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ANGELA M. KELLY
LAKE CO. CLERK OF COURT

IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

STATE OF OHIO ex rel. RICHARD CORDRAY, OHIO ATTORNEY GENERAL,	)	**CASE NO. 09CV000616**
Plaintiff	)	**JUDGE VINCENT A. CULOTTA**
vs.	)	**JUDGMENT ENTRY**
SANDS TRAILER PARK & SALES, INC., et al.,	)	
Defendants	)	

This matter comes before the Court for consideration of the State of Ohio's Motion for Summary Judgment on Liability and Memorandum in Support; the Motion for Immediate Leave to File Brief in Opposition to Plaintiff's Motion for Summary Judgment; the Brief in Opposition to Plaintiff's Motion for Summary Judgment; and Plaintiff's Motion to Strike Defendants' Brief in Opposition to Plaintiff's Motion for Summary Judgment and in the Alternative, Reply to Defendant's Brief in Opposition.

STATEMENT OF THE CASE

The State of Ohio ex. rel. Richard Cordray, Ohio Attorney General, Environmental Enforcement Section, initiated this action against Sands Trailer Park & Sales, Inc. and David Ungers seeking injunctive relief and civil penalties. Plaintiff alleges that at all times relevant, Defendant Ungers held a National Pollutant Discharge Elimination System (NPDES) Permit to discharge from the waste water treatment plant, which bears NPDES permit number OPV00114*AD, effective April 1, 2004, and which was issued pursuant to R.C. §6111.03(J). Plaintiff asserts that Defendants own and/or operate a wastewater treatment plant that serves the Sands Trailer Park and that Defendants continue to discharge effluent into an unnamed tributary to Lake Erie despite a permit requirement that the discharge was to be eliminated, the outfall connected to publically-owned sewers, and the wastewater treatment plant abandoned. Plaintiff further alleges that Defendants have also operated the wastewater treatment plant in violation of effluent limitation, monitoring and reporting requirements contained within the permit. Plaintiff

indicates that it filed this action against Defendants to remedy violations of Ohio's water pollution control laws, R.C. Chapter 6111, and the rules adopted thereunder.

Specifically, in Count One, Plaintiff alleges that Defendants have violated National Pollutant Discharge Elimination System (NPDES) Permit 3PV001114*AD, Part I.A., Final Effluent Limitations & Monitoring Requirements, which required that beginning twelve months from the effective date of the permit, or by April 1, 2005, the discharge from Outfall 3PV00114001 shall be eliminated. Plaintiff alleges that from April 1, 2005, to the present Defendants have violated the requirements of Part I.A. as the discharge from Outfall 3PV00114001 has not be eliminated and continues to be discharged to an unnamed tributary of Lake Erie which constitutes a violation of R.C. §§6111.07(A)[1] and 6111.04[2] for which Defendants are subject to an injunction pursuant to R.C. §6111.07(B) and for which Defendants are liable to pay the State of Ohio a civil penalty of up to ten thousand dollars for each day of each violation, including each day subsequent to the filing of the Complaint pursuant to R.C. §6111.09(A).

In Count Two, Plaintiff alleges that the NPDES Permit 3PV001114*AD, Part I.A., Final Effluent Limitations & Monitoring Requirements state that beginning twelve months from the effective date of the permit, or by April 1, 2005, Outfall 3PV00114001 shall be tied into the publically owned sanitary sewer system, but that from at least April 1, 2005, to the present, Defendants have violated the above-mentioned requirements in that the Outfall 3PV00114001 has not been tied into the publically owned sanitary sewer system and continues to discharge effluent into an unnamed tributary of Lake Erie in violation of R.C. §§6111.07(A) and 6111.04 for which are subject to an injunction pursuant to R.C. §6111.07(B). Plaintiff alleges that Defendant is liable to pay Plaintiff a civil penalty of up to ten thousand dollars for each day of each violation, including each day subsequent to the filing of the Complaint.

In Count Three, Plaintiff alleges that the NPDES Permit 3PV001114*AD, Part I.A., Final Effluent Limitations & Monitoring Requirements required that beginning twelve months from the effective date of the permit, or by April 1, 2005, the wastewater treatment plant shall be abandoned. Plaintiff contends that from at least April 1, 2005, Defendants have violated the

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[1] Prohibits any person from violating any duty imposed by R.C. 6111.01 to 6111.08 or by the provisions of any permit, rule or order issued or adopted pursuant to those sections.

[2] Prohibits any person from discharging sewage, industrial waste, or other waste to waters of the State of Ohio in excess of permitted discharge limits.

requirements of the NPDES Permit 3PV001114*AD, Part I.A., Final Effluent Limitations & Monitoring Requirements as the waste water treatment plant has not been abandoned and continues to discharge effluent into an unnamed tributary to Lake Erie which constitutes a violation of R.C. §§6111.07(A) and 6111.04 for which are subject to an injunction pursuant to R.C. §6111.07(B). Plaintiff alleges that Defendant is liable to pay Plaintiff a civil penalty of up to ten thousand dollars for each day of each violation, including each day subsequent to the filing of the Complaint.

Count Four alleges that Permit 3PV00114*AD Part III, paragraph five required Defendants to collect and analyze for specified pollutants according to the approved methods and required Defendants to report monitoring data resulting from the collection and analysis of such samples to the Ohio EPA. Specifically, Defendants were to monitor for pH, water temperature, suspended solids, dissolved oxygen, flow, $CBOD_5$, nitrogen, ammonia, odor, turbidity and color from April 1, 2004 to March 31, 2005, but Defendants failed to do so. Plaintiff alleges that failure to so monitor is a violation of R.C. §6111.07(A) for which Defendants are subject to injunctive relief pursuant to R.C. §6111.07(B) and for which Defendants are liable to pay the State of Ohio a civil penalty of up to ten thousand dollars for each day of each violation, including the days subsequent to the filing of the Complaint pursuant to R.C. §6111.09(A).

Count Five alleges that NPDES permit 3PV00114*AD, Part I.A. Interim Effluent Limitations and Monitoring Requirements authorized Defendants to discharge from Outfall 3PV00114001 in compliance with the effluent discharge limitations set forth therein beginning from April 1, 2004, to March 31, 2005. Plaintiff alleges that on various dates, Defendants violated Part I.A. Interim Effluent Limitations and Monitoring Requirements of the NPDES Permit 3PV00114*AD by discharging from Outfall 3PV00114001 to an unnamed tributary to Lake Erie effluent that violated or exceeded the applicable interim effluent limitations for the total suspended solids, nitrogen, ammonia and $CBOD_5$. Plaintiff alleges that the acts constitute violations of R.C. §§6111.07(A) and 6111.04 for which Defendant are subject to an injunction pursuant to R.C. §§6111.07(B) and for which each Defendant is liable to pay the State of Ohio a civil penalty of up to ten thousand dollars for each day of each violation, including the days subsequent to the filing of the Complaint pursuant to R.C. §6111.09(A).

Lastly, Count Six alleges that NPDES permit 3PV00114*AD, Part III, paragraph 4(B) requires that if Defendants monitor any pollutant at the locations designated in the permit more

frequently than required by the permit, the results of said monitoring shall be included in the calculation and reporting values in the Defendants required monthly operating reports. Plaintiff alleges that from at least August, 2004, as reported in the monthly operating reports for the waste water treatment plant, Defendants violated permit 3PV00114*AD, Part III, paragraph 4(B) by monitoring pollutants more frequently than required by the permit and failing to include the results of that monitoring in the calculation and reporting values submitted in Defendants' monthly operating reports. Plaintiff alleges that the acts constitute violations of R.C. §6111.07(A) for which Defendants are subject to an injunction pursuant to R.C. §6111.07(B) and for which each Defendant is liable to pay the State of Ohio a civil penalty of up to ten thousand dollars for each day of each violation, including the days subsequent to the filing of the Complaint pursuant to R.C. §6111.09(A).

At this time, Plaintiff is seeking an Order granting summary judgment in its favor and against the Defendant pursuant to Civ.R. 56. Defendants have opposed Plaintiff's motion and Plaintiff has filed a Reply.

As a preliminary matter, the Court notes that Defendants have been given numerous extensions in this case including: 1) three Leaves to answer Plaintiff's Complaint, (the third after Plaintiff filed a Motion for Default Judgment); 2) one stipulation extending Defendants' time to produce discovery; and 3) two extensions of time to produce discovery responses *after* the Court had already issued an Order compelling Defendants to produce discovery responses. In its March 19, 2010, Judgment Entry granting Defendants a second extension of time to produce their discovery responses, the Court set a dispositive motion briefing schedule stating that Defendants' deadline to file any opposition brief would not be extended. Even in light of this Court's clear Order, Defendants filed a Motion for Extension of Time until April 30, 2010, to oppose Plaintiff's Motion for Summary Judgment, which the Court granted. On May 3, 2010, Defendants filed a Second Motion for Immediate Leave to File its Brief in Opposition to Plaintiff's Motion for Summary Judgment. Contemporaneously with the filing of their second motion for leave, Defendants also filed a Brief in Opposition. In the interest of deciding the issues on their merits, the Court will consider Defendants' Brief in Opposition to Plaintiff's Motion for Summary Judgment and hereby deems it as having been filed with proper leave of Court on May 3, 2010. The Court therefore declines to strike Defendants' Brief in Opposition to Plaintiff's Motion for Summary Judgment.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff contends that it is entitled to judgment as a matter of law because the facts establish that Defendants are liable for the violations alleged in Counts One through Six of the State of Ohio's Complaint for Injunctive Relief and Civil Penalties concerning the operation of a waste water treatment plant at the Sands Mobile Home Park.

Plaintiff notes that the issuance of a final NPDES permit is an action of the Director that may be appealed to the Environmental Appeal Commission within thirty days after notice of its issuance and the Environmental Appeal Commission had exclusive jurisdiction to hear challenges to the terms and conditions of all NPDES permits issued by the Director of the Ohio EPA, including effluent limitations and schedules of compliance. Thus, it is Plaintiff's position that this Court lacks jurisdiction to consider any argument by Defendants attacking the validity of the permits at issue in this case or the terms and conditions contained in the permits.

Plaintiff further notes that environmental protection statutes have long been recognized as strict liability laws designed to prohibit public welfare offenses. See *Professional Rental, Inc. v. Shelby Ins. Co.* (1991), 75 Ohio App.3d 365, *State of Ohio v. Gastown* (1975), 49 Ohio Misc. 29; *State ex. rel. Brown v. Dayton Malleable, Inc.* (Oct. 12, 1979), Montgomery C.P. Case No 78-694, unreported; *State v. Cheraso* (1988), 43 Ohio App.3d 221; and *State v. Grimsley* (1982), 3 Ohio App. 3d 265. Plaintiff asserts that R.C. Chapter 6111 contains no requirement that a violation of its requirements be intentional, deliberate, knowing or purposeful. Thus, it is Plaintiff's position that the plain language of the statute expresses the intention of the General Assembly to make Ohio's Water Pollution Control laws to be strict liability statutes.

In support of its motion, Plaintiff relies on the Defendants' admissions to the Plaintiff's Requests for Admissions wherein Defendants admitted that David Unger is the owner of the Sands Trailer Park & Sales, Inc. and the holder of NPDES Permit No 3PV00114*AD issued by the Director of the Ohio EPA and that Defendant Ungers received notice of the Permit on March 1, 2004, and did not appeal its issuance. Defendants further admitted that the Permit became effective on April 1, 2004, and expired on March 31, 2009. Defendants admitted that the Permit authorized the Sands waste water treatment plant to discharge effluent to the waters of the State of Ohio from designated outfall 3PV00114588 to an unnamed tributary of Lake Erie in accordance with the effluent limitations set forth in Part I,A. Defendant admitted that the State's

Complaint contains a fair and accurate copy of the NPDES Permit 3PV00114*AD that was issued to Defendant Sands Trailer Park and RV Sales, Inc. Defendants admitted that Part I,A of the Permit only authorized Defendants to discharge effluent from the Sands waste water treatment plant for twelve months following the effective date of the Permit, or from April 1, 2004, until March 31, 2005, at which time the Permit required that the discharge be eliminated, the outfall tied into the publically owned sanitary sewers and the waste water treatment plant abandoned. The Defendants further admitted that the requirement to tie in is also contained in Part III, Paragraph 32 of the Permit which required Sands Trailer Park & RV Sales, Inc. to abandon the semi-public disposal system and connect it to a publically owned treatment works when such sewers become available and accessible. Defendants admitted that the property in question in this case abuts Townline Road in Lake County, Ohio and that a sanitary sewer line runs along Townline Road and is available and accessible to the Defendants' property.

Plaintiff moves for judgment as a matter of law on Counts One, Two and Three of the Complaint based on the evidence that Defendants have failed to comply with Permit conditions requiring the connection to the Lake County sanitary sewers. Plaintiff also maintains that the monthly operating reports submitted to the Ohio EPA on behalf of Sands Motor Home Park constitute admissions by Defendants and serve as the basis for liability for the violations alleged in the Complaint. Plaintiff further alleges that it is entitled to judgment as a matter of law on Counts One, Two and Three of the Complaint because the evidence is unrefuted that Defendants failed to eliminate the discharge and did not connect to the Lake County sanitary sewers and did not abandon the waste water treatment plant by April 1, 2005, as required by the Permit.

Plaintiff also moves for judgment as a matter of law on Count Four of the Complaint contending that the evidence is unrefuted that Defendants have violated R.C. Chapter 6111 by failing to monitor effluent with the required frequency as required by the Terms and Conditions of Defendants' Permit. Plaintiff relies on the sworn affidavit of Marie Underwood, Ohio EPA Environmental Specialist in the Division of Surface Water who lists the instances in which Defendants failed to report monitoring data required by its NPDES Permit.

Plaintiff seeks judgment as a matter of law on Count Five of the Complaint on the grounds that Defendants have violated R.C. Chapter 6111 by failing to meet the interim effluent limitations as required by the Terms and Conditions of the NPDES Permit. Again, Plaintiff relies on the Affidavit of Marie Underwood who lists the instances in which Defendants violated

effluent limitations which comprise 238 days of violation. It is Plaintiff's position that it should be granted summary judgment on liability for 238 days of effluent violations.

Plaintiff lastly contends that it is entitled to judgment as a matter of law on Count Six of the Complaint because the evidence is unrefuted that Defendants violated R.C. Chapter 6111 by failing to report in the monthly operating reports samples taken during the period of interest. Plaintiff maintains that on September 9, 2004, Defendants submitted a monthly operating report for the August, 2004, reporting period. Thereafter, on April 3, 2006, Defendants submitted a second set of monthly operating reports to the Ohio EPA for the August, 2004, reporting period that contained values not reported or including in the calculations in the first set of monthly operating reports. Plaintiff maintains that inasmuch as the monthly operating reports are admissions, the monthly operating reports clearly demonstrate that Defendants failed to report samples in the September 9, 2004, report that were included in the monthly operating reports a year and a half later, thus violating the requirements of the Permit. Plaintiff further maintains that R.C. §6111.07 is a strict liability statute that requires compliance with the Permit, and the Permit requires that all sample results taken be submitted to the Ohio EPA and that they are to be submitted no later than the 15th day following the month of interest. Plaintiff asserts that re-submitting the previously omitted samples and re-calculating monthly averages using the additional samples in no way cures the violation of the terms of the Permit. Thus, Plaintiff maintains that it is entitled to judgment as a matter of law on Count Six of the Complaint because there is no genuine issue of material fact as to whether the Defendants failed to report all of the samples taken during the period of interest in the September 9, 2004, monthly operating reports.

DEFENDANTS' OPPOSITION TO SUMMARY JUDGMENT

In opposition to Plaintiff's motion, Defendants argue that Plaintiff is not entitled to summary judgment because Plaintiff did not commence the action within the five year statute of limitations regarding this type of action. Specifically, Defendants rely on R.C. §3745.31(B)(1) and (2) which provide:

> (B)(1) Except as provided in division (B)(2) of this section, any action under any environmental law for civil or administrative penalties of any kind brought by any agency or department of the state or by any other governmental authority charged with enforcing environmental laws shall be commenced within five years of the time when the agency, department,

> or governmental authority actually knew or was informed of the occurrence, omission, or facts on which the cause of action is based.
>
> (2) If an agency, department, or governmental authority actually knew or was informed of an occurrence, omission, or facts on which a cause of action is based prior to the effective date of this section, the cause of action for civil or administrative penalties of any kind for the alleged violation shall be commenced not later than five years after the effective date of this section.

It is Defendants' position that inasmuch as the instant action was filed on February 26, 2009, and Plaintiff has been trying to get Defendants to tie into a public sanitary system since at least 1997, Plaintiff's action is untimely.

Defendants further argue that Plaintiff is not entitled to judgment as a matter of law solely upon the grounds that Defendants allegedly did not properly appeal the issuance of the conditions contained in the Permit. Defendants contend that they are not precluded by law or otherwise from defending the legality, reasonableness and application of the NPDES Permit as well as its conditions. Defendants rely on R.C. §6111.06(A) which provides:

> All proceedings of the director of environmental protection or of the director's officers or agents under sections 6111.01 to 6111.08 of the Revised Code, including the adoption, issuance, modification, rescission, or revocation of rules and regulations, permits, orders, and notices, and the conduct of hearings, except standards of water quality adopted pursuant to section 6111. 041 of the Revised Code, shall be subject to and governed by sections 119.01 to 119.13, and Chapter 3745 of the Revised Code.

Defendants argue that Plaintiff and the Ohio EPA are subject to the requirements for notice and the right to appeal or object to a ruling of the Ohio EPA.

Defendants also distinguish two cases relied upon by Plaintiff. Specifically, Defendants maintain that in *State ex. re. Williams v. Bozarth* (1978), 55 Ohio St.2d 34, the Supreme Court of Ohio addressed the proposed actions by the EPA to deny variances from air pollution emissions standards and did not hold that a defendant could not assert defenses to an unreasonable or unenforceable condition set forth in a permit. Likewise, Defendants maintain that in *State ex. rel. Maynard v. Whitfield* (1984), 12 Ohio St.3d 49, the Supreme Court of Ohio addressed a non-party citizen's failure to object after a public notice was published regarding the denial of an individual's request for a license to operate a landfill and only decided the court's jurisdiction

regarding the issuance of declaratory and injunctive relief against the EPA and not the right to assert defenses to a cause of action brought by the EPA.

Defendants further argue that Plaintiff is not entitled to summary judgment on Counts One, Two and Three for failing to prove violations of the Permit and R.C. §6111.07 regarding the alleged failure to tie in to a public sewer system. Specifically, Defendants assert that the purported sewer line is not accessible as defined under R.C. §6117.51(C) because it is more than two hundred feet from the nearest boundary of the right-of-way within which the sewer is located. Further, Defendants argue that the sewer line is not accessible because access can only be achieved by Defendants' expending hundreds of thousand of dollars and to require Defendants to tie in would be unreasonable and inequitable.

Lastly, Defendants argue that Plaintiff is not entitled to summary judgment on Counts Four, Five and Six of the Complaint because Plaintiff has not established that Defendants violated the requirements set forth in the Permit. Defendants assert that even assuming *arguendo*, that the permit is valid and enforceable, Plaintiff has failed to prove that Defendants failed to monitor the effluent with the required frequency, to meet the interim effluent limitations and report in the monthly operating reports samples taken during those stated periods, because Plaintiff has relied on the Affidavit of Marie Underwood and has not provided copies of the monthly operating reports to the Court.

PLAINTIFF'S REPLY TO DEFENDANTS' OPPOSITION

In reply to Defendants' opposition, Plaintiff maintains that Defendants have failed to present any genuine issue of material fact as to whether the Statute of Limitations bars this action. Plaintiff notes that while R.C. §3745.31 does preclude the State of Ohio from seeking civil penalties for violations that occurred more than five years prior to the commencement of the action, the State of Ohio is not seeking civil penalties for any violation which occurred prior to February 26, 2004. Further, Plaintiff maintains that the allegations in the Complaint are that there is unauthorized discharge of effluent and that Defendants have failed to connect to the sanitary sewer, which are on-going violations of R.C. Chapter 6111 for which the State of Ohio is entitled to civil penalties. Plaintiff asserts that even if the alleged violations occurred more than five years ago such that the State of Ohio could not seek civil penalties, the limitation set forth in R.C. §3745.31 does not effect the State's ability to obtain injunctive relief to remedy the

violations. Plaintiff notes that the relevant portion of R.C. §3745.31 which the Defendants did not cite provides:

> (E) When an action seeks injunctive relief or another remedy in addition to a remedy of civil or administrative penalties of any kind under an environmental law, division (B) of this section applies only to the remedy of civil or administrative penalties of any kind.

Thus, Plaintiff maintains that Defendants' argument that Plaintiff's action is barred by the Statute of Limitations is simply incorrect.

Plaintiff also asserts that Defendants' make the argument that they were not advised of their right to appeal the NPDES Permit, is not supported by any evidence, such as an affidavit, to prove their argument. Plaintiff notes that the assertion by Defendants regarding the appeal is in fact contradicted by Defendant Ungers' own admission. Specifically, Plaintiffs rely on Admission No. 8 wherein Defendant Ungers admits that the letter attached thereto as Attachment 2 is a fair and accurate copy of the letter he received on March 1, 2004. Plaintiff notes that Attachment 2 clearly advises Defendant of his right to appeal the NPDES Permit. Likewise, Plaintiff relies on Admission No. 10 wherein Defendant Ungers admits he failed to appeal the NPDES Permit.

Plaintiff notes that despite the admissions that Defendant failed to appeal the NPDES Permit, Defendants are now making the argument that they should be permitted to challenge "the reasonableness and application of the NPDES Permit and its contention." Plaintiff maintains that this argument flies in the face of the holding in *State ex. rel. Maynard v. Whitfield*, 12 Ohio St.3d 49 in which the Supreme Court of Ohio stated:

> It is well-settled that the statutory procedure for review of OEPA actions set forth in R.C. Chapter 3745 is exclusive and that courts of common pleas are without jurisdiction to proceed in actions for declaratory and injunctive relief involving controversies under R.C. Chapter 3745.

Citing *Bozarth*, 55 Ohio St.2d 34 and *Warren Molded Plastics, Inc. v. Williams* (1978), 56 Ohio St.2d 352.

Plaintiff further notes that Defendants took pains in their brief to attempt to attach significance to the fact that *Bozarth* and *Whitfield* involve actions of the Director other than the issuance of a NPDES Permit. However, Plaintiff maintains that while *Bozarth* involves the denial of a variance, and *Whitfield* involves the denial of a license to operate a landfill, both are

acts of the Director and the "well-settled" legal principle is the same. That is, R.C. §3745.04 gives exclusive jurisdiction to the Environmental Review Commission to review such actions. Plaintiff argues that Defendants did not avail themselves to the right of appeal and the Ohio Revised Code and the Supreme Court of Ohio have held that this Court does not have jurisdiction to review the terms and conditions imposed in the NPDES Permit. Further, Plaintiff maintains that its own Motion for Summary Judgment establishes that the terms and conditions of the NPDES Permit are valid and enforceable against the Defendants, and, therefore, Plaintiff's motion should be granted.

As to Defendants' argument that the sewer tie in is not accessible, Plaintiff asserts that R.C. §6117.51(C) is not applicable to the instant matter. Plaintiff explains that R.C. §6117.51(C) sets forth the authority of a county board of health district within which a new sewer construction project is located or proposed to order the owner of a semi-public disposal system to connect to a sanitary sewer line once it is available and accessible. Plaintiff notes that inasmuch as this action was not brought by the Lake County Board of Commissioners and R.C. §6117.51(C) does not apply to the Director of the Ohio EPA, Defendants' reliance on R.C. §6117.51(C) is misplaced. Plaintiff further note that while Defendants assert that installing the sewer lines would cause financial hardship and would require an easement, Defendants have provided no evidence in the form of an Affidavit to support those assertions. Plaintiff argues that even if an Affidavit was filed, O.A.C. 3745-33-08 does not give the Defendants an exemption from connecting if it is expensive or if easements are required.

Plaintiff asserts that its Motion for Summary Judgment should be granted on Counts One, Two and Three of the Complaint because Plaintiff has shown that there is no genuine issue of material fact as to the availability and accessibility of sanitary sewers and that the Defendants are obligated to connect.

Lastly, Plaintiff maintains that there is no genuine issue of material fact as to whether the Defendants violated the NPDES Permit based on the data submitted to the Ohio EPA in the monthly operating reports. Plaintiff relies on *United States v. Hoboken* (D.N.J. 1987), 675 F.Supp. 189, wherein the Court held that where the monthly operating reports indicate that a defendant has exceeded the permit limitations, permit violations are established. Plaintiff also relies on *Natural Resources Defense Council v. Outboard Marine Corp.* (N.D. Ill. 1988), 692 F. Supp. 801 wherein the court held that monthly operating reports submitted under a permit are

admissions and statements contained therein are conclusive and irrebuttable evidence that permit violations have occurred. Plaintiff notes that Defendants have not and cannot set forth any evidence to rebut the data already submitted to the Ohio EPA in the monthly operating reports. See *State ex. rel. Petro v. Maurer Mobile Home Court, Inc.* (May 11, 2007), Wood App. No. WD-06-053, unreported.

Plaintiff asserts that the fact that the monthly operating reports are not attached to Plaintiff's motion have no bearing on the validity of the sworn Affidavit of Marie Underwood attesting to the violations. Plaintiff notes that pursuant to Ohio Rule of Evidence 1006, Plaintiff is not required to attach voluminous writings, recordings or photographs which cannot conveniently be examined by the court and may present that evidence in the form of a chart, summary or calculation, which Plaintiff did in this case. Thus, Plaintiff asserts that Summary Judgment should be granted in Plaintiff's favor on Counts Four, Five and Six of the Complaint.

SUMMARY JUDGMENT STANDARD

Pursuant to Civ.R. 56, summary judgment is proper when, after construing the evidence in a light most favorable to the nonmoving party, there remains no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

The moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim. *Dresher v. Burt* (1996), 75 Ohio St.3d 280. If the moving party satisfies this burden, then the nonmoving party has the burden pursuant to Civ.R. 56(E) to provide evidence demonstrating a genuine issue of material fact. *Id.* If the nonmoving party does not satisfy this burden then summary judgment is appropriate. *Id.*

COURT'S ANALYSIS AND CONCLUSION

Upon consideration, the Court finds that Plaintiff has met its burden of informing this Court of the basis for its motion and has identified those portions of the record which demonstrate the absence of a genuine issue of material fact. Specifically, Defendants have made numerous admissions in responding to Plaintiff's Requests for Admissions which establish that Defendants were required by the NPDES Permit at issue in this case to eliminate discharge, tie-in

the outfall to the publically owned sanitary sewers and abandon the waste water treatment plant. Defendants admitted that they were required to abandon the semi-public disposal system and connect it to a publically owned treatment works when such sewers become available and accessible and that an available and accessible sewer line abuts Defendants' property. The Affidavit of Marie Underwood further establishes that Defendants have committed violations of the NPDES Permit and R.C. Chapter 6111.

Defendants, however, have not provided any evidence demonstrating the existence of a genuine issue of material fact. Moreover, the Court rejects Defendant's arguments as to why Plaintiff is not entitled to an Order granting summary judgment in its favor. Specifically, the Court finds that R.C. §3745.31(B)(1) and (2) do not preclude Plaintiff from obtaining injunctive relief and do not preclude Plaintiff from seeking civil penalties for violations occurring on or after February 26, 2004. Further, the Court finds that Defendants' argument that sewer line tie in is not accessible pursuant to R.C. §6117.51 is without merit as R.C. §6117.51 does not apply in this case. Lastly, pursuant to *Whitfield*, 12 Ohio St.3d 49, this Court does not have jurisdiction to decide the reasonableness of the NPDES Permit and/or its conditions and requirements.

Thus, summary judgment in favor of the Plaintiff on the issue of Defendants' liability is appropriate.

ACCORDINGLY, Plaintiff's Motion to Strike Defendants' Brief in Opposition to Plaintiff's Motion for Summary Judgment is denied. The State of Ohio's Motion for Summary Judgment on Liability and Memorandum in Support is well taken and granted. The Court will conduct a hearing on the issue of damages and fines on June 25, 2010 at 3:00 p.m.

IT IS SO ORDERED.

VINCENT A. CULOTTA, JUDGE

Copies:

Andrea M. Salimbene, Esq.
Robert S. Leach, Esq.