United States District Court,D. Colorado.
WASON RANCH CORPORATION, Plaintiff,
v.
HECLA MINING COMPANY, a Delaware corporation; Barrick Gold Corporation, a Canadian corporation; Chevron Usa, Inc., a Pennsylvania corporation, individually, as parent, and as successor in interest to Chevron Resources Company, a division of Chevron Industries, Inc., Defendants.
Civil Action No. 05-cv-00838-WDM-PAC.

May 9, 2006.

John Dennis Fognani, Kristina I. Mattson, Richard Kirk Mueller, Fognani & Faught, PLLC, Denver, CO, for Plaintiff.
Nathan Michael Longenecker, Scott William Hardt, Temkin Wielga Hardt & Longenecker, L.L.P, Bradford Evan Dempsey, Henry W. Ipsen, Jeffrey Charles Blair, Nadia Ann Sarkis, Holme, Roberts & Owen, LLP, Denver, CO, Andrew L. Strong, Pillsbury Winthrop Shaw Pittman, LLP, Houston, TX, for Defendants.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

PATRICIA A. COAN, Magistrate Judge.

This is a citizen suit brought under the Clean Water Act (CWA), 33 U.S.C. § 1365, and under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C § 6972(a)(1)(B), for injunctive relief and civil penalties. An October 19, 2005 order of reference referred this case to me for pretrial case management. On January 11, 2006, dispositive motions were referred for recommended disposition.

The matters now before the court are defendant Barrick Gold's (Barrick) Motion to Dismiss, filed October 20, 2005 [doc. # 8]; defendant Hecla Mining Company's (Hecla) Motion to Dismiss, filed November 18, 2005 [doc. # 15]; and defendant Chevron USA's (Chevron) Motion to Dismiss, filed December 12, 2005 [doc. # 22]. The motions have been fully briefed and I heard oral argument on April 21, 2006.

I. Background

Plaintiff is the owner of Wason Ranch, a guest ranch on the banks of the Rio Grande River, in Creede, Colorado. Wason Ranch alleges that defendants have historically released and discharged and currently release and discharge toxic solid and hazardous wastes into the East and West Willow Creek watersheds, so that pollutants travel downstream to the main stem of Willow Creek and migrate into the Rio Grande. Plaintiff alleges that the releases and discharges have contaminated soils, surface water and groundwater near, on, or under the Wason Ranch.

An October 13, 2003 Notice Letter from plaintiff's counsel to defendants ("First Notice Letter") is attached to the complaint as Exhibit A. Plaintiff argues that the letter is the notice required prior to filing suit in federal court under both RCRA and CWA. Defendants challenge the sufficiency of the First Notice Letter, arguing that the letter does not comply with applicable regulations, and that, as a result, the court lacks subject matter jurisdiction.

On April 12, 2006, plaintiff filed a Notice of Supplemental Information, accompanied by a Second Notice Letter. Plaintiff does not admit any deficiency in its First Notice Letter, *id.* ¶ 6 at 2, but states that "the statutory 90day non-adversarial period triggered by the second Notice Letter" will elapse on June 15, 2006, when this matter is likely to still be pending, and will serve as the basis for the amended complaint plaintiff intends to file after the running of the "non-adversarial" period. *Id.,* ¶ ¶ 7, 8 at 3.

Defendants filed a joint response to the Notice of Supplemental Information on April 19, 2006 and plaintiff filed its reply on April 27, 2006.

II. Regulations' Notice Standard

Under the CWA, no citizen suit may be brought under 33 U.S.C. § 1365(a)(1) before sixty days after the plaintiff

has given notice to the alleged violator pursuant to § 1365(b)(1)(A). The RCRA notice timing requirement is ninety days prior to filing suit. 42 U.S.C. § 6972(b)(2)(A). The regulation applicable to RCRA provides:

§ 254.3 Contents of notice.

(a) Violation of permit, standard, regulation, condition, requirement, or order. Notice regarding an alleged violation of a permit, standard, regulation, condition, requirement, or order which has become effective under this Act shall include sufficient information to permit the recipient to identify the specific permit, standard, regulation, condition, requirement, or order which has allegedly been violated, the activity alleged to constitute a violation, the person or persons responsible for the alleged violation, the date or dates of the violation, and the full name, address, and telephone number of the person giving notice.

(b) Failure to act. Notice regarding an alleged failure of the Administrator to perform an act or duty which is not discretionary under the Act shall identify the provisions of the Act. which require such act or create such duty, shall describe with reasonable specificity the action taken or not taken by the Administrator which is claimed to constitute a failure to perform the act or duty, and shall state the full name, address, and telephone number of the person giving the notice.

Identification of counsel. The notice shall state the name, address, and telephone number of the legal counsel, if any, representing the person giving the notice.

40 C.F.R. § 254.3.

The CWA notice implementing regulation, at 40 C.F.R. § 135.3 (2006), is nearly identical to the RCRA regulation, providing that "[n]otice regarding an alleged violation of an effluent standard or limitation of an order with respect thereto, shall include sufficient information to permit the recipient to identify" (1) the specific standard, limitation or order alleged to have been violated; (2) the activity alleged to constitute a violation; (3) the person or persons responsible for the alleged violation; (4) the location of the alleged violation; (5) the date or dates of such violation; and (6) the full name, address, and telephone number of the person giving notice.

The CWA's sixty-day and RCRA's ninety-day notice filing requirements are mandatory conditions precedent to filing suit. *Hallstrom v. Tillamook County,* 493 U.S. 20, 31 (1989)(notice and 60day delay requirements are mandatory conditions precedent to commencing suit under the RCRA citizen suit provision). The notice prior to a citizen suit serves the Congressional goal of balancing "between citizen enforcement of environmental regulations with avoiding burdening federal courts with excessive numbers of citizen suits" in two ways: first, it allows the government to take responsibility for enforcement of regulations because citizen suits are designed to supplement governmental action; and second, it gives the alleged violator "an opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen suit." *Gwaltney v. Chesapeake Bay Foundation,* 484 U.S. 49, 60 (1987).

III. Analysis

Barrick moves to dismiss for lack of subject matter jurisdiction because plaintiff's First Notice Letter does not meet either Act's required "sufficient information" standard in that it fails to describe the following: point sources or discharges from any of the named or unnamed mines; a list of mines Barrick owned; the specific segments of the 35square-mile Willow Creek drainage area impacted by the discharges; and reasonable date ranges. Hecla argues that the notice requirement is strictly construed and that, because the First Notice Letter failed to provide Hecla sufficient information to permit the identification of: (1) the standard, limitation or order alleged to have been violated; (2) the activity allegedly conducted by Hecla resulting in the violation; (3) the person or persons responsible for the alleged violation; (4) the dates on which each violation occurred; and (5) the actual location of each alleged violation, Hecla should be dismissed because subject matter jurisdiction is lacking. Chevron moves to dismiss on similar grounds, contending that plaintiff's failure to provide sufficient notice under either the CWA or RCRA requirements mandates dismissal for lack of subject matter jurisdiction.

A. Does a Timely Notice Letter Allegedly Deficient in Content Comply with either the CWA's or RCRA's Notice Regulation?

It is undisputed that the First Notice Letter is timely, and Wason Ranch argues that, since it was timely, the content

requirement of its RCRA and CWA notice letter should be interpreted liberally. Defendants respond that the notice should have been more specific in order to comply with the applicable regulations.

In *New Mexico Citizens for Clean Air v. Espanola Mercantile Co., Inc.,* 72 F.3d 830,83233 (10th Cir.1996), a CWA case, the Tenth Circuit held that the Pueblo of San Juan was not a proper party to the proceeding because it had failed to provide either the state or the EPA the required sixty-day notice. The court reasoned that each and every plaintiff must comply with the notice requirements in order to be a proper party to a citizen suit, and acknowledged that *Hallstrom's* "strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Id.,* citing *Hallstrom,* 493 U.S. at 31 (quotation omitted); see also *Sierra Club v. El Paso Gold Mines, Inc.,* 198 F.Supp.2d 1265 (D.Colo.2002) *(reversed on other grounds, Sierra Club v. El Paso Gold Mine, Inc.,* 421 F.3d 1133 (10th Cir.2005) (where this court held that compliance with both elements of the CWA's notice requirements is a "jurisdictional prerequisite[ ] to [the] maintenance of a citizen suit." 198 F.Supp.2d at 1273.

I recommend finding that a notice letter which provides insufficient detail but complies with the sixty or ninety-day notice period fails to achieve the purpose of the notice, which is to give the recipient an opportunity to remedy the situation (or give the government an opportunity to act) before a lawsuit is filed. The recipient must be given enough detail about the alleged violation so that it can be corrected. The Congressional goals described in *Hallstrom* are defeated where the notice, due to its vagueness or its lack of essential details does not provide the alleged violator enough information upon which it can act. *Hallstrom,* 493 U.S. at 26, 3032 (rejecting a "flexible or pragmatic" construction of the 60day statutory notice provision, in favor of the plain language of the statute).

I read *Hallstrom* to hold that the notice provisions regarding content and timing should be read together to achieve the stated statutory purpose, and that both elements are mandatory and jurisdictional. See *Hallstrom, id.,* at 33 ("[w[here a party suing under the citizen suit provisions of RCRA fails to meet the *notice and 60day* delay requirement of § 6972(b), the district court must dismiss the action as barred by the terms of the statute." (emphasis added). I therefore reject plaintiff's implication that Hallstrom concerns only the timing issue and I will consider the content together with the timing of the First Notice Letter to determine whether both the timing and the content requirements of the applicable RCRA and CWA regulations are met.

B. Does the First Notice Letter meet the regulations' requirements for RCRA and the CWA?

As previously stated, the requirements for the notice letter are set forth in the regulations promulgated by the Environmental Protection Agency ("EPA") [FN1], which are found at 40 C.F.R. § 135.3 for the CWA, and at 40 C.F.R. § 254.3 for RCRA.I compare the First Notice Letter to each element of the regulations' requirements as follows.

> FN1. Because the EPA is charged with the administration of RCRA and CWA, I defer to its regulation whenever the statute is silent or ambiguous with respect to a specific issue. So long as the agency's interpretation is reasonable and consistent with the statutory purpose, a court must uphold it. *See, e.g., Chemical Mfrs. Ass'n v. EPA,* 919 F.2d 158, 16263 (D.C.Cir.1990) (review of final agency action by EPA interpreting amendments to RCRA) (citing *Chevron U.S .A. Inc. v. NRDC,* 467 U.S. 837, 84445 (1984) (if Congress explicitly left a statutory gap for the agency to fill, there is an express delegation of authority to clarify or elaborate on a statutory provision through regulation by the agency); see also *United States v. Riverside Bayview Homes, Inc.,* 474 U.S. 121, 131(1985) (court must be deferential to the agency's construction of a statute it is entrusted to administer if the construction is reasonable and does not conflict with congressional intent).

1. Identification of the Specific Standard, Limitation or Order Alleged to Have Been Violated.

In its First Notice Letter, plaintiff does not identify any order, permit, standard or limitation which defendants are alleged to have violated under RCRA or CWA. Instead the First Notice Letter identifies some of the substances allegedly discharged, see Compl., Ex. A at 2, and lists several pollutants. *Id.* at 34. Wason Ranch's general references to chemicals allegedly present in soil, groundwater and surface waters in unspecified quantities, however,

do not meet the first element of the notice requirements of RCRA or CWA because Wason Ranch does not mention a violated standard or limitation or order. [FN2]

FN2. I further note that review of the complaint fails to yield any additional or more specific information. See Compl. at 812.

2. Identification of the Activity Alleged to Constitute a Violation.

The First Notice Letter also does not identify any activities which are alleged violations, other than general references to defendants' mining operations and to leaking tailings. See Compl., Ex. A at 24. That is not enough information to allow defendants to identify which activities allegedly violate RCRA and/or CWA nor is it enough information to advise defendants of any actual or potential violation so that they can take remedial action.

3. Identification of the Person or Persons Responsible for the Alleged Violation.

Wason Ranch names three defendants in the Complaint but does not state specific facts connecting each defendant to an alleged violation or violations. Similarly, the First Notice Letter collectively refers to defendants. Plaintiff did not comply with this notice element because it did not individually identify any defendant nor link any individual defendant to any particular violation of RCRA or CWA.

4. Identification of the Location of the Alleged Violation.

The CWA requires that the notice letter state the location of the violation. RCRA does not require that element in a notice letter. Here, Wason Ranch did not refer to the specific location of any violations, but instead referred generally to mining operations along the East and West Willow Creek watersheds, and the main stem of Willow Creek, naming twelve mines. See Compl., Ex. A at 3. The area described comprises about thirty-five square miles of property. See Barrick's Reply to Motion to Dismiss at 6; Hecla's Reply to Motion to Dismiss at 6.

Wason Ranch relies upon *York Center Park Dist. v. Krilich,* 1993 WL 114628 at * *23, April 13, 1993 (N.D.Ill.1993) and *Fried v. Sungard Recovery Services, Inc.,* 900 F.Supp. 758, 76465 (E.D.Pa.1995) for its position that the notice should be interpreted liberally. I recommend finding that the cases are easily distinguishable on their facts and that neither should be found persuasive.

For example, *York Center* was an action brought by a park district under the Clean Air Act, allegedly for the defendant's failure to disclose the presence, release and disposal of asbestos during renovations of a building identified by its street address in Philadelphia. There, the court held that the notice letter sufficiently described the location of the allegedly violative activity by referring to a more specific description in the EPA's Notice of Violation and Compliance Order. In contrast here, Wason Ranch has not specifically identified the location of any alleged violation of RCRA or the CWA, and has not referred to any other document for further description. I therefore recommend finding that this notice element also has not been satisfied.

5. Identification of the Date or Dates of Such Violation.

The First Notice Letter refers to mining operations from the 1800s until at least 1983, see Compl., Ex. A at 24. Wason Ranch mentions only one specific date in the letter, which was an incident in March of 2001, when the Emperious Tailings Pile was alleged to have “washed out,” causing mine tailings to flood onto plaintiff's property. Plaintiff, however, does not link that March 2001 incident to any of the other elements of either RCRA's or the CWA's notice requirements, including the standard or permit allegedly violated or the identity of the responsible defendant. I therefore recommend finding that Wason has not complied with this element of the notice requirements.

6. Name, Address, and Telephone Number of Person Giving Notice .

Wason Ranch did provide the full name, address and telephone number of the person giving notice, so that it has met one element of the required notice. See Chevron's Motion to Dismiss at 6.

To aid me in determining whether Wason's notice was adequate, two Circuit Courts of Appeal considering arguments about the adequacy of notice provide some guidance. See, e.g. *Atlantic States Legal Found., Inc. v. Stroh Die Casting Co.,* 116 F.3d 814, 820 (7th Cir.1997) (in a CWA citizen action for violation of National Pollutant Discharge Elimination System (NPDES) permits, "[t]he key to notice is to give the accused company the opportunity to correct the problem"); *San Francisco Baykeeper, Inc v. Tosco Corp.,* 309 F.3d 1153, 1158 (9th Cir.2002) (in CWA citizen action, "the key language in the notice regulation is the phrase 'sufficient information to permit the recipient to identify' the alleged violations and bring itself into compliance").

Because Wason met only one of the elements required for proper notice to defendants in its First Notice Letter, I recommend finding that the Letter of October 13, 2003 did not give the defendants sufficient information to correct any alleged violation of RCRA or CWA, nor did it give enough information for any defendant to identify the alleged violation and correct it. Accordingly, the First Notice Letter did not comply with either RCRA's or the CWA's notice regulation.

C. Can Wason Ranch "Cure" Its First Notice With the Second Notice and Subsequent Amended Complaint?

In its April 12, 2006 Notice of Supplemental Information (Service of Second Notice Letter) ("Second Notice Letter"), Wason Ranch "intended to address Defendants' stated desire to learn more details about Wason Ranch's claims, and to eliminate nonproductive procedural wrangling over the First Notice Letter." Plaintiff's Notice of Supplemental Information, filed April 12, 2006, 9¶ 5 at 2. Defendants object to the filing of the Second Notice Letter.

In deciding whether the Second Notice Letter should be allowed to cure the deficiencies of the First Notice Letter, I find two decisions helpful. *In Public Interest Research Group of New Jersey, Inc. v. Hercules, Inc.,* 50 F.3d 1239, 1246 (3rd Cir.1995), an issue was whether the plaintiff could maintain a CWA citizen suit for post-complaint NPDES discharge violations which were a continuation of the same type of violation described in the original notice letter. There, the Third Circuit recognized that "[t]he regulations should not require notice that places impossible or unnecessary burdens on citizens but rather should be confined to requiring information necessary to give a clear indication of the citizens' intent." The Third Circuit held that "when a *parameter violation has been noticed,* subsequently discovered, *directly related violations* of discharge limitations or of monitoring, reporting, and record keeping requirements for that same parameter at that outfall *for that same period* maybe included in the citizen suit." 50 F.3d at 1252 (emphasis added). And, in *San Francisco Baykeeper, Inc. v. Tosco Corp.,* 309 F.3d 1153, 115858 (9th Cir.2002), the plaintiff had given notice of ongoing violations of Tosco's obligation to use the best available technology to prevent storm water pollution, and the court held that Tosco's knowledge of the nature of plaintiff's claim, coupled with its own knowledge of the ship-loading dates (on which alleged violations occurred), were sufficient information.

Here, the facts are distinguishable from those in Public Interest Research Group and in *San Francisco Baykeeper* because Wason's First Notice Letter was so lacking in the required information that Wason's Second Notice Letter had an insufficient foundation for any meaningful supplementation. There also is no indication that any defendant independently is aware that it or any of its affiliates or predecessor's' actions could be considered violations of the CWA or actions which could implicate RCRA. Accordingly, I recommend finding that Wason's Second Notice Letter does not contain supplemental information relating to violations which occurred during and after the period covered by the First Notice Letter, nor does it describe with additional particularity, any situation about which the defendants would already be on notice and have sufficient information with which to respond and correct the problems brought to their attention.

Accordingly, the Second Notice Letter cannot "cure" the deficiencies in the First Notice Letter. Even if it could, suit has already been filed and acceptance of the Second Notice Letter would deprive defendants of a pre-suit opportunity for correction of any purported violation which is the express purpose of the notice requirement. For all the reasons stated, I recommend finding that the deficient First Notice Letter, which is a mandatory condition

precedent to suit, does not comply with either RCRA's nor the CWA's notice regulations and therefore does not give this court subject matter jurisdiction over plaintiff's complaints. See *Hallstrom,* 493 U.S. at 31.

IV. Recommendation

For the reasons stated, It is hereby

RECOMMENDED that defendant Barrick Gold's (Barrick) Motion to Dismiss, filed October 20, 2005 [doc. # 8] be granted; it is

FURTHER RECOMMENDED that defendant Hecla Mining Company's (Hecla) Motion to Dismiss, filed November 18, 2005 [doc. # 15] be granted; it is

FURTHER RECOMMENDED that defendant Chevron USA's (Chevron) Motion to Dismiss, filed December 12, 2005 [doc. # 22] be granted; it is

FURTHER RECOMMENDED that this action be dismissed in its entirety, without prejudice, for lack of subject matter jurisdiction.

Within ten days after being served with a copy of the proposed findings and recommendation, any party may serve and file written objections to the proposed findings and recommendation with the Clerk of the United States District Court for the District of Colorado. The district court judge shall make a determination of those portions of the proposed findings or specified recommendation to which objection is made. The district court judge may accept, reject, or modify, in whole or in part, the proposed findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions. Failure to make timely objections to the magistrate judge's recommendation may result in a waiver of the right to appeal from a judgment of the district court based on the findings and9recommendations of the magistrate judge.