

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES PUBLIC)	
INTEREST RESEARCH)	
GROUP, STEPHEN E.)	
CRAWFORD, AND)	
CHARLES FITZGERALD,)	
)	
Plaintiffs)	Civil No. 00-149-B-C
)	
v.)	
)	
STOLT SEA FARM, INC.,)	
)	
Defendant)	
)	

RECOMMENDED DECISION ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiffs, the United States Public Interest Research Group, Stephen Crawford, and Charles FitzGerald (collectively "USPIRG"), filed a Clean Water Act citizen suit against defendant, Stolt Sea Farm, Inc. alleging discharges of pollutants in violation of the Act. (Docket No. 2.) Before me for recommended decision are USPIRG's motion for summary judgment (Docket No. 17) on the issue of Stolt Sea Farm's ("Stolt") liability for Clean Water Act violations and Stolt's motion for summary judgment on all claims. (Docket No. 25.) I recommend that the Court **DENY** Stolt's motion for summary judgment and **GRANT** USPIRG's motion for summary judgment on the issue of liability under the Clean Water Act.

Summary Judgment Standard

Summary judgment is appropriate when the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment

as a matter at law.” Fed. R. Civ. P. 56(c). A fact is “material” when it has the “potential to affect the outcome of the suit under the applicable law.” Nereida-Gonzalez v. Tirado-Delgado, 990 F.2d 701, 703 (1st Cir. 1993) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). A “genuine issue” exists when the evidence is “sufficient to support rational resolution of the point in favor of either party.” Id. To determine whether genuine issues of material fact exist in matters subject to cross-motions for summary judgment, the court must draw all reasonable inferences against granting summary judgment. Cont’l Grain Co. v. P.R. Mar. Shipping Auth., 972 F.2d 426, 429 (1st Cir. 1992). Summary judgment should be granted “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

Facts

The Parties

Defendant, Stolt Sea Farm, Inc. (“Stolt”), owns and operates three salmon farms known as Johnson Bay, Rogers Island North, and Rogers Island South. (Pls.’ Statement of Material Facts (PSMF) ¶ 1.) The farms are located in Cobscook Bay. (Id. ¶ 1.) Stolt also owns D.E. Salmon, which consists of two salmon farms known as Booth and Gove Point, both located in Cobscook Bay. (Id. ¶¶ 2-3.)

Plaintiffs consist of the United States Public Interest Research Group, a national organization dedicated to environmental protection, and two individuals, Stephen Crawford and Charles FitzGerald, members of USPIRG. (Id. ¶¶ 157-158.) Collectively, the plaintiffs will be referred to as “USPIRG.” USPIRG initiated this citizen suit

claiming that Stolt's salmon farms release pollutants into the water in violation of the Clean Water Act. (Am. Compl. at 1.)

Stolt's Fish Farm Operations

Stolt's salmon farms consist of sea cages and working platforms (i.e. catwalks) which are moored by chain, line, and mooring blocks. (Def.'s Statement of Material Facts (DSMF) ¶ 2.) Stolt uses two types of sea cages (also referred to as net pens). (Id.) One type consists of square steel frames that contain flotation. (Id.) An inner containment net and an outer predator net hang from the steel frame structure. (Id.) These sea cages are moored in a grid system. (Id.) The other type of sea cage consists of plastic collars containing flotation and has the inner and outer nets hanging from the collars. (Id.) The net pens are anchored to the bottom of the sea floor. (PSMF ¶ 25.) The open mesh of the nets allows the current to pass through the nets. (DSMF ¶ 2.)

At Stolt's farms, young fish are brought in, grown for about eighteen months to maturity, and then harvested for market. (PSMF ¶¶ 19, 20.) Stolt purchases its salmon from freshwater hatcheries when the fish are smolts (i.e. young salmon that are ready to migrate from fresh water to salt water). (Id. ¶ 23.) After receiving smolts from a hatchery, Stolt delivers the smolts to the net pens by boat. (Id. ¶ 24.) The smolts are "sluiced" from the boat into the net pens through a 6-inch diameter plastic hose. (Id. ¶ 26.) Stolt can stock up to twenty-eight pens at a single farm site, and each pen can hold between 5,000 and 16,000 fish. (Id. ¶ 27.) USPIRG estimates that at any given time, over a quarter of a million fish can be stocked at one of Stolt's farms. (Id. ¶ 28.) Each of Stolt's farms produces at least 9,090 harvest weight kilograms (approximately 20,000

pounds) of salmon a year. (PSMF ¶ 117; Def.'s Resp. to Pls.' Statement of Material Facts (DRSMF) ¶ 117.)

1. Copper

The nets that confine the fish, as well as the nets that keep predators away from the fish, are treated with an "antifoulant" called Flexguard. (PSMF ¶ 39.) Flexguard contains copper, which is designed to reduce the growth of plant life, mussels, and other life that would otherwise clog the mesh in the nets. (Id. ¶ 40.) Copper can be toxic to fish at a certain concentration. (Id. ¶ 41.) USPIRG claims that copper from the nets is released into the marine environment. (Id. ¶ 42.)

2. Feed

Stolt feeds its salmon a meal containing poultry parts and a chemical dye called carophyll red that colors the fish's flesh pink. (Id. ¶ 47; Def.'s Additional Statement of Material Facts (DASMF) ¶ 1.) Stolt stores the feed on scows, and then delivers the feed by boat from the scows to the net pens. (PSMF ¶ 46.) Stolt's smolts are fed by hand three or four times a day. (Id. ¶ 44.) As the fish mature, Stolt switches to a "blower mechanism" feeding one or two times a day. (Id.) A blower is a large hopper with an air supply that blows the feed through a pipe into a salmon cage. (Id. ¶ 45.) During feedings, excess feed falls through the bottom of the net pen or is flushed out by the current. (Id. ¶ 96; DASMF ¶ 2.) Stolt's farms each feed at least 2,272 kilograms (approximately 5,000 pounds) of food during the calendar month of maximum feeding. (PSMF ¶ 118; DRSMF ¶ 118.)

3. Diseases, Viruses, and Parasites

Salmon in Stolt's pens have contracted bacterial kidney disease ("BKD"), flexibacter, and vibrio (hitra, angularium, or ordalli), which can kill fish or have sublethal effects. (PSMF ¶¶ 48-49.) Flexibacter resides in the ambient waters and infects farmed salmon opportunistically when the fish are stressed or physically injured from rubbing against the containment net. (Id. ¶ 52.) When bacterial diseases exist in a pen, the bacterial pathogens can be dispersed from the pens by tidal currents or can be spread through feces and urine from infected salmon. (Id. ¶¶ 59, 97.) Some bacterial diseases such as BKD, can be spread "horizontally" through the water from fish in one cage to fish in other cages, and "vertically" from the parent or broodstock to later generations. (Id. ¶ 51.)

Stolt's primary concern regarding viral diseases is infectious salmon anemia ("ISA"). (Id. ¶ 53.) USPIRG claims that ISA has been found in Stolt's New Brunswick salmon farms and at salmon farms near Treats Island, not over a mile from Stolt's Johnson Bay operations. (Id. ¶¶ 55-56.) USPIRG asserts that there is no cure for ISA and it is a significant threat to the remaining endangered wild salmon. (Id. ¶ 58.)

An additional problem at Stolt's farms is parasites such as sea lice that can damage or kill salmon. (Id. ¶ 72-73.) The "intensive culture" of Stolt's farms makes the sea cages an attractive spot for sea lice to gather. (Id. ¶ 75.) Once in the net pens, these parasites can be dispersed into the waters by tidal currents. (Id. ¶ 76.)

4. Chemicals and Fish Wastes

Stolt treats bacterial infections by mixing the antibiotic oxytetracycline (also known as Terramycin 100) or Romet to the salmon feed or by feeding the salmon a

purchased medicated feed. (Id. ¶¶ 65-67; DRSMF ¶ 65-67; DASMF ¶ 12.)

Antibiotic-laden feed can fall through the bottom of the net pens or be flushed out of the nets into the water by the current. (PSMF ¶ 70; DSMF ¶ 70.) Stolt stopped using the antibiotic oxytetracycline in either 1999 or 2000. (DASMF ¶ 10; Pls.' Reply to Def.'s Resp. Additional Statement of Material Facts (PRASMF) ¶ 10.)

In order to kill sea lice, Stolt uses cypermethrin, a chemical found in agricultural pesticides. (PSMF ¶ 77.) The cypermethrin is contained in a product called Excis, which the FDA has not yet approved. (Id. ¶ 78.) Excis contains one percent cypermethrin and is used by Stolt as an Investigational New Animal Drug ("INAD"). (Id. ¶ 79; DASMF ¶ 5.) Although, the designation of cypermethrin as an INAD has expired, Stolt wants to continue to use this toxic chemical to control sea lice in its pens. (PSMF ¶ 80.) Stolt applies cypermethrin after placing a tarp around a net pen and raising the tarp to confine the salmon in a small area. (Id. ¶ 83.) The cypermethrin, diluted in water, is then poured from a container into the tarped net pen. (Id. ¶ 83; DASMF ¶ 3.) Following the treatment, the tarp is removed and the cypermethrin is released from the net pens into the marine environment. (PSMF ¶ 84.) Stolt has used cypermethrin from 1995 through 2000. (DASMF ¶ 9; PRASMF ¶ 9.) Stolt uses a similar tarp technique to treat its fish for gill parasites, but uses formaldehyde. (PSMF ¶ 85; DRSMF ¶ 85.) Like cypermethrin, formaldehyde washes out of Stolt's net pens into the surrounding water after the treatment. (PSMF ¶ 87; DSMF ¶ 87.) In order to control ISA, Stolt's workers and equipment are treated with an iodine-based disinfectant called Germ Kill which washes into the water. (PSMF ¶¶ 63-64; DRSMF ¶¶ 63-64.)

Aside from these chemicals, salmon feces and urine fall through the bottom of the net pens or are flushed out by the current and enter the bay water. (Id. ¶ 96.) Each of Stolt's farms releases substances such as feces, urine, and excess feed, into the waters at least thirty days a year. (Id. ¶ 116; DRSMF ¶ 116.)

5. Escapees

Fish can escape through holes in Stolt's nets, which can be created by seals, storms, vandalism, chafing, and mechanical equipment such as a boat's propeller. (PSMF ¶¶ 88-89; DRSMF ¶¶ 88-89.) In September 1999, approximately 30,000 fish escaped through a hole in a net pen at one of Stolt's Canadian sites. (PRSMF ¶ 91.) Stolt's internal documents report "negative variances" from the number of fish initially stocked in its pens and this loss could be the result of escapes. (Id. ¶ 90.) Stolt cannot guarantee that its fish will not escape from its Maine sites in the future. (Id. ¶ 92.)

Stolt's salmon are different from the salmon that naturally exist in Cobscook Bay. First, some of Stolt's salmon are of non-North American origin. (Id. ¶¶ 15-17.) Second, Stolt's farm raised salmon can have shortened and eroded fins, a plumper body, and a smaller head to body ratio than non-farmed salmon. (Id. ¶ 21.)

EPA Involvement

In a July 18, 1989 letter from the Director of EPA Region One, Water Management Division to William Lawless, Chief Regulatory Branch, Army Corps of Engineers, the Director, in commenting on proposed floating aquatic animal production facilities in a bay, stated that "[u]pon re-evaluating the regulations, we have determined that some of these concentrated aquatic animal production facilities may require a permit under the National Pollutant Discharge Elimination System (NPDES) program." (DSMF

¶ 4; Culley Decl. I Ex. 3.) The following month, August 1989, the EPA responded by letter to a party's notice of intent to sue the EPA for failing to require salmon net pen facilities in Maine to have NPDES permits. (DSMF ¶ 5, Culley Decl. I Ex. 4.) In the letter, the EPA stated that upon its review of the Clean Water Act and the applicable regulations, it concluded that salmon net pen facilities in Maine may constitute "Concentrated Aquatic Animal Production Facilities" under 40 C.F.R. § 122.24(b) and Appendix C or under § 122.24(c). (*Id.*) The EPA noted that the Maine salmon net pen facilities would be required to submit information to enable the EPA to take appropriate action. (*Id.*) Fourteen months later, in October 1990, EPA Region One sent Stolt a letter stating that its facilities are required to obtain National Pollutant Discharge Elimination System ("NPDES") permits and instructed Stolt to submit an NPDES application. (PSMF ¶ 105; DSMF ¶ 9.) Stolt submitted its application for an NPDES permit on December 17, 1990, for its Johnson Bay farm.¹ (PSMF ¶ 106; DSMF ¶ 10.) However, Stolt never received a permit or any response from the EPA regarding its NPDES application. (PSMF ¶ 107; DSMF ¶ 11.)

A few years later in August 1992, in compliance with a request from the Maine Department of Marine Resources ("DMR"), Stolt sent a "Notice of Intent" to DMR stating that Stolt "intends to be covered by and will comply with the terms of the general NPDES permit for offshore net pen facilities in the State of Maine." (PSMF ¶ 108.)

During these years, the EPA was the only NPDES permitting agency, as delegation to the

¹ The EPA has not issued a "general" NPDES permit to cover the salmon farming industry in Maine, thus Stolt would have applied for an "individual" permit. A "general" NPDES permit is generally applicable to a group of point sources consisting of similar operations and similar types of waste discharges. *Texas Oil & Gas Ass'n v. U.S. E.P.A.*, 161 F.3d 923, 929 (5th Cir. 1998) (citing 40 C.F.R. 122.28). An "individual" permit applies to individual point source dischargers. *Driscoll v. Adams*, 181 F.3d 1285, 1288 (11th Cir. 1999). When an NPDES permit is required, either type of permit suffices as compliance with the Act.

State of Maine did not occur until January 2001. (DSMF ¶ 21.) In a September 1994 letter to Stolt, the U.S. Army Corps of Engineers granted navigation permits for Stolt's net pens and explained that Stolt still needed to obtain NPDES permits from the EPA. (PSMF ¶ 110.) Stolt was also advised by one of its operating managers that Stolt's salmon farms located in the State of Washington required NPDES permits, and that its Maine farms would most likely be required to have permits as well. (Id. ¶ 111.) To this day, Stolt has not obtained an NPDES permits for any of its Maine salmon farms and is not aware of any permit being issued by the EPA for the salmon farming industry in Maine. (Id. ¶¶ 104, 109.)

Discussion

In its citizen suit under the Clean Water Act, USPIRG seeks a declaratory judgment that Stolt has violated, and is violating, the Clean Water Act and an injunction ordering Stolt to cease operations at its Maine salmon farms. (Am. Compl. at 8.) Further, USPIRG seeks civil penalties for Clean Water Act violations from April 26, 1995, to date and reasonable attorney's fees and costs. (Id.) USPIRG filed a motion for summary judgment requesting the court to grant their claim for declaratory relief by finding that Stolt's salmon farms violate the Clean Water Act, 33 U.S.C. § 1311, as the farms discharge pollutants without a National Pollution Discharge Elimination System ("NPDES") permit. (Pls.' Mot. Summ. J. (PMSJ) at 2.) Stolt filed a cross motion for summary judgment on the grounds that it is not required to obtain an NPDES permit and that it is not prohibited under the Clean Water Act from discharging pollutants. (Def.'s Mot. Summ. J. (DMSJ) at 2.)

A. *Is There a Violation of the Clean Water Act?*

The Clean Water Act (“Act”) states that “the discharge of any pollutant by any person is unlawful.” 33 U.S.C. § 1311(a). When a person or entity is in compliance with certain provisions of the Act, they are exempt from the prohibition in § 1311(a). Id. Here, the only relevant exemption is section 1342, which authorizes the Environmental Protection Agency Administrator (“EPA”) to issue NPDES permits allowing individuals or entities to discharge pollutants, thereby exempting them from the prohibition in § 1311(a). See 33 U.S.C. § 1342(a)(1) & (k). Sections 1311(a) and 1342 are understood to mean that the discharge of a pollutant is prohibited unless an NPDES permit has been obtained. See, e.g., EPA v. Cal. ex rel. State Water Res. Control Bd., 426 U.S. 200, 205, n. 14 (1976); Int’l Paper Co. v. Ouellette, 479 U.S. 481, 489 (1987) (“Section 301(a) of the Act, 33 U.S.C. § 1311(a), generally prohibits the discharge of any effluent into a navigable body of water unless the point source has obtained an NPDES permit... .”). A permit may be granted from the EPA or from the state where the discharger is located, if the state has developed a program and has received permitting authority from the EPA. See 33 U.S.C. § 1342(a), (b).

The phrase “discharge of a pollutant” found in § 1311(a) is defined as “any addition of any pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12). Thus, a “discharge of a pollutant” occurs when five elements exist: “(1) a pollutant must be (2) added (3) to navigable waters (4) from (5) a point source.” Nat’l Wildlife Fed’n v. Gorsuch, 693 F.2d 156, 165 (D.C. Cir. 1982). USPIRG has the burden of demonstrating that each element exists in order to establish that Stolt is “discharging a pollutant” as defined by the Act.

1. Elements (1) and (2): A Pollutant Must be Added

Under § 1362(6) of the Act, the term “pollutant”

means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.

33 U.S.C. § 1362(6) (emphasis added).

Courts have interpreted the definition of pollutant “to encompass substances not specifically enumerated but subsumed under the broad generic terms” listed in § 1362(6). See, e.g., Hudson River Fishermen’s Ass’n v. City of N.Y., 751 F. Supp. 1088, 1101 (D. N.Y. 1990), aff’d, 940 F.2d 649 (2nd Cir. 1991)(citing United States v. Hamel, 551 F.2d 107 (6th Cir. 1977)). It is not relevant that the EPA has not issued a permit or promulgated an effluent limitation to regulate the substance alleged to be a pollutant; the court can independently determine that a substance falls within one of the general terms of § 1362(6).² Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., 73 F.3d 546, 566-568 (5th Cir. 1996), cert. denied, 519 U.S. 811 (1996) (stating that the definition of pollutant is meant to “leave out very little” and discussing the courts’ ability in citizen suits to determine whether a particular substance falls within the definition of “pollutant” and citing cases). See also Weinberger v. Romero-Barcelo, 456 U.S. 305, 309 (1982) (“the release of ordnance from aircraft or from ships into navigable waters is a discharge

² Although USPIRG introduces into the record numerous facts relating to the harm certain substances may have on the environment or to humans, the Act does not require proof that the pollutant causes harm. See Long Island Soundkeeper Fund, Inc. v. N.Y. Athletic Club, 1996 WL 131863, *15 (D.N.Y. 1996) (citing City of Milwaukee v. Ill., 451 U.S. 304, 310 (1981); Orange Env’t, Inc. v. County of Orange, 811 F. Supp. 926, 934 (D. N.Y. 1993)). In citizen suits such as this (where an action is brought against a defendant for discharging an alleged pollutant without a permit) a court’s role is only to “apply the statutory definition [of § 1362(6)] to determine if the substance in question is a pollutant.” Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., 73 F.3d 546, 567 (5th Cir. 1996) (also stating that the determination of whether a substance is a pollutant does not require “a ‘complex balancing’ of biological, technical, and economic factors, such as the EPA must undertake when promulgating effluent standards.”).

of pollutants, even though the EPA, which administers the Act, had not promulgated any regulations setting effluent levels or providing for the issuance of an NPDES permit for this category of pollutants.”).

USPIRG alleges that Stolt’s fish farms release pollutants such as salmon, salmon feces, salmon urine, fish feed, cypermethrin, copper, pathogens, parasites, and antibiotics.³ (Am. Compl. at 5-6; PMSJ at 6.) USPIRG argues that these substances fall under the Act’s definition of “pollutants” because they are solid waste, chemical wastes, biological materials, or agricultural waste. (PMSJ at 15-16.)

The record supports USPIRG’s claim that Stolt puts various substances into the water at its net pens and these substances flow out of Stolt’s net pens and into Cobscook Bay. First, it is undisputed that Stolt grows salmon of non-North American origin in its net pens (PSMF ¶¶ 15-17; DRSMF ¶¶ 15-17) and that some of these salmon escape from the pens into the bay. (PSMF ¶¶ 88-92; DRSMF ¶¶ 88-92.) Fish that do not naturally occur in the water, such as non-North American salmon, fall within the term “biological material” and are therefore pollutants under the Act. See Nat’l Wildlife Fed’n v. Consumers Power Co., 862 F.2d 580, 583, 586 (6th Cir. 1988) (finding that “... live fish, dead fish and fish remains annually discharged into Lake Michigan by the... facility are pollutants within the meaning of the CWA, since they are ‘biological materials,’” but

³ USPIRG also argues that from 1994 or 1995 to 1997, Stolt released “blood water” (i.e. the mixture of salmon blood and carbonated water that remains after bleeding the fish) into Johnson Bay. (PMSJ at 5; PSMF ¶¶ 31-35.) It is undisputed that Stolt stopped this practice in 1997 and has been disposing blood water through a hired septic service. (PSMF ¶¶ 33-34, 38; DRSMF ¶¶ 33-34, 38). Neither the record nor USPIRG’s motion contains any allegations or indication that there are continuous or intermittent violations. Thus, Stolt’s dumping of blood water appears to be a wholly past violation. The dumping occurred prior to the filing of USPIRG’s complaint and there are no allegations or record indications of a likely recurrence. For these reasons, liability for Stolt’s past dumping of blood water cannot be considered. See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49, 64 (1987).

holding that because the fish were not “added,” a permit was not required) (citing Ass’n of Pacific Fisheries v. EPA, 615 F.2d 794 (9th Cir. 1980)). Second, the salmon feces and urine that exit the net pens and enter the waters (PSMF ¶ 96; DRSMF ¶ 96) are pollutants as they constitute “biological materials” or “agricultural wastes.” See Higbee v. Starr, 598 F. Supp. 323, 330-331 (D. Ark. 1984), aff’d, 782 F.2d 1048 (8th Cir. 1985) (finding that the hog farm is a concentrated animal feeding operation and the hog waste that fell directly from the animals through slats in the floor into holding basins is “agricultural waste” under the Clean Water Act, but holding that there was no evidence that a “discharge” to navigable waters occurred).

Third, Stolt blows salmon feed into the net pens one or two times a day or hand feeds them three to four times a day. (PSMF ¶ 44.) The feed contains poultry parts, a chemical dye called carophyll (PSMF ¶ 47), and at times an antibiotic called oxytetracycline or a drug called Romet. (PSMF ¶¶ 65-67; DRSMF ¶¶ 65-67.) Excess or uneaten feed can enter the water when it flows out of the pens or falls through the net pens. (PSMF ¶¶ 70, 96; DRSMF ¶¶ 70, 96; DASMF ¶ 2.) The feed falls under the category of “solid waste,” “biological materials,” or “agricultural wastes” as it contains poultry parts. Thus, it is a pollutant. The uneaten carophyll, the oxytetracycline, and the Romet flow out of the net pens (PSMF ¶ 70; DRSMF ¶ 70) and become waste. As such, they are subsumed in the category of “chemical wastes” and are therefore pollutants. See United States v. Schallom, 998 F.2d 196, 199 (4th Cir. 1993), cert. denied, 510 U.S. 902 (1993) (finding that shotcrete, which is “composed of materials specifically identified as pollutants, including chemicals,” and that cement, which is a mixture of chemicals and materials, fall under the category of “chemical wastes”).

Fourth, after treating its salmon for sea lice, Stolt releases the tarp holding the salmon and thereby releases cypermethrin through the net pens into the water. (PSMF ¶¶ 77-78, 83-84; DRSMF ¶¶ 77-78, 83-84.) Using the same process, Stolt releases formaldehyde into the water when it treats its fish for gill parasites. (PSMF ¶¶ 85, 87; DRSMF ¶¶ 85, 87.) These chemicals that are released into the water after their use fall within the category of “chemical wastes” and are also pollutants. Fifth, copper from the net pens at Stolt’s farms enters the water.⁴ (PSMF ¶ 42.) Copper is specifically listed by the EPA as a “toxic pollutant” in 40 C.F.R. § 401.15(22), thus copper is a pollutant under the Act. See Cedar Point Oil Co, 73 F.3d at 568-569 (finding produced water to be a pollutant under the Act in part because components of produced water were included in 40 C.F.R. § 401.15, the EPA’s “toxic pollutants” regulation (citing Dague v. Burlington, 732 F. Supp. 458, 469-70 (D. Vt. 1989) (“finding substances discharged by defendants to be pollutants by reference to the toxic pollutant list.”))).

Based on the undisputed facts and the broad reading of the term “pollutant,” the escaping non-North American origin salmon, the copper, the feed containing poultry parts and carophyll, the cypermethrin, the formaldehyde, and the antibiotics oxytetracycline and Romet, all fall within the definition of “pollutants” under the Act. Moreover, as these items are put in the water by Stolt as a part of its operation, they do

⁴ USPIRG’s complaint and motion focus on the argument that the point source is Stolt’s facilities, not the nets in and of themselves (the distinction will become clear in the discussion below regarding whether Stolt’s net pen fish farms constitute “concentrated aquatic animal production facilities” and are therefore point sources). The nets are treated with copper, Stolt physically introduces the copper-coated nets into the water, and the copper is released from the nets into the waters. Thus, copper is added from the outside world into the waters at Stolt’s facilities.

not naturally occur in the bay and therefore are “additions” to the water.⁵ See, e.g., Catskill Mountains Chapter of Trout Unlimited v. City of N.Y., 273 F.3d 481, 491 (2nd Cir. 2001) (“The EPA’s position, upheld by the Gorsuch and Consumers Power courts, is that for there to be an ‘addition,’ a ‘point source must introduce the pollutant into navigable water from the outside world.” (citing Gorsuch, 693 F.2d at 165 and Consumers Power Co., 862 F.2d at 586) (emphasis added).

2. Element (3): Navigable Waters

The Clean Water Act defines “navigable waters” as “the waters of the United States, including the territorial seas.” 33 U.S.C. § 1362(7). Stolt’s Maine sea farms are located in Cobscook Bay (PSMF ¶ 1), thus they are clearly within the definition of “navigable waters.”

3. Elements (4) and (5): From a Point Source

Stolt does not dispute that the alleged discharges come “from” its farms (PSMF ¶¶ 47, 65-67, 70, 85, 96; DASMF ¶¶ 2, 4, 11, 12), but does dispute the final element, whether Stolt’s net pen operations constitute a “point source.”

When the Clean Water Act was drafted, the focus was placed on point sources presumably because they were easy to identify and regulate compared to nonpoint sources. Natural Res. Def. Council v. EPA, 915 F.2d 1314, 1316 (9th Cir. 1990). The classification as a point source is crucial as the Act only prohibits discharges from a point

⁵ USPIRG claims Stolt’s net pens also release parasites, pathogens, and disease. It is sufficient to find Stolt liable for Clean Water Act violations for adding pollutants such as non-native fish, fish feed, and chemicals, therefore I need not determine whether these other items are “pollutants” that are “added” to the water.

source.⁶ United States v. Earth Sciences, Inc., 599 F.2d 368, 371 (10th Cir. 1979). The EPA was given the power to define point sources and nonpoint sources. Natural Res. Def. Council, Inc. v. Costle, 568 F.2d 1369, 1382 (D.C. Cir. 1977). In exercising that power, the EPA determined that fish farms which are “aquatic animal production facilities” (“AAPFs”) are nonpoint sources. 44 Fed. Reg. 32,854, 32,870 (June 7, 1979). As nonpoint sources, they are not prohibited by § 1311(a) from discharging pollutants and are not required to have an NPDES permit. The EPA also determined that AAPFs that fall within the definition of “concentrated aquatic animal production facilities” (“CAAPFs”) found in 40 C.F.R. Appendix C of Part 122, are point sources. 40 C.F.R. § 122.24(b). Appendix C, titled “Criteria for Determining a Concentrated Aquatic Animal Production Facility,” states:

A hatchery, fish farm, or other facility is a concentrated aquatic animal production facility for purposes of § 122.24 if it contains, grows, or holds aquatic animals in either of the following categories:

- (a) Cold water fish species or other cold water aquatic animals in ponds, raceways, or other similar structures which discharge at least 30 days per year but does not include:
 - (1) Facilities which produce less than 9,090 harvest weight kilograms (approximately 20,000 pounds) of aquatic animals per year; and
 - (2) Facilities which feed less than 2,272 kilograms (approximately 5,000 pounds) of food during the calendar month of maximum feeding.
- (b) Warm water fish species or other warm water aquatic animals in ponds, raceways, or other similar structures which discharge at least 30 days per year, but does not include:
 - (1) Closed ponds which discharge only during periods of excess runoff; or
 - (2) Facilities which produce less than 45,454 harvest weight kilograms (approximately 100,000 pounds) of aquatic animals per year.“old water aquatic animals” include, but are not limited to, the Salmonidae family of fish; e.g., trout and salmon.
“Warm water aquatic animals” include, but are not limited to, the Ameiuride,

⁶ Nonpoint sources can be regulated by states. Oregon Natural Res. Council v. U.S. Forest Service, 834 F.2d 842, 849 (9th Cir. 1987) (“Congress addressed nonpoint sources of pollution in a separate portion of the Act which encourages states to develop areawide waste treatment management plans.” (citing 33 U.S.C. § 1288)).

Centrarchidae and Cyprinidae families of fish; e.g., respectively, catfish, sunfish and minnows.

40 C.F.R. Pt. 122, App. C.

The EPA promulgated its determination that CAAPFs are point sources in a 1979 regulation, 40 C.F.R. § 122.24, which in part states:

(a) Permit requirement. Concentrated aquatic animal production facilities, as defined in this section, are point sources subject to the NPDES permit program.

(b) Definition. "Concentrated aquatic animal production facility" means a hatchery, fish farm, or other facility which meets the criteria in Appendix C of this part, or which the Director designates under paragraph (c) of this section.

40 C.F.R. § 122.24

As subsection (b) mentions, AAPFs that do not fall within the Appendix C definition of a CAAPF, do not have a free pass to discharge pollutants. The EPA recognizes "that some [AAPFs] that may not be classified as concentrated under the formula [in Appendix C], nevertheless, may be significant contributors of pollution." 44 Fed. Reg. 32,854, 32,870 (June 7, 1979). Thus, under subsection (c) of § 122.24, the EPA has the discretion, on a case-by-case basis to "designate any warm or cold water aquatic animal production facility as a concentrated aquatic animal production facility upon determining that it is a significant contributor of pollution to waters of the United States." 40 C.F.R. § 122.24(c). This is established in the remainder of § 122.24:

(c) Case-by-case designation of concentrated aquatic animal production facilities.

(1) The Director may designate any warm or cold water aquatic animal production facility as a concentrated aquatic animal production facility upon determining that it is a significant contributor of pollution to waters of the United States. In making this designation the Director shall consider the following factors:

- (i) The location and quality of the receiving waters of the United States;
- (ii) The holding, feeding, and production capacities of the facility;
- (iii) The quantity and nature of the pollutants reaching waters of the United States; and

(iv) Other relevant factors.

(2) A permit application shall not be required from a concentrated aquatic animal production facility designated under this paragraph until the Director has conducted on-site inspection of the facility and has determined that the facility should and could be regulated under the permit program.

40 C.F.R. § 122.24

“In designating an operation or facility as a significant contributor of pollutants, the Director essentially finds that the facility’s discharges are more like point sources already subject to NPDES regulation than agricultural nonpoint sources that are not.” 65 Fed. Reg. 43,586, 43,648 (July 13, 2000). When an AAPF is designated as a CAAPF under subsection (c), the facility is not required to have a permit until after the EPA has conducted a site visit and made a determination that the site should and could be regulated under the NPDES program. 40 C.F.R. § 122.24(c)(2).

USPRIG and Stolt agree that the EPA has not designated Stolt’s farms as CAAPFs under the discretionary provision of subsection (c). (DMSJ at 10; PRMSJ at 3.) USPIRG claims, and Stolt disputes, that Stolt’s farms are CAAPFs under Appendix C and are therefore required to have a permit. Stolt raises two intertwined arguments as to why their farms do not involve “ponds, raceways, or other similar structures” and thus are not regulated under Appendix C.⁷ First, Stolt argues that their offshore net pen

⁷ Stolt’s underlying theory is that its net pen operations are CAAPFs that are not regulated. (DMSJ at 3.) Not having been designated a CAAPF under subsection (c) and not falling within the definition in Appendix C, Stolt asserts that its farms are CAAPFs which are not regulated. (Id. at 10-11.) However, this theory contradicts the definition of a CAAPF in § 122.24 which states that a CAAPF is a “hatchery, fish farm, or other facility which meets the criteria in Appendix C of this part, or which the Director designates under paragraph (c) of this section.” 40 C.F.R. § 122.24(b) (emphasis added). Thus, a facility cannot be a CAAPF without either falling under the Appendix C definition or being designated by the EPA as a CAAPF. Moreover, Stolt’s interpretation of § 122.24 is inconsistent with the EPA’s statements regarding the regulation of CAAPFs. The EPA has clearly stated that all CAAPFs require an NPDES permit. 65 Fed. Reg. 43,586 43,648-649 (July 13, 2000) (stating that “[u]nder existing regulation, concentrated aquatic animal production facilities are subject to the NPDES program” and stating that an AAPF is “subject to regulation under the NPDES permitting program only if the facility is ‘concentrated’ according to the NPDES regulations.”). Stolt’s assertion that its farms are CAAPFs that are not regulated is further undermined by the fact that the EPA in 1990 informed Stolt that its farms require an NPDES permit. (PSMF ¶ 105; DRSMF ¶ 9.)

operations do not fall within the phrase “ponds, raceways, or other similar structures” because the phrase focuses on “land-based” structures. (DMSJ at 8.) Second, Stolt asserts that net pen operations do not involve a “discrete, confined and direct conveyance” (Id. at 3), or specifically “discrete discharge pipes” and therefore “are not point sources subject to NPDES permitting.” (Id. at 8, 9.)

In respect to Stolt’s first argument, Stolt’s conclusion that the Appendix C phrase “ponds, raceways, and similar structures” excludes its net pen operations due to their offshore location is contrary to EPA statements that Stolt’s net pens may fall within Appendix C. At least two communications from the EPA indicate that the EPA does not view the Appendix C phrase “ponds, raceways, or other similar structures”⁸ as barring the application of Appendix C to offshore net pen sea farms.⁹ First, in an August 1989 letter responding to a party’s notice of intent to sue the EPA, EPA Region One stated that it reviewed the provisions of the Act and applicable regulations and concluded that salmon net pen sea farms may constitute CAAPFs under 40 C.F.R. § 122.24(b) (i.e. Appendix C) or (c). (DSMF ¶ 5, Culley Decl. I Ex. 4.) The EPA further stated that it

⁸ There are no cases interpreting the Appendix C phrase “ponds, raceways or other similar structures.” In addition, neither the proposed rule nor the final rule for the promulgation of § 122.24 provides insight as to the scope of phrase. A traditional “raceway” is an enclosed channel with relatively high rates of moving or flowing water. See Michael P. Masser and Andrew Lazur, In-Pond Raceways, Southern Regional Aquaculture Center (SRAC), Publication No. 170 (August 1997), available at <http://www.msstate.edu/dept/srac/fslist.htm>. USPIRG and Stolt debate when net pen culture techniques came into existence in order to prove whether the Appendix C phrase includes such operations. (DMSJ at 11; PRMSJ at 6-7, n. 4.) However, establishing the time frame in which net pen facilities were first used is not dispositive to the crux of the matter here, which is whether net pens are structures similar to ponds or raceways.

⁹ This case involves the meaning of terms in an agency regulation and does not involve statutory construction. Generally, unless plainly erroneous or inconsistent, an agency’s interpretation of an ambiguous term in its own regulations is entitled to deference. See, e.g., Am. Express v. United States, 262 F.3d 1376, 1382 (Fed. Cir. 2001) (citing Auer v. Robbins, 519 U.S. 452, 461-462 (1997); Thomas Jefferson Univ. v. Shalala, 512 U.S. 504 (1994)). Even without these EPA communications, I would reach the conclusion that offshore net pens fall within the scope of the Appendix C phrase “ponds, raceways, and other similar structures.”

planned to inform “facilities operating in waters off the coast of Maine” that they must obtain NPDES permits if they meet the criteria in § 122.24. (Culley Decl. I Ex. 4.) (emphasis added). This communication demonstrates that the EPA interprets Appendix C as pertaining to net pen sea farms located off the coast of Maine. In a second letter, written in 1990, the EPA informed Stolt that pursuant to the Clean Water Act, 33 U.S.C. Part 1251 et seq, its facilities are required to obtain NPDES permits for the discharge of pollutants into the waters of the United States. (PSMF ¶ 105; DSMF ¶ 9.) In reaching the conclusion that Stolt’s operations required NPDES permits, the EPA must have first classified Stolt’s facilities as CAAPFs. In order to determine that an AAPF constitutes a CAAPF under the discretionary provision of § 122.24(c), the EPA must first conduct an on-site inspection of the facility and consider the factors listed in subsection (c). See 65 Fed. Reg. 43586, 73649 (July 13, 2000). It is undisputed that the EPA had not conducted a site visit as required under § 122.24 (DSMF ¶20; DMSJ at 10) and that the EPA has never exercised its discretion to deem Stolt’s farms as CAAPFs under subsection (c). (DMSJ at 11.) Thus, Stolt’s farms are not considered CAAPFs by the EPA under subsection (c). The EPA therefore must have determined that Stolt’s farms are subject to the NPDES requirement because they fall within the definition of a CAAPF under Appendix C. Both communications strongly suggest that the EPA interprets the Appendix C phrase “ponds, raceways, or similar structures” as encompassing net pens sea farms.¹⁰

¹⁰ In a June 23, 2000 letter by EPA, Region One to plaintiffs’ counsel in response to plaintiffs’ notice of intent to file a lawsuit against ASM, Connors Aquaculture, and Stolt Sea Farm, the EPA states “The EPA shares your concerns regarding the environmental issues raised in your notice. Under 40 C.F.R. § 122.24 and Appendix C to Part 122, salmon farms are concentrated aquatic animal production facilities (CAAPFs), and thus are point sources under the Act.” (Pls.’ Resp. Def.’s Statement Material Facts (PRSMF) ¶ 30; Nicholas Decl. I Ex. 23 at 1.) (emphasis added.) The EPA acknowledges Stolt’s submission of an NPDES application and explains that due to resource constraints, the EPA did not issue the permits at

I find no support for Stolt's contention that the phrase “ponds, raceways, or other similar structures” excludes offshore sea cages because they are not land-based. There is no indication in the proposed rule or the final rule for § 122.24 that suggests that the EPA was intending to narrowly focus on land-based fish farms. See 43 Fed. Reg. 37,078, 37,082 & 37,100 (Aug. 21, 1978); 44 Fed. Reg. 32,854, 32,870 (June 7, 1979). The goal of the Clean Water Act is to restore and maintain the integrity of the nation’s waters. 33 U.S.C. § 1251(a). Requiring fish farms in ponds or raceways to obtain an NPDES permit based on their terrestrial location, while allowing other facilities located in a bay to discharge directly into the water without a permit would be counter to the purposes of the Act. The goals of the Act, the EPA’s interpretation that Appendix C is applicable to net pen sea farms, and the lack of judicial support to indicate otherwise, support the conclusion that a sea cage in a predominately enclosed bay can constitute a “similar structure” and therefore fall within Appendix C. Stolt offers no evidence or caselaw that would compel an alternative conclusion.¹¹

that time because they were considered low-priority permits as the “environmental issues related to fish farms in Maine... were not well understood.” (Id. Nicholas Decl. I Ex. 23 at 1.) Stolt objects to the letter as unauthenticated and hearsay, therefore the communication is not included in reaching my conclusion that Stolt’s net pen operations constitute CAAPFs and thus require an NPDES permit. I call attention to the letter because it reaches a legal conclusion that is the same conclusion I have reached: that these net pen farms located in the bay are deemed CAAPFs under Appendix C.

¹¹ One section of the 1990 NPDES application requires the applicant to indicate in one of three boxes the total number of ponds, raceways, and other similar structures in the facility. (Def.’s Reply to Pls.’ Resp. Mot. Summ. J. (DRRMSJ) at 5, Atlantic Salmon of Maine Nicholas Decl. I Ex. 17 at 3.) Interestingly, the instructions for this section state:

Give the total number of ponds or raceways in your facility. Under [the box marked] “other,” give a descriptive name of any structure which is not a pond or raceway but which results in discharge to waters of the United States.” (Id. Ex. 17 at 4.)(emphasis added.)

This language further demonstrates that the Appendix C definition does not narrowly focus on “land based” facilities that operate with “discharging pipes,” but rather focuses broadly on any structure that results in a discharge of pollutants into the waters. Stolt’s facility consists of net pens, or sea cages as they are sometimes referred, that consist of huge nets suspended from square or round floating structures. (DSMF ¶ 2.) There is nothing in the record that precludes the conclusion that these net pens, which confine fish in a concentrated area and have substances flowing out of them into the waters, are structures.

Stolt claims in its second argument that it does not fall within the phrase "ponds, raceways, or other similar structures" because net pen operations do not involve a "discrete, confined and direct conveyance" (DMSJ at 3) or more specifically, "discernible discharging pipes" and therefore "are not point sources subject to NPDES permitting." (Id. at 8, 9.) This argument fails because it is contrary to the Act's definition of a point source and twenty years of caselaw. In differentiating itself from the Appendix C "ponds, raceways, or other similar structures," Stolt argues,

In the context of defining a point source, the key characteristic of ponds and raceways is their land-based location and their need to collect and direct the flow of discharge water in a discrete concentrated point source pipe discharge based on their construction and design. Net pens do not share that characteristic because they are not self-contained, solid facilities that require the operator to gather water and funnel it through a pipe to a specific, confined outfall. Rather, because they are free floating in the ocean, the water flows through the nets driven by tides, currents, and other natural factors.

(DMSJ at 8-9.)

Essentially, Stolt takes the position that the phrase "ponds, raceways, or other similar structures" refers to a "narrow category of land-based structures with discrete discharging pipes." (Id. at 8.) Stolt defines "pond" as "a body of standing water smaller than a lake, often artificially formed," however Stolt does not explain how a pond would fall into its interpretation of "structures with discrete discharging pipes." (Id. at 8.) Stolt concludes that net pens do not involve "discharging pipes," therefore they cannot be point sources.¹²

(Id.)

¹² The designation of "nonpoint source" is limited to circumstances in which it is difficult to ascribe the discharge to a single polluter or to any identifiable point of discharge. See, e.g., United States v. Earth Sciences, Inc., 599 F.2d 368, 371 (10th Cir. 1979) ("Because nonpoint sources of pollution, such as oil and gas runoffs caused by rainfall on the highways, are virtually impossible to isolate to one polluter, no permit or regulatory system was established as to them."); United States v. Plaza Health Lab., Inc., 3 F.3d 643, 647 (2nd Cir. 1993) ("Very simply, a non-point source of pollution is one that does not confine its polluting

However, there is no basis for concluding that the phrase “ponds, raceways, or other similar structures” narrowly focuses on pipes, conduits, or the channeling of water. In cases involving “classic” point source discharges, surface water runoff, or stormwater, the use of buzzwords and phrases such as “collect and direct the flow,” “pipe discharge,” “self-contained, solid facilities,” and “gathering and funneling of water,” is relevant because the existence of such items is often dispositive.¹³ But the term “point source” covers a broader means of discharging. As early as 1974, the Act has defined “point source” as:

[A]ny discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.

33 U.S.C. § 1362(14) (emphasis added).¹⁴

See United States v. Holland, 373 F. Supp. 665, 668 (D. Fla. 1974)(quoting definition of “point source” with same language used today). The examples listed in section 1362(14) illustrate that a “point source” exists regardless of whether a pipe, a solid structure, or funneled/channeled water is involved.

discharge to one fairly specific outlet... .” (citing S. Rep. No. 92-414, reprinted in 1972 U.S.C.C.A.N. 3668, 3760)).

¹³ Classic point source discharges involve things like pipes, in part because “pipes and similar conduits are needed to carry large quantities of waste water, which represent a large portion of the point source pollution problem... and are readily classified as point sources.” United States v. Plaza Health Lab., Inc., 3 F.3d 643, 651 (2nd Cir. 1993) (Oakes, J., dissenting). Surface water runoff does not constitute discharge from a point source unless it is channeled or collected. See Sierra Club v. Abston Const. Co., 620 F.2d 41, 47 (5th Cir. 1980) (stating that the point source definition “excludes unchanneled and uncollected surface waters (citing Consolidated Coal Co. v. Costle, 604 F.2d 239, 249 (4th Cir. 1979) and Appalachian Power Co. v. Train, 545 F.2d 1351, 1373 (4th Cir. 1976)).

¹⁴ The EPA states that although the Act does not specifically address CAAPFs, CAAPFs are a type of “‘concentrated animal feeding operation’ which the CWA explicitly identifies as a ‘point source.’” 65 Fed. Reg. 4,3586, 73,649 (July 13, 2000).

Further, numerous cases reflect the broad means of discharging which constitute “point sources.” See, e.g., Romero-Barcelo v. Brown, 478 F. Supp. 646, 664 (D.P.R. 1979), rev’d on other grounds, 643 F.2d 835 (1st Cir. 1981), aff’d sub nom. Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982) (aircraft from which the release or firing of ordnance into the water is a point source); Avonyelles Sportsmen’s League v. Marsh, 715 F.2d 897, 922 (5th Cir. 1983) (bulldozers and backhoes constitute point sources); Concerned Area Residents for Env’t v. Southview Farm, 34 F.3d 114, 119 (2nd Cir. 1994), cert. denied, 514 U.S. 1082 (1995) (manure spreader which distributed manure in field deemed a point source); United States v. West Indies Transp., Inc., 127 F.3d 299, 308 (3rd Cir. 1997), cert. denied, 522 U.S. 1052 (1998) (barge from which cement blocks were dumped and paint chips from sandblasting were projected is a point source); Stone v. Naperville Park Dist., 38 F. Supp.2d 651, 655 (D. Ill. 1999) (shooting range where lead shots and air borne clay targets ultimately land in the water is a point source). See also United States v. Plaza Health Lab., Inc., 3 F.3d 643, 651-652 (2nd Cir. 1993) (Oakes, J., dissent listing cases) and Long Island Soundkeeper Fund, Inc. v. N.Y. Athletic Club, 1996 WL 131863, *13 (D.N.Y. 1996) (listing cases). Rather than focusing on pipes, conduits, and the channeling of water, as Stolt suggests, the courts find that a point source exists where there is an identifiable source from which the pollutant is released.¹⁵

An argument similar to Stolt’s was rejected in Stone v. Naperville Park Dist., 38 F. Supp.2d 651 (D. Ill. 1999), which involves a citizen suit brought under the CWA

¹⁵ The EPA has the same interpretation: that the term “point source” includes “all discrete, identifiable sources from which pollutants are emitted or conveyed into the United States waters.” Long Island Soundkeeper Fund, Inc. v. N.Y. Athletic Club, 1996 WL 131863, *13 (D.N.Y. 1996) (citing Amicus Brief of the United States at 6 and finding that a trap shooting range designed to concentrate shooting activity from a few specific points, systematically directed in a single direction, is an identifiable source from which spent shots and target fragments are conveyed into navigable waters).

against the operators of a trap shooting facility. In Stone, the plaintiffs claimed that the defendants' facility discharged lead shot into navigable waters without an NPDES permit thereby violating the Act. Stone, 38 F.Supp.2d at 652. On plaintiff's motion for summary judgment, the court noted that the facility consisted of three firing stations, several target throwers, and a fenced shotfall zone where shooting debris would fall. Id. The defendants conceded that they discharged pollutants into navigable waters, thus, the sole issue was whether the facility constituted a "point source." Id. at 656. After considering defendants' argument that the shooting range "is a place, wholly unlike a discrete item like a pipe or container, that does not discharge or channel anything," the court concluded "the range 'channels' shooting by providing a facility at which individuals may shoot; it channels the discharge of pollutants by inviting individuals to come shoot at airborne clay targets that land in the water with lead shot that also land in the water." Id. at 655. The court found that the range qualified as a point source and was in violation of the Act. Id. at 656.

The Act's definition of "point source" and the caselaw identifying various point sources do not support Stolt's conclusions that the phrase "ponds, raceways, or other similar structures" relates only to facilities with "discrete discharging pipes" or its conclusion that its net pens operations cannot be considered point sources. Instead, the Act and the caselaw lead to the conclusion that the release of pollutants from Stolt's net pens into the bay, constitutes an identifiable, discernible, confined, and discrete emission or conveyance into the water. To conclude that Stolt's net pen operations could not constitute point sources would be contrary to twenty years of caselaw and would ignore

the EPA's interpretation that Appendix C is applicable to net pen sea farms.¹⁶ For these reasons, Stolt's argument that its net pen operations cannot be characterized as point sources fails, as well as its assertion that Appendix C focuses narrowly on pipe discharges.¹⁷

Based on the foregoing, USPIRG has met its summary judgment burden of demonstrating that Stolt has been and currently is "discharging pollutants" without a NPDES permit in violation of the Clean Water Act. USPIRG provides sufficient support and record evidence to compel the conclusion that net pens fall within the scope of Appendix C. Stolt's unsupported assertion that the EPA intended to narrowly regulate enclosed, land-based structures with discharging pipes does not compel an alternate conclusion. In sum, the Clean Water Act and the caselaw identifying various point sources support the conclusion that Appendix C is applicable to Stolt's sea net pen operations. Additionally, the EPA has expressed its interpretation that the phrase "ponds, raceways, and other similar structures" encompasses net pen sea farms. (DSMF ¶ 5.) It

¹⁶ In a 2000 final rulemaking decision, the EPA stated, "[m]ost commercial fish husbandry that the layperson refers to as 'aquaculture,' including fish farms located in waters of the U.S., is subject to NPDES regulation under the rubric 'concentrated aquatic animal production facility.'" 65 Fed. Reg. 43,586, 43,648-649 (July 13, 2000)(emphasis added). This comment was made in explaining and correcting a mischaracterization the EPA made in a proposed rule preamble in which the EPA differentiated between "aquaculture projects" (regulated under § 122.25) and "concentrated aquatic animal production facilities" (regulated under § 122.24). (Id.) The mischaracterization suggested that aquaculture projects confine aquatic stock within jurisdictional waters whereas CAAPFs do not confine aquatic stock within jurisdictional waters but discharge to jurisdictional waters. (Id.) After reviewing the "original CWA legislative history, the regulations for aquaculture and aquatic animal production facilities, and past Agency statements on the matter," the EPA corrected their error, stating that the difference between aquaculture projects and CAAPFs "is not based on the location of aquatic stock confinement relative to jurisdictional waters of the United States." Id.

¹⁷ I note that my determination that Stolt's operations fall within the definition of a point source is limited to the purpose of refuting Stolt's argument that its net pen operations cannot be classified as a "point source" pursuant to the CAAPF regulation, 40 C.F.R. § 122.24(a), (b), and Appendix C. My analysis should not be construed to contradict the EPA's determination of which salmon farms constitute CAAPFs and are therefore deemed to be point sources under 40 C.F.R. ¶ 122.24. In other words, all CAAPFs are point sources under Appendix C, but not all salmon farms are necessarily CAAPFs. That determination would be based on whether the farm fell within the criteria of Appendix C or, in the case of an AAPF that did not meet the criteria of Appendix C, by a site visit and a designation by the EPA that the farm constitutes a CAAPF.

is undisputed that Stolt's facilities meet the quantitative criteria under Appendix C for AAPFs "automatically" deemed to be CAAPFs (PSMF ¶¶ 116-118; DRSMF ¶¶ 116-118), and Stolt concedes that its farms are "concentrated aquatic animal production facilities." (DMSJ at 3, 7, 10; Def.'s Resp. to Pls.' Mot. Summ. J. (DRMSJ) at 5.) Based on the foregoing, as a matter of law I conclude that Stolt's farms are CAAPFs as defined in Appendix C.¹⁸ Under the regulation, all CAAPFs are prohibited from discharging pollutants unless an NPDES permit has been obtained. See 40 C.F.R. § 122.24(a). Stolt's salmon farms discharge pollutants without an NPDES permit and are therefore in violation of the Act.¹⁹ See 33 U.S.C. § 1311(a); (PSMF ¶¶ 70, 84, 87, 88-89, 96, 104, 116; DRSMF ¶¶ 70, 84, 87, 88-89, 96, 104, 116; DASMF ¶¶ 1-2, 4.)

B. Stolt's Affirmative Defenses

In its opposition to plaintiffs' motion for summary judgment, Stolt raises three affirmative defenses to USPIRG's citizen suit. Despite USPIRG's challenge regarding Stolt's timing in raising these defenses, I will briefly address them, as they are potentially dispositive of this matter. First, Stolt asserts that it is exempt from the "zero-discharge standard" in § 1311(a) under a narrow exception created in Hughey v. JMS Dev. Corp., 78 F.3d 1523 (11th Cir. 1996). (DRMSJ at 5.) Hughey stands for the proposition that "Congress did not intend...for the zero discharge standard to apply when: "(1) compliance with such a standard is factually impossible; (2) no NPDES permit covering such

¹⁸ As I find that Stolt's farms constitute CAAPFs, I need not address USPIRG's alternate argument that Stolt's farms are "aquaculture projects" operating without a permit in violation of the Act. Clearly they are not aquaculture projects. See 65 Fed. Reg. 43586, 43649 (July 13, 2000) (stating that the EPA regulations for "aquaculture projects" do not apply to fish farms or fish hatcheries).

¹⁹ There is a dispute to whether Stolt should be held liable for Clean Water Act violations at its wholly owned subsidiary, D.E. Salmon. Additionally, it is unclear in the factual record whether the D.E. Salmon farms fall within the quantitative requirements of a CAAPF under Appendix C of Part 122.

discharge exists; (3) the discharger was in good-faith compliance with local pollution control requirements that substantially mirrored the proposed NPDES discharge standards; and (4) the discharges were minimal.” Hughey, 78 F.3d at 1530. The court in Hughey concluded that the law does not compel the doing of the impossible. Id.²⁰ Stolt claims that it is impossible for its farms to comply with a zero-discharge standard because like the defendant’s inability to prevent rainwater in Hughey, Stolt cannot prevent the alleged discharge of pollutants at its facilities. (DRMSJ at 7.) Stolt argues that it must feed its salmon, that it must medicate the salmon, and that it cannot prevent the discharge of fish wastes or medicine into the water. (Id. at 7-8.) Stolt further asserts that compliance with the NPDES permit requirement is “impossible” because “no NPDES permit exists” for its salmon farms. (Id. at 8.) Stolt explains that it was not required to have a permit in 1987 when its operations began, but then in 1990 it was informed that it would be required to have a permit. (Id.) After Stolt submitted an NPDES application, eleven years passed without any EPA action. Stolt adds that it is in compliance with local pollution control requirements and that its discharges are minimal. (Id. at 8-9.)

The very narrow Hughey exception is not applicable in this case. Unlike the discharger in Hughey, Stolt does not meet all four of the necessary requirements. First, in Hughey, there was no permit procedure available to the defendant through the state or the EPA for its discharging actions. Hughey, 78 F.3d at 1527, n.7. Thus, in Hughey, it was impossible for the defendant to obtain a permit from any governmental agency. Stolt is in a factually different circumstance. Since 1979, the EPA has had a permit procedure for CAAPFs in place which was adopted in 40 C.F.R. § 122.24. 44 Fed. Reg. 32,854,

²⁰ The First Circuit has not had an occasion to address the Hughey exception.

32870 (June 7, 1979) (final rule to be codified at 40 C.F.R. § 122.43, effective June 14, 1979, requiring permits for CAAPFs and allowing case-by-case determination for AAPFs). In 1990, the EPA informed Stolt that its operations required an NPDES permit. (PSMF ¶ 105; DSMF ¶ 9.) Stolt followed the procedure that was in place by submitting an NPDES application. (PSMF ¶ 106; DSMF ¶ 10.) Although the EPA apparently failed to follow up after Stolt’s application was submitted, there is nothing in the record to indicate that the EPA could not have issued an NPDES permit for Stolt’s activities. In other words, despite the fact that the EPA did not respond to Stolt’s application, an NPDES permit for the type of activities Stolt engaged in could be obtained from the EPA at that time.²¹ A discharger of pollutants cannot avoid liability for violating the zero-discharge standard by asserting that it applied for an NPDES permit but for some administrative failure, the EPA failed to issue a permit.²² See, e.g., Beartooth Alliance v. Crown Butte Mines, 904 F. Supp. 1168, 1174 (D. Mont. 1995) (“To be in compliance with the CWA, it is necessary to not only apply for, but also to have a permit.” (citing Comm. to Save Mokelumne River v. East Bay Mun. Util. Dist., 13 F.3d 305, 309 (9th Cir. 1993); 33 U.S.C. §§ 1311(a), 1342(a); and United States v. Tom-Kat Dev., Inc., 614 F. Supp. 613, 614-615 (D. Alaska 1985) (holding that when the EPA fails to process an

²¹ In Hughey, the state had NPDES permitting authority but had not yet developed a permit for the regulation of rainwater discharges. Hughey, 78 F.3d at 1527 & n. 7-8. Thus, the state was unable to provide defendant with a permit. Id. Defendant could not turn to the EPA for a permit because the EPA’s authority to issue permits had been transferred to the state once the state delegation occurred. As it was impossible for defendant to control rainwater and impossible for defendant to obtain a permit from any governmental agency, the court found that it was impossible for the defendant to comply with the CWA. Id. at 1527, 1530.

²² Stolt recognizes that they cannot avoid liability merely because it submitted an NPDES application. (DRMSJ at 10 n.3.) Instead, Stolt asserts that the “EPA, through DMR and the joint federal-state implementing program...provided that, assuming an application were filed, Stolt could continue operations.” (Id.) Stolt argues that it should not be punished for relying on what the EPA and DMR instructed. (Id.) As I have considered and rejected this argument below, I refrain from doing so here.

application, defendant's good faith efforts to obtain an NPDES permit does not shield defendant from liability for CWA violations)).

Second, unlike the defendant in Hughey, it is not impossible for Stolt to comply with a zero-discharge standard. The court in Hughey noted the county inspector's testimony that "zero discharge of storm water will never be achieved because rainfall must find its way back into the streams and rivers of this state." Hughey, 78 F.3d at 1530. The court distinguished the matter from "a case of a manufacturing facility that could abate the discharge of pollutants by ceasing operations." Id. Stolt's argument that it is "impossible" to prevent the discharge of pollutants centers on the existence and subsistence of the salmon, which Stolt introduced to the net pens. In essence, Stolt is responsible for creating a circumstance in which the discharge of pollutants is required in order for it to continue to operate in the same manner. Conversely, the defendant in Hughey did not create the resulting discharge; as the court stated, "rain water will run downhill and not even a law passed by Congress... can stop that." Id. The factual disparities between Hughey and this case and Stolt's inability to meet all four elements of Hughey compel the conclusion that the narrow exception recognized in Hughey does not apply here.

Stolt's second affirmative defense asserts that USPIRG's claim is barred by laches. (DRMSJ at 10.) A party asserting laches has the burden of demonstrating that "a party's delay in bringing suit was (1) unreasonable, and (2) resulted in prejudice to the opposing party." Iglesias v. Mut. Life Ins. Co. N.Y., 156 F.3d 237, 243 (1st Cir. 1998) (quoting K-Mart Corp. v. Oriental Plaza, Inc., 875 F.2d 907, 911 (1st Cir. 1989)). As Stolt correctly concedes, laches is a disfavored defense in environmental cases because the

plaintiff is not the only party to suffer harm by the alleged environmental damage. See Portland Audubon Soc’y v. Lujan, 884 F.2d 1233, 1241 (9th Cir. 1989) (“We have repeatedly cautioned against application of the equitable doctrine of laches to public interest environmental litigation. Laches must be invoked sparingly in environmental cases... . This approach has found unanimous support in the other circuits.” (citing Preservation Coalition, Inc. v. Pierce, 667 F.2d 851, 854 (9th Cir. 1982))). Stolt relies on the First Circuit decision in Concerned Citizen on I-190 v. Sec’y of Transp., 641 F.2d 1 (1st Cir. 1981), to support its defense. However, this decision was not made in the context of a citizen suit under the Clean Water Act. Although, many courts find laches inappropriate in citizen suits under the Clean Water Act (Student Pub. Interest Research Group, Inc. v. P.D. Oil & Chem. Storage, Inc., 627 F. Supp. 1074, 1085 (D. N. J. 1986) (stating that in citizen suits plaintiffs stand as private attorneys general, therefore laches should not apply to bar the suit), some courts allow the defense when the plaintiff has engaged in some affirmative misconduct. See, e.g., Nat’l Wildlife Fed’n v. Consumers Power Co., 657 F. Supp. 989, 1011 (D. Mich. 1987), reversed on other grounds, 862 F.2d 580 (6th Cir. 1988) (finding that because “plaintiff is in essence acting as a private attorney general in this matter, it probably is not subject to the doctrine of laches, at least absent a showing of some affirmative misconduct.” (citing Student Pub. Interest Research Group, 627 F. Supp. at 1085 and United States v. Amoco Oil Co., 580 F. Supp. 1042, 1050 (D. Mo. 1984))). There is no evidence in the record to suggest that plaintiffs, the State of Maine or the EPA engaged in any affirmative misconduct.

Moreover, there is nothing in the record that supports Stolt’s assertion that it endured undue prejudice as a result of USPIRG’s alleged delay in bringing this action.

This is not a case where “prejudice to the defendant flows from the plaintiff’s delay.” See Murphy v. Timberlane Reg’l Sch. Dist., 973 F.2d 13, 17 (1st Cir. 1992). USPIRG brought this action in the fall of 2000. Stolt complains that plaintiffs could have, but did not, take action when it began operations in 1987 and Stolt has continued to develop and invest in its facilities over the past thirteen years. (DRMSJ at 11-12.) However, during most of this time Stolt has been aware that its facilities may be subject to the NPDES permit requirement. Stolt has not shown that misconduct by USPIRG altered Stolt’s obligation or ability to comply with the NPDES permit requirement. Further, Stolt has failed to demonstrate that USPIRG’s delay in bringing the citizen suit was unreasonable. See, e.g., N.C. Wildlife Fed’n v. Woodbury, 1989 WL 106517, *4 (D. N.C. 1989) (ruling on motion for summary judgment in a Clean Water Act action and stating that “Laches will bar a suit in equity where plaintiff’s ‘lack of diligence is wholly unexcused; and both the nature of the claim and the situation of the parties was such as to call for diligence.’”).

Stolt claims in its third affirmative defense that USPIRG’s citizen suit is barred by equitable estoppel. (DRMSJ at 13.) To successfully assert this defense, a defendant must show that he (1) “reasonably” relied on plaintiff’s conduct (2) “in such a manner as to change his position for the worse.” Conn. Fund for the Env’t, Inc. v. Upjohn Co., 660 F. Supp. 1397, 1411 (D. Conn. 1987) (citing Heckler v. Comty. Health Serv. of Crawford County, Inc., 467 U.S. 51, 59 (1984)). Stolt asserts that in a citizen suit USPIRG is “treated the same as the federal government for purposes of equitable estoppel.” (DRMSJ at 13 n. 4.) Stolt acknowledges it has an uphill battle, as courts are reluctant to find estoppel against the government.

A defendant raising equitable estoppel against the government must show that the government engaged in “affirmative misconduct” See, e.g., United States v. Marine Shale Processors, 81 F.3d 1329, 1349-1351 (5th Cir. 1996). At a minimum, the government official must have intentionally or recklessly misled Stolt. Id. at 1350. Mere negligence does not rise to the level of affirmative misconduct. Id. (citing Kennedy v. United States, 965 F.2d 413, 421 (7th Cir. 1992)). In support of its defense, Stolt claims that the EPA did not require a permit when it began operating in 1987 and Stolt relied on this position when its facilities were established. (DRMSJ at 14). Then in 1990, the EPA informed Stolt that they were subject to the NPDES permit requirement. (Id.) Stolt claims that in 1992, the Maine Department of Marine Resources, on behalf of the EPA, represented that Stolt did not need to do more than file a Notice of Intent to be covered by an NPDES permit.²³ (Id. at 14.) Stolt adds that the EPA failed to take action on the NPDES application it submitted. (Id.)

There is no evidence in the record to find that the DMR statement was made with the knowledge of falsity or with the intent to mislead. The facts do not support a conclusion that the statements were a result of anything more than negligence. Stolt’s additional argument that it relied on EPA’s silence or failure to act during the years following Stolt’s submission of its NPDES application is unavailing. The Supreme Court

²³ Stolt introduces into the record information related to a monitoring program, informational guidelines, and a combined agency application for aquaculture farms that collected the information required by the relevant agencies. (DSMF ¶¶ 12-17.) Stolt states that the Maine Department of Marine Resources (DMR) took a lead position on an aquaculture farm monitoring program coordinated by DMR and certain representatives of Federal agencies, including the EPA. (DRRMSJ at 3.) Stolt suggests that the DMR’s lead position in the monitoring program and/or the multi-agency application is evidence demonstrating that the EPA did not intend to move forward with the NPDES program so long as the sea farms were adequately regulated by DMR’s monitoring program. (DRRMSJ at 4.) However, the record does not support this assertion nor does it show that DMR’s monitoring program, the guidelines, or the combined agency application was created to be a substitute for a NPDES permit. (See Culley Decl. I Ex. 9-13.)

has stated that “citizen suits are proper only ‘if the Federal, State, and local agencies fail to exercise their enforcement responsibility.’” Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 60 (1987) (quoting S. Rep. No. 92-414, at 64 (1971), reprinted in 2 A Legislative History of the Water Pollution Control Act Amendments of 1972, at 1482 (1973)). “If private citizen plaintiffs were estopped from maintaining a suit because of waivers or inaction by government officials, the effectiveness of section 505 [i.e. the citizen suit provision § 1365] would be drastically curtailed and its purpose defeated.” Student Pub. Interest Res. Group of N. J., Inc. v. Hercules, Inc., 1986 WL 6380, *8 (D.N.J. 1986).²⁴ As Stolt has not met its burden in demonstrating affirmative misconduct on the part of the government, estoppel should not be a bar to USPIRG’s citizen suit.

Conclusion

I recommend that the Court **DENY** Stolt’s motion for summary judgment and **GRANT** USPIRG’s motion for summary judgment on the issue of liability under the Clean Water Act and grant declaratory relief providing that Stolt is required to obtain an

²⁴ The alleged 1992 Maine Department of Marine Resources statement, if shown it was said on behalf of the EPA, may be considered as a factor influencing the imposition of civil penalties and the nature, if any, of injunctive relief. In January 2001, the EPA granted the State of Maine the authority to issue NPDES permits in the state. (DSMF ¶ 21.) According to the record, the State agreed to issue “draft” permits for Maine salmon farms that constitute CAAPFs by November 2001. (Id. ¶ 22, Culley Decl. I Ex. 15 at 4, section III (A)(10).) The agreement further indicates that the State will issue final permits within six months following the draft permits. (Id. Culley Decl. I Ex. 15 at 4.) At this time, there is no indication that the State has issued draft permits or final permits. Nonetheless, the State’s delay has no bearing on the issue of Stolt’s liability for discharging pollutants without a permit. Stolt submitted its permit application to the EPA in the early 1990s and although Stolt did not receive a permit, Stolt proceeded to discharge pollutants. Stolt’s reliance on statements, actions, or inaction of the EPA is an issue more appropriately addressed when considering whether to impose civil penalties or to order injunctive relief. See United States v. BP Oil, Inc., 1989 WL 83623, *5 (D. Pa. 1989); Conn. Fund for the Env’t Inc. v. Upjohn Co., 660 F. Supp. 1397, 1412 (D. Conn. 1987) (citing Heckler v. Comty. Health Serv. of Crawford County, Inc., 467 U.S. 51, 61 (1984); Student Pub. Interest Research Group of N.J. v. Monsanto, 600 F. Supp. 1479, 1486 (D.N.J. 1985); United States v. Amoco Oil, 580 F. Supp. 1042, 1050 (D. Mo. 1984).

MEPDES permit from the State of Maine²⁵ or an NPDES permit from the EPA in order to lawfully discharge pollutants into Cobscook Bay. I further recommend that the Court schedule a hearing on the issue of what, if any, civil penalty and/or injunctive relief are appropriate in this case. Certainly the inaction and the delay of the permitting authorities, both the EPA and now the State, may be a factor that the court considers when fashioning its relief. See United States v. BP Oil, Inc., No. 86-0792, 1989 WL 83623, *5 (E.D. Pa. July 27, 1989) (“If any action or inaction by the government contributed to defendant’s violations, these facts can be considered when a remedy is fashioned.”)

NOTICE

A party may file objections to those specified portions of a magistrate judge’s report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court’s order.

Margaret J. Kravchuk
U.S. Magistrate Judge

Dated February 19, 2002

²⁵ In January 2001, the State of Maine was approved to administer the NPDES program in Maine. See 66 Fed. Reg. 12,791, 12,792 (Feb. 28, 2001). The Maine permits to be issued equivalent to the NPDES permit is referred to as the “Maine Pollutant Discharge Elimination System” permit or MEPDES permit. (Id.) Although the State of Maine has permitting authority, the EPA has the authority in certain circumstances to issue an NPDES permit itself. (Id.)

BANGOR STNDRD

U.S. District Court

District of Maine (Bangor)

CIVIL DOCKET FOR CASE #: 00-CV-149

U S PUBLIC INTEREST, et al v. STOLT SEA FARM INC Filed: 07/31/00

Assigned to: JUDGE GENE CARTER Jury demand: Defendant

Demand: \$0,000 Nature of Suit: 893

Lead Docket: None Jurisdiction: Federal Question

Dkt# in other court: None

Cause: 33:1319 Clean Water Act

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