

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

FRESHWATER ACCOUNTABILITY)	
PROJECT,)	
)	
Plaintiff,)	CASE NO. 4:17-CV-1361
)	
v.)	
)	JUDGE BENITA Y. PEARSON
PATRIOT WATER TREATMENT, LLC,)	
)	
and)	
)	
CITY OF WARREN, OHIO)	
)	
Defendants.)	

**MEMORANDUM IN OPPOSITION TO THE CITY OF WARREN, OHIO'S PARTIAL
MOTION TO DISMISS**

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STATEMENT OF THE QUESTIONS TO BE DECIDED

1. Did Count Six of Plaintiff's Complaint sufficiently plead that the City of Warren, Ohio ("Warren") violated a condition of its National Pollutant Discharge Elimination System permit ("NPDES permit"), and thus "an effluent standard or limitation" subject to the citizen suit provisions of the Clean Water Act ("CWA"), 33 U.S.C. §1365 by providing no method for Warren to determine Patriot Water Treatment LLC's ("Patriot") compliance with the Total Dissolved Solids ("TDS") limit for oil and gas wastewater contained in its Administrative Order ("AO")?

Suggested Answer: **Yes.**

2. Did Count Seven of Plaintiff's Complaint sufficiently plead that Warren violated a condition of its NPDES permit, and thus "an effluent standard or limitation" subject to the citizen suit provisions of the CWA by not including a monitoring requirement for radionuclides in Patriot's AO?

Suggested Answer: **Yes.**

3. Did Count Eight of Plaintiff's Complaint sufficiently plead that Warren violated a condition of its NPDES permit, and thus "an effluent standard or limitation" subject to the citizen suit provisions of the CWA by not establishing a local limit for barium?

Suggested Answer: **Yes.**

I. SUMMARY OF THE ARGUMENT PRESENTED

In its Memorandum in Support of its Motion to Dismiss Counts Six, Seven, and Eight of Plaintiff's Complaint, Warren mischaracterizes the violation alleged in Count Six and argues that Count Six, Seven, and Eight involve actions that are not required under Warren's National Pollution Discharge Elimination System ("NPDES") permit. Warren holds that Part II.BB of

Warren's NPDES permit does not include the obligations Plaintiff alleges in its Complaint, and therefore, Warren argues these counts should be dismissed for failure to state a claim for which relief can be granted pursuant to Fed.R.Civ.P. 12(b)(6).

Courts have held that NPDES permits should be interpreted using contract law principles, and when the terms of a NPDES permit are ambiguous, the Court must look to extrinsic evidence to determine the intent of the permitting authority. *See* Part. IV.A. *infra*, of this Memorandum. Plaintiff asserts that the language of Warren's NPDES permit is clear and that Counts Six and Seven of its Complaint present sufficient allegations of fact and law to demonstrate Warren is violating Part II.BB.5 of its NPDES permit by 1) not including a method to ensure Patriot meets the TDS standard contained in its AO and 2) not including radionuclide monitoring requirements in Patriot's AO to account for the constituents of oil and gas wastewater entering the Warren POTW. Count Eight presents sufficient factual matter to demonstrate that Warren is violating Part II.BB.4 of its NPDES permit by not issuing local limits for barium, a constituent of oil and gas wastewater, for which the Warren POTW remains in significant noncompliance with its NPDES permit. That the parties disagree about what is required under Part II.BB of Warren's NPDES permit is not enough for Warren to succeed on its Motion to Dismiss. It only highlights that Counts Six, Seven, and Eight raise questions of fact that cannot properly be decided on a motion to dismiss.

Defendant also argues that because Warren is a regulator of a pretreatment program, Counts Six, Seven, and Eight are not the proper subject of a citizen suit, and thus this Court lacks subject matter jurisdiction under 12(b)(1). The case law upon which Warren relies seeks to analogize Warren to the administrator of the Ohio Environmental Protection Agency ("OEPA") or the U.S. Secretary of the Interior. But Warren is not simply a regulator carrying out the requirements of a

regulatory program; Warren is a regulated discharger under the NPDES program. The conditions contained in Part II.BB of Warren's NPDES permit are issued by the OEPA to Warren. It is under those conditions that Warren's publicly-owned wastewater treatment works (the "Warren POTW") is permitted to discharge directly into the Mahoning River. Plaintiff brings Counts Six, Seven, and Eight against Warren for violations of its own NPDES permit, violations that impact the Warren POTW's discharge into the Mahoning River.

The CWA is clear that the terms of a discharger's NPDES permit constitute an "effluent standard or limitation" enforceable under the citizen suit provision. When all material allegations of the complaint are treated as true, and all inferences are resolved in a light most favorable to the Plaintiff, Counts Six, Seven, and Eight sufficiently establish violations of Part II.BB of Warren's NPDES permit, giving this Court subject matter jurisdiction over these claims.

II. LEGAL AND FACTUAL BACKGROUND

Congress enacted the CWA as a "comprehensive regulatory scheme to control the discharge of waste and pollutants into the nation's navigable waters." *Stephens v. Koch Foods, LLC.*, 667 F.Supp.2d 768, 779 (E.D. Tenn. 2009). The Act's stated purpose is to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." *Id.* (citing 33 U.S.C. § 1251). Toward that end, the Act generally prohibits the "discharge of any pollutant by any person" from a point source into waters of the United States, unless that discharge is permitted under one of six sections under Title 33 of the U.S. Code. 33 U.S.C. § 1311(a). The CWA defines "pollutant" broadly, and included in that definition is "chemical wastes, biological materials, radioactive materials...and industrial, municipal and agricultural waste discharged into water." 33 U.S.C. § 1362(6). Warren's NPDES permit is issued under one of the six sections that can authorize a

discharge of pollutants into the waters of the United States, Section 1342, which establishes the National Pollutant Discharge Elimination System.

OEPA issued the Warren POTW its NPDES permit pursuant to 33 U.S.C. §1342. (Compl. ¶¶ 24-26). Warren's NPDES permit is incorporated in Plaintiff's Complaint at Exhibit 7. Warren's NPDES permit authorizes it to discharge from the Warren POTW into the Mahoning River "in accordance with the conditions specified in Parts I, II, II, IV, and VI of this permit." (Compl. Ex. 7 at p. 1). Part II.BB of Warren's NPDES permit is at issue in Counts Six, Seven, and Eight of Plaintiff's Complaint. (*See id.* at pp. 28-33).

Part.II.BB of Warren's NPDES permit incorporates Warren's pretreatment program as an enforceable condition of the permit. *Id.* at p. 28. Part.II.BB of Warren's NPDES further states:

To ensure that the approved program is implemented in accordance with 40 CFR 403, Chapter 3745-3 of Ohio Administrative Code and Chapter 6111 of the Ohio Revised Code, *the permittee shall comply with the following conditions:*

4. Local Limits

The permittee *shall use the following waste load allocation values* when evaluating local limits for the following pollutants for which a final effluent limit has not been established:

[Barium 340 ug/l and thirteen other pollutants are listed.]

For the purpose of periodically reevaluating local limits, *the permittee shall implement and maintain a sampling program to characterize pollutant contribution to the POTW from industrial and residential sources and to determine pollutant removal efficiencies through the POTW. The permittee shall continue to review and develop local limits as necessary.*

5. Control Mechanisms

The permittee shall issue control mechanisms to all industries determined to be Significant Industrial Users as defined in OAC 3745-3-01(FF). *Control mechanisms must meet at least the minimum requirements of OAC-3745-3-03(C)(1)(c).*

(*Id.* at 30 (emphasis added)).

By its incorporation into Part II.BB.5 of Warren’s NPDES permit, the minimum requirements of OAC-3745-3-03(C)(1)(c) are also at issue in Counts Six and Seven of the Complaint. (Compl. Ex. 7 at p. 30). OAC-3745-3-03(C)(1)(c) requires the POTW to issue individual or general control mechanisms to each significant industrial user or group of users. These control mechanisms “shall be enforceable, and, at a minimum, shall include...effluent limits that are based on applicable general pretreatment standards in 40 CFR 403, categorical pretreatment standards, local limits, and state and local law” and “[r]equirements for...self monitoring...based on the applicable general pretreatment standards in 40 C.F.R. 403, categorical pretreatment standards, local limits, and state and local law.” OAC-3745-3-03(C)(1)(c)(iii) & (iv).

Pursuant to the citizen suit provision of the CWA, “any citizen” may commence a civil action against “any person...who is alleged to be in violation of...an effluent standard or limitation under this chapter.” 33 U.S.C. § 1365(a)(1). The CWA defines “effluent standard or limitation” to include “*a permit or condition thereof* issued under section 1342 of this title” (emphasis added). 33 U.S.C. § 1365(f). OEPA issued Warren its NPDES permit under Section 1342 of Title 33. Courts have broadly interpreted the Act’s command that a “permit or condition thereof” constitutes an “effluent limitation” subject to enforcement via citizen suits. *See, e.g., Stephens*, 667 F.Supp.2d at 791-792 (summary judgment denied where factual dispute existed as to whether a POTW complied with the narrative conditions contained in its permit); *see also Northwest Env’tl. Advocates v. Portland* (“NWEA”), 56 F.3d 979, 982 (9th Cir. 1995), *cert. denied* (narrative water quality standards enforceable via citizen suits where the NPDES permit in question incorporates those standards); *Ohio Valley Env’tl. Coalition v. Fola Coal Co.*, 845 F.3d 133, 139 (4th Cir. 2017) (similar); *Ohio Valley Env’tl. Coalition v. Elk Run Coal Co.*, 24

F.Supp.2d 532, 541 (S.D. W.V. 2014) (similar); *Ohio Valley Env'tl. Coalition v. Marfork Coal Co.*, 966 F.Supp.2d 667, 683-685 (S.D. W.V. 2013) (similar).

III. STANDARD OF REVIEW

Defendant Warren's Motion is grounded in Federal Rules of Civil Procedure 12(b)(1) and (6), which respectively provide for dismissal of an action for want of subject-matter jurisdiction, and for failure to state a claim upon which relief can be granted.

With regard to Defendant Warren's Rule 12(b)(1) Motion, attacks on a court's subject matter jurisdiction come in two varieties: facial and factual. *United States v. Ritchie*, 15 F.3d 592 (6th Cir. 1994). Factual attacks involve challenges to the truth of the factual content of the complaint that, if proven, would grant the court power to hear the controversy; in considering such motions, the plaintiff must prove jurisdiction and the court has wide latitude to consider and weigh materials that are not of-record. *See RMI Titanium Co. v. Westinghouse Elec. Corp.*, 78 F.3d 1125, 1134-35 (6th Cir. 1996). By contrast, facial attacks, like the one presently leveled by Warren, merely challenge the sufficiency of the plaintiff's pleading. *Gentek Bldg. Prods. v. Sherwin Williams Co.*, 491 F.3d 320, 330 (6th Cir. 2007). On such a motion, the court must treat the material allegations of the complaint as true and construe unresolved facts in the light most favorable to the plaintiff. *Ritchie*, 15 F.3d 592, 598; *Gentek*, 491 F.3d at 330. If the allegations of the complaint establish a federal claim, jurisdiction exists. *Gentek*, 491 F.3d at 330.

Relatedly, a complaint withstands Rule 12(b)(6) scrutiny where it contains "either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory." *In re Cardizem CD Antitrust Litigation*, 105 F. Supp.2d 618, 632 (E.D. Mich. 2000) (citing *Schied v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir. 1988)). Stated differently, a count will survive where it contains sufficient factual matter,

accepted as true for the purposes of the motion, to state a claim for relief that is plausible on its face. *Barney v. PNC Bank*, 714 F.3d 920 (2013) (citing *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)). A claim is facially plausible where the plaintiff pleads facts that allow the court to draw the reasonable inference that the defendant's alleged misconduct renders the defendant liable. *Center for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 369 (6th Cir. 2011). Plausibility does not mean probability. *Id.* Rather, a plaintiff must make factual allegations that merely "raise a right to relief above the speculative level" and "nudge the claims across the line from conceivable to plausible." *Erie County, Ohio v. Morton Salt, Inc.*, 702 F.3d 860 (6th Cir. 2012) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Thus, the assessment of whether a complaint plausibly states a claim for relief is a context-dependent analysis. *Center for Bio-Ethical Reform*, 648 F.3d at 369; *Morton Salt*, 702 F.3d at 867.

IV. ARGUMENT

A. Counts Six, Seven, and Eight of Plaintiff's Complaint present factual allegations that demonstrate Defendant Warren is violating its NPDES permit.

The crux of Warren's argument in support of its motion to dismiss Counts Six, Seven, and Eight for failure to state a claim pursuant to 12(b)(6) is that the terms and conditions of Warren's NPDES permit do not require what Plaintiff claims they require, and thus, each of these three counts must be dismissed. However, a review of the relevant language of Warren's NPDES permit, coupled with the well-pleaded allegations contained in the complaint, establish that Warren's administration of its POTW falls well short of the express requirements of its NPDES permit. Alternatively, determining the precise obligations imposed upon Warren by its NPDES permit will require fact-finding beyond the proper analytical lens of 12(b)(6) motion.

In arguing Counts Six through Eight should be dismissed, Warren attempts to distinguish the allegations as “completely different” than the numeric NPDES permit violations complained of in Counts Four and Five. (*See* Warren’s Brief in Supp., at 7). But the same logic that drives the violations of “certain numeric effluent standards” described in Counts 4 and 5, drives the violations of narrative standards alleged in Counts Six through Eight; namely, these narrative regulations constitute conditions of Warren’s NPDES permit to which Warren has failed to adhere. (Compl. ¶¶ 144-145, 150, 152-155, 157-158, 160, 162). Courts consistently hold that non-numeric permit conditions are as enforceable via citizen suits as are specific effluent criteria. *See, e.g., Natural Resources Defense Council v. Metropolitan Water Reclamation District of Greater Chicago*, 175 F.Supp.3d 1041, 1052-53 (N.D. Ill. 2016) (“the [Defendant] equates the lack of *numeric* limits on phosphorus in its effluent with a lack of any ‘effluent limits of phosphorus.’...This conclusion is not warranted; ‘effluent limitations’ are not restricted to numeric limitations”) (emphasis original); *see also Stephens*, 667 F.Supp.2d at 791-792 (factual disputes over a POTW operator’s compliance with the narrative conditions imposed by its NPDES permit requiring the city to enforce the Industrial Pretreatment Program must be resolved at trial); *see also NWEA*, 56 F.3d at 986-989 (narrative water quality standards are enforceable via citizen suits when incorporated into a NPDES permit); *Ohio Valley Env’tl. Coalition v. Fola Coal Co.*, 845 F.3d at 139 (holding similarly); *Ohio Valley Env’tl. Coalition v. Elk Run Coal Co.*, 24 F.Supp.2d at 541 (holding similarly); *Ohio Valley Env’tl. Coalition v. Marfork Coal Co.*, 966 F.Supp.2d at 683-685 (holding similarly).

Thus, determining whether Warren violated its NPDES permit requires an examination of permit terms in light of the well-pleaded allegations of the Complaint. The terms and

conditions of a NPDES permit are to be analyzed according to contract law principles. *NWEA*, 56 F.3d at 982; *City of Portland v. Northwest. Env'tl. Advocates*, 518 U.S. 1018 (1996); *see also Piney Run Pres. Ass'n v. County Comm'rs*, 268 F.3d 255, 269-270 (4th Cir. 2001). If the language is "plain and capable of legal construction, the language alone must determine the permit's meaning." *Piney Run*, 268 F.3d at 269-270; *see also FDIC v. Prince George Corp.*, 58 F.3d 1041, 1046 (4th Cir. 1995). If the term or condition is "ambiguous," the court "must look to extrinsic evidence to determine the correct understanding of the permit." *Piney Run*, 268 F.3d at 269-270; *see also NWEA*, 56 F.3d at 982; *Inland Refuse Transfer Co. v. Browning-Ferris Industries*, 474 N.E. 2d 271, 272-273 (Ohio 1984).

For the reasons discussed *infra*, the allegations described in each of Counts Six, Seven, and Eight constitute clear violations of the express terms of Warren's NPDES permit and the regulations incorporated by reference therein. Even if this Court were to find ambiguity in the Permit conditions subject to Counts Six, Seven, and Eight, resolving these ambiguities would require a complex factual analysis well beyond the scope of a 12(b)(6) motion. For the purposes of this motion, the Court should only determine whether Plaintiff, in Counts Six, Seven, and Eight, has pled facts that allow this Court to draw the reasonable inference that Warren's alleged misconduct renders them liable for violations of their NPDES permit. As explained in the following subsections, Plaintiff pleads sufficient factual allegations in each of the three counts to survive a 12(b)(6) motion to dismiss. For this reason, and all of the reasons that follow, this Court should deny Warren's 12(b)(6) motion to dismiss.

- 1. Count Six includes factual matters that demonstrate Warren is in violation of Part II.BB.5 of its NPDES permit because the AO it issued to Patriot does not allow Warren to effectively enforce Patriot's TDS limit.**

In its Memorandum in Support of its Motion to Dismiss, Warren mischaracterizes the violation alleged in Count Six. In arguing that Warren's NPDES permit does not require specific limits on TDS, Warren argues generally that POTW's are "free to make the management decision that they will install the technology needed to treat the specific pollutants" and that "POTWs may make the management decision to regulate by way of narrative prohibitions." (Warren's Brief in Supp. at p. 14). Defendant Warren poses the question of whether Warren's decision not to impose a numeric effluent limit for TDS on Patriot's entire wastewater discharge constitutes a violation of an effluent standard or limitation under the CWA. (*Id.* at 4). These are not the issues raised by Plaintiff's Complaint, and do not reflect the violation alleged in Count Six. Count Six alleges that the AO Warren issued to Patriot does not meet the minimum requirements of Part II.BB.5 of Warren's NPDES permit, and, as a standard in the NPDES permit, this is an "effluent standard or limitation" pursuant to the CWA. (Compl. ¶¶ 143-149); *Stephens*, 667 F.Supp.2d at 780. As a result, the Complaint alleges the Warren POTW is in violation of its NPDES permit. (Compl. ¶ 150).

Specifically, the Complaint states that Part II.BB.5 of the NPDES permit requires Warren to issue control mechanisms to Significant Industrial Users (of which Patriot is one) that meet at least the minimum requirements of OAC-3745-3-03(C)(1)(c). In order to "control each industrial user's contribution to the POTW to ensure compliance with applicable pretreatment standards and requirements," OAC-3745-3-03(C)(1)(c) requires Warren's AO to Patriot to at a minimum "include effluent limits that are based on applicable general pretreatment standards in 40 CFR 403, categorical pretreatment standards, local limits, and state and local law" and requirements for "self-monitoring, including an identification of the pollutants to be monitored or the process for seeking a waiver from monitoring a pollutant neither present nor expected to be present in the

discharge...based on the applicable general pretreatment standards in 40 C.F.R. 403, categorical pretreatment standards, local limits, and state and local law.”

In turn, OAC-3745-3-03(C)(1)(c) incorporates “40 C.F.R. 403, categorical pretreatment standards, local limits, and state and local law” into Part II.BB.5 of Warren’s NPDES permit. This body of law contains many provisions, but importantly, it explains when a POTW must develop “specific limits” on pollutants. *See* 40 C.F.R. § 403.5. POTWs with approved pretreatment programs must “continue to develop” and “effectively enforce” specific limits to prohibit “*any pollutant* released in a Discharge at a flow rate and/or pollutant concentration that will cause interference with the POTW.” 40 C.F.R. § 403.5(c)(1); 40 C.F.R. § 403.5(b)(4) (emphasis added). Importantly, the Complaint specifically alleges that “Patriot’s discharge of effluent containing high-TDS levels has impaired the operation and efficiency of the Warren POTW and caused the Warren POTW to be in an ongoing state of significant noncompliance with its NPDES permit.” (Compl. ¶ 148). The Complaint further alleges that Warren has not issued a control mechanism to Patriot that permits it to effectively enforce its specific limits for TDS from oil and gas wastewater, and therefore has failed to meet the requirements of OAC-3745-3-03(C)(1)(c), and in turn, the requirements of Part II.BB.5 of its NPDES permit. (Compl. ¶¶ 145-146).

Warren appears to argue that the general prohibition on disruptions and pass through violations in Patriot’s AO is enough to fulfill its obligation under Part II.BB.5 of its permit. (*See* Warren’s Brief In Supp. at p.14, n.3). However, Plaintiff’s Complaint presents sufficient factual allegations to refute this claim. The Complaint alleges the Warren POTW is experiencing interference with its operations as the result of high-TDS effluent coming from the Patriot Facility. (*See* Compl. ¶¶ 63, 66, 148-149). It alleges that the AO Warren has issued to Patriot

contains a TDS limit for Patriot's oil and gas flow, but no such limit for Patriot's other industrial flow, despite the AO containing no provisions for how in practice the two flows will be distinguished. (*See Id.* at ¶¶ 52, 147). The Complaint also alleges that wastewater from hydraulic fracturing ("HF") operations is known to contain high levels of TDS, that high concentrations of TDS have been found in drinking water sources downstream from discharging facilities accepting HF wastewater, and that Patriot's discharge to Warren contains higher TDS levels when Patriot is processing HF wastewater, which is a type of oil and gas waste (Compl. ¶¶ 48-49, ¶66). Due to these factual circumstances, the Complaint alleges the AO does not provide Warren with the ability to accurately monitor the TDS standard for Patriot's oil and gas flow (Compl. ¶¶ 52, 146). Count Six asserts that this *inability* to effectively enforce or even determine compliance with Patriot's TDS standard is a violation of Part II.BB.5 of Warren's NPDES permit, specifically those requirements incorporated through OAC-3745-3-03(C)(1)(c).

Thus, Count Six presents sufficient factual allegations that when taken as true presents a violation of Warren's NPDES permit. Finding this violation exists does not require the Court to issue numeric criteria or step into the role of regulator, as Warren argues. Rather, this inquiry simply requires an examination of the unambiguous narrative criteria imposed upon Warren by Part II.BB.5 of its NPDES permit, in light of the Complaint's well-pleaded allegations. Alternatively, if the Court determines the aforementioned permit conditions are ambiguous, then extrinsic factual evidence must be examined to determine what Part II.BB.5 requires and whether those requirements have been met. *See Stephens*, 667 F. Supp. 2d at 792. These questions are outside the scope of what can be determined on a 12(b)(6) motion to dismiss, and thus this Court should deny Warren's motion to dismiss Count Six.

2. Count Seven includes factual matters that demonstrate Warren violated conditions contained in Part II.BB.5 of its NPDES permit by not including monitoring requirements for radionuclides in Patriot's AO.

In a single paragraph, Warren argues Count Seven of Plaintiff's Motion should be dismissed "for the same reason as Count Six." First, as explained above, Warren's argument for dismissing Count Six misstates the alleged violation. Similarly, in regard to Count Seven, Warren is wrong to brush over the factual allegations contained in Plaintiff's complaint simply because Defendant disagrees with the obligations contained in Part II.BB.5 of Warren's NPDES permit.

Count Seven states specific provisions of law and allegations of fact, that when taken as true, state a violation of the Warren POTW's NPDES permit. Part II.BB.5 of Warren's NPDES permit, by its incorporation of OAC-3745-3-03(C)(1)(c), requires Warren's AO to Patriot to at a minimum contain requirements for "self-monitoring, including an identification of the pollutants to be monitored or the process for seeking a waiver from monitoring a pollutant neither present nor expected to be present in the discharge...based on the applicable general pretreatment standards in 40 C.F.R. 403, categorical pretreatment standards, *local limits*, and *state and local law*." (Emphasis added). State law OAC 3701:1-40-03 generally prohibits a person from handling, possessing, or disposing of radioactive material except as authorized by license. Warren's NPDES permit contains nothing that would authorize it to handle, possess, or dispose of radioactive material.

Local Ordinance 924.03, a part of Warren's pretreatment program, also prohibits the discharge into Warren's public sewer of "any wastewater containing any radioactive wastes or isotopes of such halflife or concentration which exceeds limits established by the City in compliance with applicable *state or federal regulations*." (Compl. at ¶152-153). Federal

regulations provide specific conditions that must be met for the *licensed* discharge of radioactive material into a sanitary sewer like the one into which Patriot discharges, and through which Warren accepts, processed HF wastewater. *See* 10 C.F.R. § 20.2003. These conditions require radium-226 concentrations in industrial effluent to not exceed 600 picocuries per liter (pCi/L). *See* 10 C.F.R. § 20.2003 and Table 3 of Appendix B. The U.S. EPA has established a maximum contaminant level for drinking water of 5 pCi/L for combined radium-226 and radium-228 and a maximum contaminant level goal of 0 pCi/L. 40 C.F.R. § 141.66(b); 40 C.F.R. § 141.55.

The complaint alleges that Marcellus and Utica shale wastewater is known to have “high uranium content and particularly high levels of radium-226,” “elevated...radium concentrations,” and “high levels of...radionuclides.” (Compl. ¶¶ 48, 49, 53).¹ The complaint alleges that Patriot processes waste from the Marcellus Shale (Compl. ¶36) and that the radioactive components of HF wastewater present problems for even the most advanced facilities (Comp. ¶54). It further states that effluent from Centralized Waste Treatment Facilities accepting HF wastewater, like Patriot, has been found to contain elevated radium concentrations (Compl. ¶49). In sum, Plaintiff’s Complaint alleges Patriot is accepting radioactive material and discharging that material to the Warren POTW. It also states that POTWs like the Warren facility are not designed to remove radioactive elements (Compl. ¶39). Taken together, these factual allegations suggest that Patriot is discharging radioactive material to Warren and that Warren is ill-equipped to process it.

Given this factual circumstance, Count Seven of the Complaint alleges that Warren’s AO to Patriot must contain requirements for the monitoring of radionuclides in order to meet its NPDES permit requirement to issue control mechanisms that include monitoring requirements

¹ Publicly-available sources cited in Exhibit 1 of the Complaint state radium-226 concentrations in Marcellus shale fluids are typically between 5,000 and 15,000 pCi/L and can exceed 10,000 pCi/L. *See* Ex. 1 at 3, n.9 and 4, n.12.

for pollutants being discharged based on local, state, and federal law. (Compl. ¶155). This is not reading in a requirement that Warren issue AOs specifying monitoring requirements for *every* pollutant an industrial user *might* discharge, as Defendant alleges. (Warren’s Brief in Supp., at 14). Plaintiff’s allegations are grounded in facts pertaining to monitoring and enforcement obligations in Warren’s permit standard and the unique nature of Patriot’s wastestream and operations. *Cf. Stephens*, 667 F.Supp.2d at 791-792 (holding that a factual dispute existed regarding a POTW operator’s compliance with narrative permit criteria that mandated, among other things, “inspection, surveillance, and monitoring procedures which will determine, independent of information supplied by the Industrial user (IU), whether the IU is in compliance with the pretreatment standards” and to “[r]equire development, as necessary, of compliance schedules for each IU for the installation of control technologies to meet applicable pretreatment standards.”).

Therefore, Count Seven must survive Defendant Warren’s 12(b)(6) motion to dismiss.

3. Count Eight includes factual matters that demonstrate that Warren has violated Part II.BB of its NPDES permit by not establishing a local limit for Barium.

Defendant Warren’s argument regarding Count Eight is nearly identical to its arguments against Count Six and Seven, except the NPDES permit provision at issue is Part.II.BB.4 instead of Part II.BB.5. Warren argues that Part II.BB.4 does not require what Plaintiffs allege it does. The plain text of Warren’s NPDES permit belies Warren’s argument. Alternatively, determining the precise contours of the NPDES permit at issue requires an examination of extrinsic factual evidence regarding the intent of the permitting authority, which is not a question that can be properly decided on Defendant’s 12(b)(6) motion.

Count Eight and Warren’s NPDES permit state that Warren is required to “develop and enforce technically based local limits to prevent the introduction of pollutants into the POTW

which will interfere with the operation of the POTW, pass through the treatment works, be incompatible with the treatment works, or limit wastewater or sludge use options” (Compl. ¶157 and Ex. 7 at p. 30). The NPDES permit supplies the waste load allocation for fourteen pollutants, including barium, for use in evaluating local limits. (*Id.* at ¶158 and Ex. 7 at p. 30). Part II.BB.4 of Warren’s NPDES permit further requires that “the permittee shall continue to develop local limits as necessary” (Compl. Ex. 7 at p. 30), yet Warren has remained in significant noncompliance with the barium preliminary effluent limit contained in its NPDES permit since 2012 without developing such a limit (Compl. at ¶67).

The Complaint provides facts describing that there are high levels of barium in HF wastewater (Compl. at ¶57), that Patriot’s AO contains no limit for barium (Compl. at ¶58), that the Warren POTW has been in significant noncompliance with its preliminary effluent limit for barium since at least 2012 (Compl. at ¶67), and that Patriot is a source of this noncompliance (Compl. ¶69). The Complaint also explains that Warren has issued a local limit for every other pollutant listed in Part II.BB.4 of its NPDES permit, except barium (Compl. at ¶159 and Ex. 3 at p. 4). Thus, the plain language of Part II.BB.4 of Warren’s NPDES permit, coupled with the facts presented in the Complaint, when taken as true and with all inferences resolved in Plaintiff’s favor, make it clear that Warren is in violation of its NPDES permit for not issuing a local limit for barium.

B. This Court has subject matter jurisdiction over Counts Six, Seven, and Eight because they sufficiently allege violations of Warren’s NPDES permit.

Defendant Warren presents three Sixth Circuit cases to argue that citizen suits cannot be filed “against regulators as regulators for an alleged failure to adequately implement or enforce a regulatory program.” (Warren’s Brief in Supp., at 19). Defendant Warren’s argument ignores the fact that Warren is the operator of the Warren POTW, a point source that discharges directly into

the Mahoning River. It is in Warren's capacity as a discharger of pollutants into the Mahoning River that OEPA issued Warren its NPDES permit, and it is in the capacity of discharger that Warren's obligations under its NPDES permit must be evaluated and understood. More simply stated, in the regulatory framework of the CWA, Warren may be a regulator, but Warren is also a regulated party.

Admittedly, the role of a POTW with an approved pretreatment program is unique. The POTW creates its pretreatment program and seeks approval of that pretreatment program from OEPA. But then, importantly, the approved pretreatment program becomes an enforceable condition of the NPDES permit issued to the POTW. *See* OAC 3745-3-03(B). By incorporating the pretreatment program as an enforceable condition of the POTW's NPDES permit, this regulatory framework recognizes that the POTW is not simply a regulator, but is a regulated party whose decisions regarding incoming waste streams affect a direct discharge into waters of the United States.

The Fourth Circuit Court of Appeals' well-reasoned decision in *Ohio Valley Environmental Coalition v. Fola Coal Company, LLC.*, is illustrative of this dichotomy. 845 F.3d 133 (4th Circuit 2017). There, environmental groups brought a citizen suit for a coal company's violation of a clause in its NPDES permit that incorporated a West Virginia regulation. *Id.* at 136. The regulation required that "discharges covered by a WV/NPDES permit are to be of such quality so as not to cause violation of applicable water quality standards," which at the time included several narrative (*i.e.*, non-numeric) water quality standards. *Id.* Following a bench trial, the trial court determined that the state regulation in question constituted an enforceable provision of the company's NPDES permit, and that the company had discharged from their facility in defiance of that provision. *Id.* at 137-138. On appeal, the company argued (much like Warren presently

contends) that the trial court's actions constituted impermissible "rulemaking." *Id.* at 145. In rejecting this argument, the Fourth Circuit distinguished between impermissible "rulemaking," (e.g., a court determining what an appropriate numeric standard might be) and making findings of fact (e.g., determining whether a defendant violated a permit condition), an endeavor well-within the traditional function of trial courts:

Finally, [the defendant] argues that the district court engaged in unlawful rulemaking. That argument is similarly unsound. Hornbook law defines "a rule" as "a generally applicable principle or standard developed by some authority including administrative authorities." 1 Admin. L. & Prac. § 1:20 (3d ed. 2016). The district court did not create any "generally applicable principle or standard." The court made factual findings based on the evidence presented in this particular case. The only rules for which the court found [the defendant] liable are contained in its permit[.] These rules have long been incorporated into [the defendant's] permit, and EPA has never approved their removal. They remain unchanged and controlling. [] **We must reject [the defendant's] attempts to transform the district court's detailed fact-finding into rulemaking.**

Id. at 145-147 (emphasis added).

Similarly, the Warren POTW's NPDES permit incorporates the pretreatment program as an enforceable term and the plain language of the NPDES permit states that Part II.BB.4 and Part II.BB.5 are conditions of Warren's NPDES permit. The permit states "[t]o ensure that the approved program is implemented in accordance with 40 CFR 403, Chapter 3745-3 of Ohio Administrative Code and Chapter 6111 of the Ohio Revised Code, *the permittee shall comply with the following conditions,*" after which it lists 11 provisions, including Part II.BB.4 and Part II.BB.5. (Ex. 7 at pp. 28-33) (emphasis added). Moreover, OEPA issued a Notice of Violation to Warren for violating Part II.B.5 of its NPDES permit for issuing inadequate control mechanisms to Patriot, further evidencing that the conditions in Part.II.BB are enforceable components of the NPDES permit. *See* Compl. at Ex. 11. Courts have been clear that "nothing in the language of the Clean Water Act, the legislative history, or the implementing regulations restricts citizens

from enforcing the same conditions of a certificate or permit that a State may enforce. To the contrary...these sources uniformly support broad citizen enforcement authority....” *NWEA*, 56 F.3d at 988 (9th Cir. 1995).

None of the cases relied on by Defendant Warren involve a citizen suit brought against a regulated entity. In *Askins v. Ohio Dept. of Agric.*, 809 F.3d 868 (6th Cir. 2016), Plaintiffs attempted to use the citizen suit provision to bring suit against the OEPA for alleged *procedural* violations in its administration of its NPDES *program*. The Court held, “the Clean Water Act does not permit citizen suits against regulators, *who are not polluters*, for procedural violations.” *Id.*, at 876 (emphasis added). But the Warren POTW is a polluter, permitted to pollute so long as it abides by the conditions of its NPDES permit. Counts Six, Seven, and Eight of Plaintiff’s Complaint allege violations of those substantive conditions.

The Court in *Askins* specifically distinguishes between bringing suit against OEPA for its administration of the NPDES *program*, as opposed to bringing suit against a regulated entity for violating its NPDES permit, stating that its decision is in regard to the former. *Id.* at 874-876. Similarly, *Sierra Club v. Korleski*, 681 F.3d 342 (6th Cir. 2012), distinguishes between regulators and regulated parties, stating that the citizen suit provision of the Clean Air Act, which is nearly identical to the one in the CWA, is “a means by which parties may enforce the substantive provisions of the CAA against regulated parties.” *Id.* at 351 (*quoting Bennett v. Spear*, 520 U.S. 154 (1997)). Warren is a regulated party whose NPDES permit is the subject of Plaintiff’s citizen suit. The regulation Warren is required to conduct as a regulated party involves the wastestream it is accepting and, in turn, its discharge as a regulated entity. Therefore, Warren is an entity against whom a citizen suit may lie, and Part.II.BB. of its NPDES permit, is a condition that may be enforced through citizen suit.

In sum, the citizen suit provision of the Clean Water Act defines “effluent standard or limitation” to include “a permit or condition thereof issued under section 1323 of this title [the National Pollutant Discharge Elimination System].” 33 U.S.C. § 1365(f). Warren’s NPDES Permit describes Part II.BB.4 and Part II.BB.5 as “conditions” of that permit. Thus, Part II.BB.4 and Part II.BB.5 are effluent standards or limitations for purposes of the citizen suit provision. The Clean Water Act gives this Court jurisdiction to hear citizen suits brought by any citizen against any person alleged to be in violation of an “effluent standard or limitation under this chapter.” 33 U.S.C. § 1365(a). Thus, this Court has subject matter jurisdiction over the claims alleged in Counts Six, Seven, and Eight and Warren’s 12(b)(1) motion to dismiss should be denied.

V. CONCLUSION

For the aforementioned reasons, Plaintiff FreshWater Accountability Project respectfully requests that this Court deny Defendant Warren’s Motion to Dismiss.

Respectfully Submitted,

/s/ Megan M. Hunter

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CERTIFICATE OF SERVICE

I, Megan M. Hunter, hereby certify that a true and correct copy of the foregoing was filed electronically on October 25, 2017. Notice of this filing will be sent to all registered parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

By: /s/ Megan M. Hunter
Megan M. Hunter (0096035)