

**UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

<b>LOWER SUSQUEHANNA</b>	:	
<b>RIVERKEEPER, ET AL.,</b>	:	
<b>Plaintiffs</b>	:	
	:	
v.	:	<b>1:19-cv-01307</b>
	:	<b>(Chief Judge Christopher C. Conner)</b>
<b>KEYSTONE PROTEIN</b>	:	
<b>COMPANY,</b>	:	
<b>Defendant</b>	:	

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**DEFENDANT KEYSTONE PROTEIN COMPANY’S MOTION FOR  
SUMMARY JUDGMENT**

Defendant Keystone Protein Company (“Keystone” or “Defendant”), by and through its counsel, hereby moves for summary judgment dismissing the claims asserted by The Lower Susquehanna Riverkeeper and the Lower Susquehanna Riverkeeper Association (collectively, “Plaintiffs”) and, in support thereof, avers:

**I. BACKGROUND**

**A. Procedural History**

1. Plaintiffs mailed notice of their intent to sue for violations of the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.* (“the Clean Water Act” or “CWA”) on February 19, 2019 and April 9, 2019, respectively. Compl., Doc. 1, at ¶ 4.

2. On July 29, 2019 Plaintiffs filed their Complaint, seeking declaratory and injunctive relief, civil penalties, attorney fees, expert witness fees, and expenses incurred in this action, pursuant to the citizen suit provisions of the CWA, 33 U.S.C. § 1365. (Doc. 1.)

3. Defendant Keystone Protein Company (“Keystone”) filed its Answer on August 21, 2019. (Doc. 7.)

**B. Statutory and Regulatory Framework Under the Clean Water Act and Pennsylvania Clean Streams Act.**

4. Section 301(a) of the CWA prohibits the discharge of pollutants into the waters of the United States, except in compliance with the terms of a permit such as a Federal National Pollution Discharge Elimination System (“NPDES”) issued by the Federal Environmental Protection Agency (“EPA”) or authorized state under 33 U.S.C.S. § 1342. *See* 33 U.S.C. § 1311(a).

5. Section 402(a) of the CWA provides that a NPDES Permit may be issued, authorizing the discharge of any pollutant directly into the waters of the United States, as long as such discharge meets certain conditions, including effluent standard limitations. *See* 33 U.S.C. § 1342(a).

6. The PADEP has the duty and authority to administer and enforce the Pennsylvania Clean Streams Law, 35 P.S. §§ 691, *et seq.*, and has been delegated

authority to administer the NPDES Permit Program under the CWA, 33 U.S.C. § 1342.

7. A NPDES permit is required for any point source discharge into the waters of the Commonwealth.

8. A consent order and agreement is a valid order of PADEP, and may be issued pursuant to Sections 5 and 610 of the Pennsylvania Clean Streams Law, 35 P.S. § 691.5 and 691.610, and Section 1917-A of the Pennsylvania Administrative Code, 71 P.S. § 510-17.

9. A consent order and agreement can constitute an appealable action of PADEP when “it has an impact on a party’s rights.” *Broad Top Twp. v. Dep’t of Env’tl. Prot.*, 2006 EHB 164, 2006 Pa. Environ. LEXIS 16 (Apr. 16, 2006).<sup>1</sup>

10. “Any person . . . having an interest which is or may be adversely affected by any action of [PADEP] shall have the right to appeal such action to the Environmental Hearing Board.” 35 P.S. § 691.7(a).

11. A third-party alleging to be aggrieved by a PADEP action may appeal to the Environmental Hearing Board within 30 days of receiving actual notice of a Departmental Action that was not noticed in the Pennsylvania Bulletin. 25 Pa. Code § 1021.52(a)(2)(ii).

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<sup>1</sup> Pursuant to Local Rule 7.8, a copy of this unpublished opinion is attached.

12. A person has standing to appeal to the Environmental Hearing Board if that person has a substantial, direct, and immediate interest in the outcome of the appeal. *Tri-County Landfill, Inc. v. Dep't of Env'tl. Prot.*, 2014 EHB 128, 2014 Pa. Environ. LEXIS 8 (March 11, 2014) (quoting *Robinson Twp. v. Cmwlth.*, 83 A.3d 901 (Pa. 2013)).<sup>2</sup>

13. An organization may have standing either in its own right or as a representative of its members if at least one of the individual members has requisite standing. *Pennsylvania Waste Industries Assn. v. Dep't Env'tl. Prot.*, 2016 EHB 590, 2016 Pa. Environ. LEXIS 49 (Aug. 31, 2016).<sup>3</sup>

14. Final decisions of the Board are reviewable by the Commonwealth Court. 42 Pa.C.S. § 763(a).

## II. UNDISPUTED MATERIAL FACTS

15. Keystone owns and operates a poultry rendering facility that generates industrial wastewater.

16. On March 30, 2012, PADEP issued NPDES Permit No. PA0080829 (“NPDES Permit” or “Permit”) to Keystone, authorizing its discharge in accordance with certain effluent limitations and other requirements. A true and

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<sup>2</sup> Pursuant to Local Rule 7.8, a copy of this unpublished opinion is attached.

<sup>3</sup> Pursuant to Local Rule 7.8, a copy of this unpublished opinion is attached.

correct copy of the NPDES Permit is attached hereto as Exhibit A; *see also* Compl. ¶ 24.

17. That NPDES permit originally was in effect From April 1, 2012 until October 31, 2017, but remains in effect to date through an administrative extension by PADEP by reason of Keystone’s application for a permit renewal. Ex. A; *see also* 2017 Consent Order and Agreement, attached hereto as Exhibit C, at p. 2 (acknowledging that Keystone’s discharge continues to be authorized under the NPDES Permit due to Keystone’s timely renewal application).

18. Keystone has exceeded its permit limits for total nitrogen at Outfall 001.

19. On March 30, 2012, Keystone entered into a Consent Order and Agreement (“2012 COA”) with PADEP to upgrade an existing waste water treatment plant in order to comply with the total nitrogen limits and other parameters in its permit by October 1, 2016. A true and correct copy of the 2012 COA is attached hereto as Exhibit B; *see also* Compl. ¶ 33.

20. The March 30, 2012 COA imposed stipulated penalties for the discharges that exceed the NPDES permit limits. Ex. B.; Compl. ¶ 33.

21. On May 24, 2017, Keystone entered into a second Consent Order and Agreement (“2017 COA”) that superseded and replaced the 2012 COA. A true

and correct copy of the 2017 COA is attached hereto as Exhibit C; *see also* Compl. ¶ 36.

22. The 2017 COA requires complete construction of a new wastewater treatment facility by June 1, 2021 so that Keystone can meet its effluent limitation guidelines, and imposes stipulated penalties for discharges exceeding Keystone's NPDES effluent limits. *See generally* Ex. C; Compl. ¶ 36.

23. Plaintiffs have had actual notice of the 2017 COA since at least March 4, 2019, when Keystone enclosed the 2017 COA in its response to their February 19, 2019 60-Day Notice Letter. A true and correct copy of Keystone's letter to Plaintiffs is attached hereto as Exhibit D.

24. The stipulated penalties are payable monthly, within thirty days of submission of a monthly monitoring report, or within sixty days of an annual monitoring report, depending upon the type of discharge. *See* Ex. C, § 4.

25. As of the date of filing, Keystone has paid a total of \$131,474.03 in stipulated penalties between the 2012 COA and 2017 COA, and continues to pay stipulated penalties as required by the 2017 COA. Affidavit of Daniel Chirico, attached hereto as Exhibit E.

26. Subject to PADEP confirming its calculations, Keystone expects to pay an additional annual penalty of \$53,294.67 for the 2019 Water Year pursuant to the terms of the 2017 COA.

27. If Keystone fails to comply with any provision of the 2017 COA, in addition to the stipulated penalties, PADEP “may . . . pursue any remedy available for a violation of an order of the [PADEP], including any action to enforce this COA.” 2017 COA, Ex. C, § 5b.

28. The 2017 COA also allows PADEP to take any other action to ensure compliance with applicable laws. *Id.*, § 6.

29. The 2012 COA and 2017 COA respectively cover each and every type of discharge at issue in this litigation.

30. Keystone has been in full compliance with the requirements of this 2017 COA to date.

31. Currently Keystone has a permit application pending with PADEP seeking permission to construct an interim upgrade to the existing waste water treatment plant that will allow it to meet the total nitrogen, and other, effluent limits sooner than June 2021. A true and correct copy of a portion of Keystone’s August 1, 2019 Application for Water Quality Management Part II Permit is attached hereto as Exhibit F.<sup>4</sup>

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<sup>4</sup> Keystone has attached the pertinent portion of the main application, and has not attached the other supporting documentation, such as submittal drawings, as these documents are voluminous, duplicative due to the several avenues of public notice required, and not relevant or necessary to the disposition of Keystone’s Motion for Summary Judgment. Keystone will produce the full application and all supporting documentation to Plaintiffs in accordance with their outstanding discovery requests.

32. Keystone expects the permit to be issued shortly and will begin construction immediately upon issuance.

### III. ARGUMENT

#### A. Summary Judgment Standard

33. Summary judgment is warranted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

#### B. **Plaintiffs' Claims are Statutorily Barred under 33 U.S.C. § 1319(g)(6)(A)(ii) Because PADEP has Commenced and Is Diligently Prosecuting an Administrative Penalty Action Covering All Claims Asserted by Plaintiffs and/or Has Issued a Final Order Under Which Keystone Has Paid an Assessed Penalty.**

34. Congress made clear that citizen suits are inappropriate in certain circumstances by enacting provisions in Sections 309 and 505 of the CWA that expressly bar citizen suits. Relevant to this litigation, Section 309 of the CWA provides:

(6) Effect of order.

(A) Limitation on actions under other sections. Action taken by the Administrator or the Secretary, as the case may be, under this subsection shall not affect or limit the Administrator's or Secretary's authority to enforce any provision of this Act [33 USCS §§ 1251 et seq.]; except that any violation—

...



(ii) with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection, . . .

shall not be the subject of a civil penalty action under subsection (d) of this section or section 311(b) or section 505 of this Act [33 USCS § 1321(b) or 1365].

33 U.S.C. § 1319(g)(6)(A).

35. The foregoing statutory bar (as well as that contained in 33 U.S.C. § 1365) demonstrates that the Citizen Suit provisions were intended to supplement jurisdiction, “rather than supplant governmental action.” *Grp. Against Smog & Pollution, Inc. v. Shenango Inc.*, 810 F.3d 116, 130 (3d Cir. 2016) (quoting *Gwaltney of Smithfield v. Chesapeake Bay Found.*, 484 U.S. 49 (1987)).

36. Legislative history surrounding the citizen suit provision of the Clean Water Act provides that “[t]he Committee intends the great volume of enforcement actions be brought by the State” and that the citizen suit is appropriate only “if the Federal, State, and local agencies fail to exercise their enforcement responsibility.” *Grp. Against Smog & Pollution*, 819 F.3d at 130 (citing S. Rep. No. 92-414, at 64 (1971)).

37. Further, the statutory bar reflects the intent to avoid “subjecting violators to dual enforcement actions or penalties for the same violation.” *Godfrey v. Upland Borough*, 246 F. Supp. 3d 1078, 1096 (E.D. Pa. 2017) (internal quotation omitted).

38. “Section 1365(b)(1)(B) does not require government prosecution to be far-reaching or zealous. It requires only diligence.” *Id.*

39. Here, PADEP is, indeed, diligently prosecuting an action under a state law comparable to Section 309 of the CWA.

40. PADEP has assessed, and continues to assess, stipulated penalties for each type of discharge involved in this litigation.

41. Further, PADEP has retained the right to pursue any other remedy for Keystone’s violation of the 2017 COA in addition to the continuous monitoring and regular assessment of penalties.

42. Plaintiffs had actual notice of the 2017 COA no later than March 4, 2014 and, if they do have standing in this litigation, then they would have had standing to challenge the 2017 COA before the Environmental Hearing Board.

43. Plaintiffs had a meaningful opportunity to fully participate through the appeals process before the Environmental Hearing Board, if they were actually aggrieved by the terms of the 2017 COA, but elected instead to forgo that available process and initiate this action in another tribunal.

44. The ultimate relief Plaintiffs seek in this Court is the duplicative of the relief sought by PADEP in the 2017 COA: namely, Keystone achieving compliance with the effluent limitations in its NPDES Permit, paying appropriate civil penalties for each violation until it does. In other words, the 2017 “requires

compliance with the same standard sought by Plaintiffs and bars their claim.”

*Godfrey*, 246 F. Supp. 3d at 1096.

45. Accordingly, this citizen-suit action is precluded by 33 U.S.C. § 1319(g)(6)(A)(ii).

**C. This Matter Should Be Stayed Pending Compliance with and Termination of the 2017 COA.**

46. Alternatively, the interests of fair and efficient adjudication, as well as the primary jurisdiction doctrine, weigh in favor of a stay of proceedings during the pendency of the 2017 Consent Agreement.

47. The Court’s power to stay proceedings is “incidental to the power inherent in every court to dispose of cases so as to promote their fair and efficient adjudication.” *United States v. Breyer*, 41 F.3d 884, 893 (3d Cir. 1994).

48. In analyzing a motion to stay, the court must consider the following three factors: (1) the length of the stay; (2) the potential injury or hardship to either party; and (3) the opportunity to simplify the issues and promote judicial economy. *Pennsylvania v. McGraw-Hill Cos.*, 2013 U.S. Dist. LEXIS 49462, \*4, 2013 WL 1397434 (Conner, C.J.).<sup>5</sup>

49. Under the 2017 COA, Keystone is not required to complete construction on the new wastewater treatment facility until June 2021—eight months after the trial scheduled in this matter—and will continue paying penalties

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<sup>5</sup> Pursuant to Local Rule 7.8, a copy of this unpublished opinion is attached.

until it can achieve completion and full compliance with the effluent limitations in its NPDES Permit.

50. Currently Keystone has a permit application pending with PADEP seeking permission to construct an interim upgrade to the existing waste water treatment plant that will allow it to meet the total nitrogen, and other, effluent limits sooner than June 2021. *See* Ex. F.

51. Keystone expects the permit to be issued shortly and will begin construction immediately upon issuance.

52. Although Plaintiffs theoretically can ask this Court to calculate penalties for the effluent limitation exceedances in a different manner than that PADEP (to whom Congress and the EPA have delegated authority to do so), Plaintiffs can demonstrate no hardship that is not already being addressed by PADEP in the 2017 COA.

53. Further, the imminent upgrades Keystone will implement upon issuance of the permit from PADEP will enable Keystone to come into compliance with regard to its effluent limitations, thereby eliminating any purported harm to Plaintiffs.

54. In the absence of a stay of proceedings, however, Keystone will face hardship by unnecessarily expending its resources in simultaneously litigating this matter, actively taking steps to comply with its effluent limits and obtain full

compliance with its NPDES Permit, paying regular stipulated penalties to PADEP in the meantime, and, ultimately, potentially facing an award of attorney's fees in collateral litigation regarding issues that are already being fully addressed by PADEP.

55. Further, a stay will greatly simplify the issues before the Court because, instead of asking the Court to guess what the effluent limitation exceedances will be between the time of trial and full compliance, the question simply will be whether PADEP's assessment was appropriate and what, if any, retroactive increased penalties are appropriate.

56. Primary jurisdiction concerns also weigh in favor of a stay of proceedings.

57. The primary jurisdiction doctrine

applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.

*Raritan Baykeeper v. NL Indus.*, 660 F.3d 686, 691 (3d Cir. 2011) (internal quotation omitted).

58. "The doctrine of primary jurisdiction, like the rule requiring exhaustion of administrative remedies, is concerned with promoting proper

relationships between the courts and administrative agencies charged with particular regulatory duties.” *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 63 (1956).

59. In evaluating whether to abstain on primary jurisdiction grounds, the court evaluates, among other considerations:

- (1) Whether the question at issue is within the conventional experience of judges or whether it involves technical or policy considerations within the agency's particular field of expertise;
- (2) Whether the question at issue is particularly within the agency's discretion;
- (3) Whether there exists a substantial danger of inconsistent rulings; and
- (4) Whether a prior application to the agency has been made.

*Raritan Baykeeper*, 660 F.3d at 691(internal quotation omitted).

60. While there is no question that the Court is competent to address the question and has jurisdiction to consider citizen suits under the CWA, there does exist a substantial danger of inconsistent rulings, and duplicative penalties, between this litigation and the 2017 COA that is presently proceeding in the PADEP. *But cf. Raritan Baykeeper*, 660 F.3d 686 (3d Cir. 2011), *supra*, (in *Raritan Baykeeper*, there was minimal risk of inconsistent rulings because the regulatory body, the New Jersey Department of Environmental Protection, had issued no orders, and had neither commented nor taken any action on the issue for several years, much unlike the diligent enforcement and oversight over Keystone undertaken by PADEP).

61. Indeed, this litigation is little more than a collateral attack on PADEP's regulatory proceedings—which proceedings afforded Plaintiffs a full and fair opportunity to participate.

WHEREFORE, for the reasons set forth above and in Keystone's Statement of Undisputed Material Facts (filed concurrently herewith in accordance with Local Rule 56.1) and supporting Brief (to be filed in accordance with Local Rule 7.5) Keystone respectfully requests that this Motion for Summary Judgment be granted. Alternatively, Keystone respectfully requests that this Court stay all proceedings pending final resolution of and compliance with the 2017 Consent Order and Agreement between Keystone and PADEP.

Respectfully submitted,

Dated: October 25, 2019

/s/Terry R. Bossert  
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**CERTIFICATE OF NON-CONCURRENCE**

Pursuant to Local Rule of Court 7.1, I hereby certify that the undersigned sought concurrence in the instant Motion and said concurrence was not granted.

**POST & SCHELL, P.C.**

Dated: October 25, 2019

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**CERTIFICATE OF SERVICE**

I hereby certify that I am this day causing to be served a true and correct copy of the foregoing Motion for Summary Judgment, Statement of Material Facts, and documents attached thereto via CM/ECF filing upon the following:

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