obligated to self-monitor and report compliance—and noncompliance—with their permit's effluent limitations. 33 U.S.C. § 1342(a)(2). *See NRDC v. Cnty. of Los Angeles*, 725 F.3d 1194, 1208 (9th Cir. 2013).

Citizens can enforce permit violations under the CWA's citizen suit provision. Specifically, "any citizen" can commence suit against "any person . . . who is alleged to be in violation of . . . an effluent standard or limitation." 33 U.S.C. § 1365(a). An "effluent standard or limitation" expressly includes permit terms, conditions, limits, and other requirements. *Id.* § 1365(f)(7). "Congress made clear that citizen groups are not to be treated as nuisances or troublemakers but rather as welcomed participants in the vindication of environmental interests." *Friends of the Earth v. Carey*, 535 F.2d 165, 172 (2d Cir. 1976)); *Nw. Envtl. Advocates v. City of Portland*, 56 F.3d 979, 989 (9th Cir. 1995) (calling CWA's citizen suit provision "an important enforcement tool" that is "necessary to the effective enforcement of effluent limitations"). *See*

[2] The Environmental Protection Agency (EPA) authorized the Colorado Department of Public Health and the Environment (CDPHE), Water Quality Control Division (Water Division), to administer Colorado's NPDES program, 40 Fed. Reg. 16,713 (Apr. 14, 1975), and issue permits. *Waterkeeper Alliance v. EPA*, 399 F.3d 486, 491 (2d Cir. 2005). *See* 33 U.S.C. § 1342.

also Sierra Club v. Pub. Serv. of Colo., 894 F. Supp. 1455, 1459 (D. Colo. 1995) ("Recognizing the importance of attaining the remedial goal of the Clean Air Act and magnitude of the task at hand, Congress armed citizens with an independent means to require compliance with the Act.").

Swift Beef runs a cattle slaughterhouse and operates the Lone Tree Wastewater Treatment Plant in Greeley, Colorado. Swift Beef pipes the slaughterhouse's wastewater to the Treatment Plant for disposal. The wastewater flowing to the Treatment Plant include chemicals and wastes from slaughtering cattle and salty brine wastewater from preserving animal hides.[3]

Swift Beef operates the Wastewater Treatment Plant under a 2012 CWA Permit. The Permit regulates Swift Beef's effluent discharges from the company's Treatment Plant into a small tributary of the South Platte River, known as Lone Tree Creek. The relevant effluent limits for this Motion involve Whole Effluent Toxicity (WET) and ammonia. WET testing assesses the combined toxic effect of effluent on aquatic life. Compliance with WET limits, EPA has explained, provides a basis of "adequate protection for aquatic life when the toxicity of effluent components is not known, effects of effluent components are additive, synergistic, or antagonistic, and/or when an effluent has not been chemically characterized." 60 Fed. Reg. 53,529, 53,530 (Oct. 16, 1995). *See also* 67 Fed. Reg. 69,952, 69,965-66 (Nov. 19, 2002) (WET tests "predict impacts of effluents on the biological integrity of receiving waters"). "If, in the laboratory, the effluent is harmful to the test organisms at a certain concentration, then it is

[3] Swift Beef recently purchased an adjacent slaughterhouse complex—formerly known as the Mountain States Rosen lamb slaughterhouse. Wastewater from the lamb slaughterhouse is also sent to the Treatment Plant. Swift Beef will be converting it to expand its cattle slaughter operations. *See* https://modernfarmer.com/2020/08/jbs-plant-takeover-leaves-uncertainty-for-western-sheep-farmers/ (last visited, Sept. 22, 2020).

presumed also to be harmful to aquatic life in the stream—*i.e.*, to be toxic—at that concentration." *Edison Electric v. EPA*, 391 F.3d at 1269 (D.C. Cir. 2004).

As set forth in the existing Complaint, Swift Beef violated its CWA Permit's effluent limitations for WET in every quarter from January 2014 through December 2018, ECF Doc. 1, ¶¶ 40-63, and for ammonia in 2018, *id*. ¶ 29. Plaintiffs notified Swift Beef of these violations on January 31, 2019, ECF Doc. 27-1, and filed this lawsuit on May 23, 2019, ECF Doc. 1. The Complaint includes claims pertaining to Swift Beef's WET violations.

In 2020, effluent discharges from Swift Beef's Lone Tree Wastewater Treatment Plant again violated the Permit's WET and ammonia limits. The most recent WET violation took place during the second quarter (April 1 through June 20), which Swift Beef was required to report in a Discharge Monitoring Report by July 28, 2020. After learning of these additional violations, Plaintiffs promptly sent Swift Beef a supplemental 60-day notice letter on July 24, 2020. ECF Doc. 50-1.

STANDARDS GOVERNING RULE 15 MOTIONS

Leave to supplement and amend a complaint pursuant to Rule 15 are governed by the same standards and should be "freely given." *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Gillihan v. Schillinger*, 872 F.2d 935, 941 (10th Cir. 1989) (leave to serve supplemental pleading "should be liberally granted unless good reason exists for denying leave"). *See Southwest Nurseries v. Florist Mut. Ins.*, 266 F.Supp.2d 1253, 1256 (D. Colo. 2003) ("The court should apply the same standard for exercising its discretion under Rule 15(d) as it does for deciding a motion [to amend the complaint] under Rule 15(a).").

Complaints are properly supplemented in response to "any transaction, occurrence, or event that happened after the date of the pleadings to be supplemented." Fed.R.Civ.P. 15(d).

Courts have "broad discretion to permit a party to serve a supplemental pleading setting forth post-complaint transactions, occurrences or events." *Walker v. UPS*, 240 F.3d 1268, 1278 (10th Cir. 2001). Rule 15 motions should be granted absent a showing of: (1) undue delay; (2) bad faith or dilatory motive; (3) repeated failure to cure deficiencies by amendments previously allowed; (4) undue prejudice to the opposing party; or (5) futility of the amendment. *Myers v. Alliance for Affordable Servs.*, 371 Fed. Appx. 950, 960 (10th Cir. 2010); *Corp. Stock Transfer v AE Biofuels*, 663 F.Supp.2d 1056, 1061 (D. Colo. 2009).

ARGUMENT

I. PLAINTIFFS SHOULD BE ALLOWED TO SUPPLEMENT AND/OR AMEND THEIR COMPLAINT

A. The Proposed Changes To The Complaint

Plaintiffs' supplemental complaint serves two main purposes. First, Plaintiffs will enforce Swift Beef's 2020 violations of its Permit's effluent limitations.[4] The First Claim for Relief in the operative Complaint addresses Swift Beef's effluent discharges that violate the CWA and Permit—specifically violations of WET limits during every quarter from 2014 through 2018. As supplemented, this same claim would now include WET violations that Swift Beef committed in the first and second quarters of 2020 as well as Swift Beef's daily and monthly ammonia violations in 2020 and 2018.[5] All of these violations relate to the same statutory

[4] Plaintiffs sent their supplemental notice letter to Swift Beef on July 24, 2020 out of an abundance of caution and to avoid any uncertainty—the law is not entirely settled as to whether one was needed for Swift Beef's 2020 WET violations.

[5] Including violations of ammonia effluent limits in the First Claim does not change the subject matter of this case. The legal violation remains the same—discharging pollutants without complying with effluents limits in a CWA permit. *See* 33 U.S.C. § 1311(a). The case continues to be about the Lone Tree Wastewater Treatment Plant, wastewater produced at Swift Beef's Greeley slaughterhouse that is piped to the Treatment Plant, and the same owner and operator and CWA permit. And Swift Beef has known that Plaintiffs may and could enforce the company's ammonia violations, as they were included in the original January 31, 2019 Notice

prohibition found in Section 301 of the CWA: "except in compliance [with a permit issued under Section 1342], the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a); *see also* 33 U.S.C. § 1365(f)(1) & (f)(7) (defining the type of "effluent standard or limitation" that citizens may enforce).

Second, Swift Beef has argued that its WET violations from 2014 though 2018 were "historic" and that means, according to the company, that the CWA's "in violation" requirement is not satisfied. ECF Doc. 20 at 8. But under *Gwaltney of Smithfield v. Chesapeake Bay Found.*, 484 U.S. 49, 57 (1989), this element of the citizen suit provision is satisfied by showing *either* (a) violations occurring after the complaint is filed *or* (b) a continuing likelihood of recurring, intermittent, or sporadic violations. *Id*.; *Chesapeake Bay Found. v. Gwaltney of Smithfield*, 844 F.2d 170, 171-72 (4th Cir. 1988); *Sierra Club v. Cripple Creek & Victor Gold Mining*, 2006 WL 2882491, at *11 (D. Colo. Apr. 13, 2006). Previously, Plaintiffs alleged there was a reasonable likelihood of recurring violations—the second way to show Swift Beef is "in violation" under *Gwaltney*. ECF Doc. 1 at ¶¶ 5, 9, 35, 62, *See generally* ECF Doc. 27; ECF Doc. 42 at 25. Plaintiffs' concerns were merited, as Swift Beef's discharges did indeed violate the WET effluent limitations in its CWA Permit again during and following briefing on the Motion to Dismiss. Consequently, Plaintiffs can now definitively satisfy the CWA's "in violation" standard through these post-complaint 2020 violations. *See* ECF Doc. 42 at 28 (this Court noting that Plaintiffs need to prove violations are "ongoing, either by being continuous or intermittent").

Letter, ECF Doc. 27-1 (Exh. 1 to Pls' Opp. to Motion to Dismiss) at 10, and alleged in the existing Complaint, ECF Doc. 1, ¶¶ 26-29 (allegations concerning ammonia limits and 2018 ammonia violations).

B. None Of The Rule 15 Factors Warrants Denying This Motion

1. Plaintiffs have not delayed seeking leave to amend. During the second week of July, Plaintiffs learned that Swift Beef self-reported violating the same Permit limits identified in the Complaint, namely effluent limitations for WET and ammonia. These violations occurred throughout the first half of 2020, with the most recent WET violation taking place during the second quarter reporting period (April 1 though June 30). After investigating further, Plaintiffs sent a supplemental Notice of Intent to Sue letter on July 24, 2020, addressing Swift Beef's new and additional violations of the WET and ammonia limits. The Court agreed that Plaintiffs acted diligently and could not have met the previous July 17, 2020 deadline for amending the pleadings. ECF Doc. 53 at 2. The current deadline is October 1, 2020, ECF Doc. 53, and Plaintiffs have timely filed their Motion to Supplement and/or Amend the Complaint on September 23, 2020. There has been no delay, let alone "undue"—or prejudicial—delay.

2. There is no bad faith or dilatory Motive. Swift Beef cannot claim Plaintiffs are acting in bad faith. By supplementing the Complaint to address Swift Beef's additional CWA violations occurring after Plaintiffs filed this lawsuit, Plaintiffs are making a good faith effort to ensure Swift Beef becomes fully compliant with its Permit. And it is Swift Beef's actions—again violating effluent limitations in its Permit—that warrant the filing of this Motion and Supplemental Complaint.

3. Plaintiffs have not failed to cure Complaint deficiencies in the past. The Court has not found deficiencies with the Complaint that require curing. This is the first request to supplement or amend the Complaint.

4. The timing of Plaintiffs' supplemental and amended complaint causes no prejudice. As noted, there has been no delay in supplementing and/or amending the Complaint. Upon learning of Swift Beef's 2020 Permit violation in July, Plaintiffs sent a notice letter on July 24, 2020 and are now filing this Motion 61 days later. Had Swift Beef wanted Plaintiffs to include the 2020 violations earlier, it should have notified Plaintiffs of the new violations when they happened. Swift Beef did not do so, leaving it to Plaintiffs to discover them independently in July 2020.

Moreover, there is nothing prejudicial about the timing of the proposed supplemental complaint. *See Patton v. Guyer*, 443 F.2d 79, 86 (10th Cir. 1971); *Hom v. Squire*, 81 F.3d 969, 973 (10th Cir. 1996) (finding prejudice from adding entirely new and different claim two months before trial). Plaintiffs are proposing to supplement one of their existing claims, and not raise a new claim. Swift Beef obviously knew about their own violations throughout 2020 and were notified on Plaintiffs' intent to enforce them on July 24, 2020. Discovery, which began in mid-June, is proceeding and will close months from now on January 15, 2021. Swift Beef will have an opportunity to conduct discovery on the merits and prepare defenses. Dispositive motions are not due until March 26, 2021. Except for Swift Beef's Motion to Dismiss—decided on June 2, 2020, no dispositive motions have been filed. Plaintiffs are not seeking to add a new defendant, nor have other deadlines in the case been extended to accommodate the new violations. Including the new 2020 violations in a Supplemental Complaint does not unduly impact Swift Beef's ability to prepare for the case.

Swift Beef's desire to avoid defending its 2020 Permit violations does not equate to prejudice within the meaning of Rule 15. *See Bylin v. Billings*, 568 F.3d 1224, 1230 (10th Cir. 2009) ("the expenditure of time, money, and efforts alone is not grounds for a finding of

prejudice"). Plaintiffs are not presenting a new theory based on the same facts, but are responding to Swift Beef violating its Permit in 2020, in the midst of this litigation. Prohibiting Plaintiffs from enforcing Swift Beef's violations that occur during litigation would be unprecedented, creating an exception to CWA compliance that does not exist in the statute or anywhere else. Indeed, the fact that Swift Beef continues to violate its Permit's effluent limits while this case is ongoing only provides further support for injunctive relief and civil penalties that deter future violations. *Laidlaw*, 528 U.S. at 186; *Benham v. Ozark Materials River Rock*, 885 F.3d 1267, 1273 (10th Cir. 2018). There is nothing "unfair" about Swift Beef being held accountable for its 2020 violations through this litigation. And there is "significant overlap" between the existing complaint and the proposed one: the new WET and ammonia violations will be added to the First Claim for Relief and Swift Beef's 2018 ammonia violations are already alleged in the existing Complaint. *See Minter v. Prime Equipment*, 451 F.3d 1196, 1208 (10th Cir. 2006).

5. The supplemental complaint is not futile. Plaintiffs complied with the citizen-suit provision by sending a supplemental notice letter to Swift Beef addressing the new and additional 2020 violations. *See* 33 U.S.C. § 1365(b)(1)(A). The State has not commenced a lawsuit to enforce these violations, *see id*. § 1365(b)(1)(B). Plaintiffs have already commenced a civil action and will be filing this supplemental complaint within 120 days of sending their notice letter. *Id*. § 1319(g)(6)(A)(i) & (ii). Swift Beef cannot factually challenge the new violations, as they were self-reported. And the Court has already denied Swift Beef's Motion to Dismiss that raised constitutional standing arguments. The filing of Plaintiffs' proposed supplemental complaint is not futile.

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Plaintiffs are seeking leave to supplement because of Swift Beef's actions and resulting Permit violations, not as a function of something Plaintiffs did or did not do. The court in *WildEarth Guardians v. Lamar Utilities Bd.*, 2012 WL 2862884 (D. Colo. July 11, 2012) permitted a supplemental complaint in a similar scenario. There, as here, new violations occurred after the complaint and that prompted plaintiffs to send an updated notice letter and then seek leave to supplement the complaint, long before the discovery cut-off and dispositive motion deadline. *WildEarth Guardians*, 2012 WL 2862884, at *1. *See also Fido TV Channel v. Inspirational Network*, 2019 WL 4043940, *2 (D. Colo. Apr. 29, 2019) (allowing amendment when "new allegations concern the Parties' conduct since the inception of this lawsuit"). For the same reasons, the Court should grant Plaintiffs' Motion under Rule 15. The interests of justice are served by allowing Plaintiffs to file their supplemental complaint.

C. The Cause Of Swift Beef's 2020 WET-Limit Violations Is Irrelevant To The Present Motion Or The Case

In opposing Plaintiffs' Motion to Modify the Scheduling Order, Swift Beef claimed its 2020 violations of its Permit's WET limits have a different cause than its prior WET violations. ECF Doc. 52 at 3 (citing ECF Doc. 52-1, ¶ 4 (Meza declaration stating: "Swift Beef ***has not sent any brine water*** from its Hides Processing Facility to the wastewater treatment plant since February 1, 2020.") (bold and italics emphasis in original)). In ruling on Plaintiffs' Motion to Modify, the Court asked about the relevance of a CWA permit violation's "root cause" to amending the pleadings and proving ongoing violations. ECF Doc. 53 at 1. Assuming, for the sake of the present Motion, that the statement in Mr. Meza's declaration is correct, the cause of Swift Beef's CWA violations has no relevance to Swift Beef's liability under the CWA or Plaintiffs' ability to plead, pursue, and prove its First Claim for Relief.

The Clean Water Act is a strict liability statute. *U.S. v. City of Colorado Springs*, 352 F.Supp.3d 1086, 1089 (D. Colo. 2018) ("Liability for a violation of the terms and conditions of an NPDES permit is strict."). *See Kelly v. EPA*, 203 F.3d 519, 522 (7th Cir. 2000). To plead a CWA violation and establish liability, the relevant elements are: "(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 Mining*, 2006 WL 2882491, at *12 (D. Colo. Apr. 13, 2006). *See also Paper, Allied-Industrial, Chem. & Energy Workers Int'l Union v. Continental Carbon Company*, 428 F.3d 1285, 1292 (10th Cir. 2005) ("Turning to the substantive cause of action under 33 U.S.C. § 1365(a)(1), there is only one issue: whether the defendant is in violation of an effluent standard or limitation under the chapter."); *Santa Monica Baykeeper v. Kramer Metals, Inc.*, 619 F. Supp. 2d 914, 919 (C.D. Cal. 2009) ("[T]o establish a violation of the Act, [Plaintiff] need only prove that [Defendant] violated the terms and conditions of its NPDES permit.").

A plaintiff need not know or understand the particular cause of the violation, as "[a]ny permit noncompliance constitutes a violation of the Clean Water Act and is grounds for enforcement action. 40 C.F.R. § 122.41(a). *See Friends of the Earth*, 528 U.S. at 174. Plaintiffs are "not required to prove any level of culpability or actual injury." *Colorado Springs*, 352 F.Supp.3d at 1089. There is also no "*de minimis*" exception for unlawful pollution. *See, e.g., Stoddard v. Western Carolina Regional Sewer Auth.*, 784 F.2d 1200, 1208 (4th Cir. 1986); *Sierra Club v. Union Oil of Cal.,* 813 F.2d 1480, 1490-91 (9th Cir. 1987), *vacated on other grounds*, 485 U.S. 931 (1988); *Puget Soundkeeper All. v. Cruise Terminals of Am.,* 216 F. Supp. 3d 1198, 1205 (W.D. Wash. 2015). And "[t]here 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). Notably, Swift Beef's Permit is consistent with how courts assess CWA liability—it simply says: "Failure to comply with any terms and/or conditions of this permit shall be a violation of this permit. The discharge of any pollutant identified in this permit more frequently than or at a level in excess of that authorized shall constitute a violation of the permit." ECF Doc. 27-1, Ex. 3 (Permit, Part II(B)(8)). Thus, for Plaintiffs to establish CWA liability, they must show that Swift Beef's effluent discharges exceeded an effluent limit, nothing more.[6]

The limited circumstances where a violation's "cause" may arise are not in play here. The Supreme Court in *Gwaltney* described how a plaintiff can meet the "in violation" element of the citizen suit provision, 33 U.S.C. § 1365(a)(1) ("who is alleged to be in violation"). Violations are "ongoing"—and not "wholly past"—when they are either "continuous," *Gwaltney*, 484 U.S. at 57, or "intermittent," *id*. *See Sierra Club v. El Paso Mines*, 421 F.3d 1133, 1139 (10th Cir. 2005). There are "continuous" violations when violations occur after the complaint has been filed. *Chesapeake Bay Found. v. Gwaltney of Smithfield*, 844 F.2d 170, 171 (4th Cir. 1988) (plaintiffs satisfy ongoing requirement "by proving violations that continue on or after the date the complaint is filed"); *Sierra Club v Cripple Creek and Victor Gold Mining*, 2006 WL 2882491, *12 (D. Colo. 2006). Here, Swift Beef's 2020 violations show that violations occurred after Plaintiffs filed suit on May 23, 2019—Swift Beef's Permit violations are thus

[6] Courts routinely adjudicate violations of multiple effluent limits and other permit terms in one case based on one complaint. *See, e.g., Gwaltney of Smithfield*, 484 U.S. 49; *U.S. v. City of Colorado Springs*, 352 F.Supp.3d 1086 (D. Colo. 2018); *Sierra Club v Cripple Creek and Victor Gold Mining*, 2006 WL 2882491 (D. Colo. 2006); *Harpeth River Watershed Ass'n. v. City of Franklin*, 2016 WL 827584 (M.D. Tenn. Mar. 3, 2016).

ongoing. That is all that is needed to satisfy the "in violation" element in the CWA citizen suit provision and *Gwaltney*.

Absent post-complaint violations, however, the analysis is more involved, requiring a plaintiff to show "a reasonable likelihood that a past polluter will continue to pollute in the future." *Gwaltney*, 484 U.S. at 57. *See Chesapeake Bay Found.*, 844 F.2d at 172 ("Intermittent or sporadic violations do not cease to be ongoing until the date when there is no real likelihood of repetition."); *Sierra Club*, 2006 WL 2882491, *12 ("Court must determine whether the violations that occurred before the Complaint was filed were likely to recur."). To assess this standard, courts sometimes will inquire into whether the polluter has "put in place remedial measures that clearly eliminate the cause of the violations." *Gwaltney*, 484 U.S. at 69. But this inquiry has no role when there are post-complaint violations, as is now the case here.[7]

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' Motion for leave to file their proposed Supplemental Complaint.

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[7] Plaintiffs acknowledge that when the parties were briefing and the Court was considering Swift Beef's Motion to Dismiss, there had not yet been a known post-complaint violation. In this regard, Swift Beef was taking advantage of a snapshot in time by filing its motion when it did. But the 2020 violations mean the violations are "continuing" under *Gwaltney*.

Respectfully submitted,

Dated: September 23, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2020, I electronically transmitted Plaintiffs' Motion for Leave to Supplement and/or Amend the Complaint using the CM/ECF System for filing and service on all registered counsel.

/s/ Neil Levine
Neil Levine