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.

REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR LEAVE TO SUPPLEMENT AND/OR AMEND THE COMPLAINT

INTRODUCTION

Plaintiffs Center for Biological Diversity and Food & Water Watch are requesting leave to supplement their Complaint. The Supplemental Complaint, as proposed, would ensure Plaintiffs can enforce Defendant Swift Beef's repeated and new violations of its Clean Water Act permit (Permit). These 2020 discharge violations, which exceeded the Whole Effluent Toxicity (WET) and ammonia effluent limitations contained in Swift Beef's Permit, would be added to Plaintiffs' First Claim for Relief. As Plaintiffs detailed in their opening brief—and not disputed by Swift Beef—this Motion to Supplement was not delayed or presented in bad faith, is not futile, and, because the violations occurred and were discovered in 2020, could not have been added to the Complaint earlier. It also does not create undue prejudice to Swift Beef's ability to present a defense: the litigation is not at a late stage, Swift Beef has known about its own violations and Plaintiffs' intent to enforce them for months, neither the subject matter nor the

legal theory is changing, and it is Swift Beef's inability to comply with its Permit that necessitate a supplemental complaint.

Previously, Swift Beef argued that a Clean Water Act complaint cannot be supplemented if the new violations—here, violations of the WET effluent limits—may have different causes. ECF Doc. 52 at 3 (citing ECF Doc. 52-1 (Meza Declaration), ¶ 4). But in its opposition brief, Swift Beef retreats from this argument, likely because it is unsupported by both law and fact.[1]

ARGUMENT

Swift Beef argues that allowing Plaintiffs to prosecute its new Permit violations will disrupt the discovery process. To advance this claim, Swift Beef first attempts to recast Plaintiffs' First Claim for Relief, suggesting Plaintiffs will be advancing new claims—the "2020 WET Claim" and the "Ammonia Claim." But as the proposed Supplemental Complaint makes clear, there are no such distinct claims for relief.[2] Indeed, Plaintiffs are not adding any new claims because their existing First Claim enforces the Clean Water Act's fundamental prohibition against non-compliant effluent discharges. 33 U.S.C. § 1311(a) (prohibiting discharges of pollutants unless in compliance with Clean Water Act permit's terms and limitations); 40 C.F.R. § 122.41(a) ("Any permit noncompliance constitutes a violation of the Clean Water Act."); ECF Doc. 27-1, Ex. 3 (Swift Beef's Permit explaining "[t]he discharge of any pollutant identified in this permit more frequently than or at a level in excess of that

[1] Swift Beef has not yet completed the type of thorough analysis called for by its Permit to ascertain the source of its WET violations and, contrary to the Meza Declaration representations, there is evidence that Swift Beef continues to send some volume of salty-brine wastewater to the Lone Tree Wastewater Treatment Plant.

[2] Though Swift Beef identifies a "2020 WET Claim," as though there must be distinct Clean Water Act claims based on the year the violations occur, it does not suggest there should be a 2018 WET Claim, 2017 WET Claim, 2016 WET Claim, 2015 WET Claim, and 2014 WET Claim. Nor does Swift Beef argue for two ammonia-related claims, one for 2018 and 2020.

authorized shall constitution a violation of the permit"). As such, Plaintiffs' First Claim captures Swift Beef's 2020 effluent violations of both the Permit's WET and ammonia limits, just as it does the WET violations occurring between 2014 and 2018.

Swift Beef apparently believes Plaintiffs do not need to add the 2020 WET violations to the Complaint. ECF Doc. 56 at 1, 7. Yet adding Swift Beef's new WET violations to the First Claim ensures that Plaintiffs can enforce these violations of federal law, and that the Court can order remedial action and civil penalties for these new violations. Plaintiffs agree that the new post-complaint WET-limit violations, even if not added to the Complaint, can be properly used to prove Swift Beef's Clean Water Act violations are ongoing and the *Gwaltney* test for being "in violation" is satisfied. *See Gwaltney of Smithfield v. Chesapeake Bay Found.*, 484 U.S. 49, 57 (1987); *Chesapeake Bay Found. v. Gwaltney of Smithfield*, 844 F.2d 170, 171 (4th Cir. 1988). But that is a different issue, as Plaintiffs explained in their opening brief. ECF Doc. 43 at 1-2, 6-7.

Swift Beef's claim of prejudice in the discovery process reveals a misunderstanding of the Clean Water Act. As noted in Plaintiffs' opening brief, Clean Water Act liability is strict and based on the existence of Swift Beef's Permit, its terms and effluent limitations, and non-compliance with those terms and limits as proven by self-reported monitoring data, usually in the form of mandatory and publicly available Discharge Monitoring Reports. *See* ECF Doc. 54 at 12 and citations therein. Swift Beef reported the 2020 WET violations and the 2018 and 2020 ammonia violations in Discharge Monitoring Reports, *see* ECF Doc. 50-1, and admitted to the allegations concerning ammonia violations in April, June, and September 2018, ECF Doc. 49, ¶ 29. As such, on the issue of liability, there is no need for further discovery. *See Nat. Res. Def. Council v. Cty. of Los Angeles*, 725 F.3d 1194, 1208 (9th Cir. 2013) ("Congress' purpose in

adopting this self-monitoring mechanism was to promote straightforward enforcement of the Act."). The new violations do not "raise significant new factual issues." *See Minter v. Prime Equip.*, 451 F.3d 1196, 1208 (10th Cir. 2006).

For several reasons, Swift Beef's overstated timing concerns about discovery are unavailing. *See* ECF Doc. 56 at 5; *id*. at 1, 3. Swift Beef knew about Plaintiffs' intent to prosecute the 2020 violations as early as July 24, 2020, the date Plaintiffs served their supplemental Notice Letter on Swift Beef and its counsel. Further, to avoid "slow[ing] down the proceedings" (ECF Doc. 56 at 1), Swift Beef certainly could have stipulated to including the new violations in Plaintiffs' First Claim, but chose instead to brief Plaintiffs' Motion to Supplement and extend the process. And when Plaintiffs asked the company to agree to push the expert deadline back, in part, to accommodate the supplemental complaint, Swift Beef said no, ECF Doc. 50 at 1-2; ECF Doc. 51, even though that would have alleviated the prejudice it now claims exists. Meanwhile, there has been some written discovery and supplemental disclosures pertaining to the ammonia violations and Plaintiffs' experts addressed, in part, the more recent 2020 WET and ammonia violations. Finally, there still remains over three months before discovery is scheduled to close. ECF Doc. 48 at 10.

Swift Beef contends that Plaintiffs could have included the 2018 ammonia violations in the original Complaint's First Claim for Relief. ECF Doc. 56 at 3-6. However, when Plaintiffs filed this lawsuit, it was uncertain whether the 2018 ammonia violations could be enforced under the citizen suit provision—that is, whether these violations were "ongoing" within the meaning of the Supreme Court's decision in *Gwaltney*, 484 U.S. 49. Any uncertainty disappeared, however, when Swift Beef *again* violated its ammonia effluent limitations in 2020. These post-complaint violations ensure Plaintiffs can show compliance with *Gwaltney* because Swift Beef is

unquestionably "in violation" of its Permit's two ammonia limits. *See Sierra Club v. Cripple Creek & Victor Gold Min.*, 2006 WL 2882491, at *11 (D. Colo. Apr. 13, 2006) (holding ongoing violations can be proven "either (1) by proving violations that continue on or after the date the complaint is filed…") (citations and quotation omitted).

Last, Swift Beef says its violations of ammonia limits cannot be used to "prove" that violations of WET limits are ongoing. ECF Doc. 56 at 6-7 (citing *Gwaltney*, 890 F.2d at 698). This contention is a red herring. In 2020, there have been post-complaint violations of the Permit's WET limits and ammonia limits. Accordingly, Swift Beef's violations of *both* limits are ongoing and the citizen-suit provision's "in violation" requirement is met.

CONCLUSION

For the reasons set forth above and in the opening brief, Plaintiffs request that the Court grant their Motion for Leave to File their proposed Supplemental Complaint.

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Respectfully submitted,

Dated: October 13, 2020

/s/ Neil Levine
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CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2020, I electronically transmitted Plaintiffs' Reply Brief in support their 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