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United States District Court, E.D. Pennsylvania.

L.E.A.D. (Local Environmental Awareness Development) Group of Berks, Clean Water Action, Inc., Kathy Grillo, Michele Esterly, Thomas Esterly, Clifton H. Blume, Charles Tobias, Nancy Tobias, Dorothy Golden, Melvin Gehris, Grace Gehris, Linda Katzenmoyer, Robert Shomo, Sena Shomo, Rodney Tyson, Cindy Gehris and Stephen C. Werner  
 Plaintiffs,

v.

**EXIDE CORPORATION and GENERAL BATTERY CORPORATION** Defendants.

**No. CIV. 96-3030.**

Feb. 19, 1999.

[Gerald J. Williams](#), Williams and Cuker, Phila, [Charles W. Elliott](#), Easton, [Wendy E. Carr](#), Widener University School of Law, Wilmington, DE, for L.E.A.D. Group of Berks County (Local Environmental Awareness Development Group of Berks County), Clean Water Action, Inc., [Kathy Grillo](#), Mrs., Michele Esterly, Mrs., Thomas Esterly, Mr., Clifton H. Blume, Mr., Charles Tobias, Mr., Nancy Tobias, Mrs., Dorothy Golden, Mrs., Melvin Gehris, Mr., Grace Gehris, Mrs., Linda Katzenmoyer, Ms., Robert Shomo, Mr., Sena Shomo, Mrs., Rodney Tyson, Mr., Cindy Gehris, Ms., [Stephen C. Werner](#), Mr., Plaintiffs.

[Larry D. Silver](#), Duane, Morris & Heckscher, [Robert L. Collings](#), Schnader Harrison Segal & Lewis LLP, Philadelphia, for Exide Corporation, General Battery Corporation, Defendants.

## MEMORANDUM AND ORDER

VAN ANTWERPEN, J.

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## I. INTRODUCTION

\*1 Plaintiffs, Local Environmental Awareness Development Group of Berks County, Clean Water Action, Inc. and various individuals, filed this action pursuant to the Resource Conservation and Recovery Act (“RCRA”), [42 U.S.C. § 6972\(a\)](#), Clean Air Act (“CAA”), [42 U.S.C. § 7604](#), the Clean Water Act (“CWA”), [33 U.S.C. § 1365](#), and have made various claims under Pennsylvania state environmental law, including the Air Pollution Control Act (“APCA”), [35 P.S. § 4010](#), and the Clean Streams Law (“CSL”), [35 P.S. § 691.601](#).

Plaintiffs essentially claim that the activities of the Defendants, Exide Corporation (“Exide”) and General Battery Corporation (“GBC”), disregarded the environmental laws by: (1) handling solid waste which may present an imminent and substantial endangerment under 42 U.S.C. § 6972(a)(1)(B), (claim I); (2) violating the Pennsylvania Hazardous Waste Management Regulations enforceable under 42 U.S.C. § 6972(a)(1)(A), (claim II); (3) violating emission standards and limitations pursuant to 42 U.S.C. ¶ 7604(a) (claim III); (4) discharging effluents in violation of 33 U.S.C. § 1365(a) (claim IV); and (5) placing industrial waste into the waters of the Commonwealth of Pennsylvania in violation of 35 P.S. § 691.601 (claim V).

Defendants and Plaintiffs both move for partial summary judgment. The following papers are presently before the court:

1. Motion for Summary Judgment of Defendants Exide and GBC and Accompanying Exhibits, filed on September 30, 1998.
2. Plaintiffs' Motion for Partial Summary Judgment with Respect to Claims Arising Under the CWA, the Pennsylvania CSL, the CAA and the Pennsylvania APCA and Accompanying Exhibits, filed on October 1, 1998.
3. Proposed Findings of Facts and Conclusions of Law by Plaintiffs, filed on October 1, 1998.
4. Defendants' Memorandum of Law and Fact in Reply to Plaintiffs' Motion for Partial Summary Judgment, filed on October 30, 1998.
5. Plaintiffs' Response in Opposition to Motion for Summary Judgment of Defendants Exide and GBC, filed on October 30, 1998.

After reviewing the lengthy motions and voluminous record, we find that: (1) Defendants are denied summary judgment on the claims brought under RCRA (claims I & II); (2) certain individual Plaintiffs lack standing to bring claims under the CAA, APCA, CWA or CSL (claims III, IV & V); (3) Plaintiffs lack standing to bring a claim under the CAA and APCA as it relates to the federal permit, No. 78 PA 22 (claim III); (4) Plaintiffs lack standing to bring claims under the CWA and CSL with respect to the discharge of iron in violation of permit, No. PA 0014672 (claim IV & V); (5) Plaintiffs are granted partial summary judgment with respect to the 1998 malodor violation and sulfur dioxide emissions violations (claim III); (6) Plaintiffs and Defendants are denied summary judgment with respect to the remaining malodor violations and afterburner temperature violations (claim III); (7) Plaintiffs are denied summary judgment with respect to the remaining air pollution violations (claim III); (8) Plaintiffs and Defendants are denied summary judgment under the CWA and CSL with respect to NPDES permit violations that are wholly past (claims IV & V); and (9) Plaintiffs are granted partial summary judgment with respect to violations of the total dissolved solids (“TDS”), zinc and antimony parameters in Defendants' NPDES permit under the CWA and CSL (claims IV & V).

## II. FACTS

\*2 Only a brief summary is practicable in light of the voluminous nature of the record before this court. Defendants, Exide and GBC, are involved in secondary lead smelting for the recycling of lead wastes and lead-acid battery manufacturing at their facilities located in Muhlenberg Township and Laureldale Borough in Berks County, Pennsylvania. Pls.' Statement of Facts at ¶ 15.

Defendants' secondary smelting operations refine lead wastes for reuse by the burning of batteries and other scrap materi-

als in industrial furnaces. Defs.' Ex. 1. Lead and polypropylene battery cases are processed in an industrial grinder. *Id.* The prepared cases are then placed in large tanks where a sink-float process is used to separate the lead. *Id.* Battery-case fragments, which float in the tanks, are collected and shredded, and then pelletized to produce new battery cases. *Id.*

The smelting facility has two reverberatory furnaces which are fueled by natural gas. *Id.* Lead-bearing materials, including those generated by the processing of the spent batteries, are fed into the reverberatory furnaces. *Id.* Two blast furnaces are charged with lead-bearing slag, as well as other lead-bearing materials. *Id.* The blast furnaces are continuously tapped to remove lead and intermittently tapped to remove slag. *Id.*

The battery manufacturing facilities produce automotive and truck batteries. *Id.* The lead ingots are melted and reacted with oxygen to form lead oxide. *Id.* After the lead oxide is mixed with additives and sulfuric acid, the battery element is created. Terminals are cast and the battery case is sealed. *Id.*

Wastewater from battery recycling, secondary lead smelting and new battery manufacturing operations are combined with storm water and leachate from inactive landfills and treated in Defendants' wastewater treatment facility. Sulfuric acid from the battery recycling operation moves through two clarification and holding tanks and is refined before the treated wastewater is discharged into an unnamed tributary of Bernhart Creek (the "Tributary"). *Id.*

The facts thereafter are in dispute. Plaintiffs claim that the offsite residential properties near the Defendants' facilities have been contaminated with lead and other toxic heavy metals. Pls.' Compl. ¶ 43. They also allege that no cleanup of the offsite properties has been undertaken. *Id.* ¶ 49. Defendants are authorized by Hazardous Waste Permit No. PA 0990763089 to store certain hazardous wastes, including spent batteries, prior to their use or reuse in the lead smelting operation. Defs.' Ex. 1.

Plaintiffs also allege that the Defendants have been responsible for violations of emission standards and limitations established by the Pennsylvania State Implementation Plan ("SIP"). Emissions from the furnaces at the smelting operations are controlled by a series of devices which have been authorized by plan approvals and operating permits issued pursuant to the CAA and the Pennsylvania APCA. Defs.' Ex. 1. Such state and federal permits require minimum afterburner temperatures which are intended to reduce air pollutant emissions of hydrocarbons and odors, as well as minimum emission requirements of sulfur dioxide. *See, e.g.*, Pls.' Exs. 58, 119, 120, 122, 132; Defs.' Ex. 1. Defendants must also monitor and report sulfur dioxide levels and afterburner temperatures on a quarterly basis. Defs.' Ex. 1. Plaintiffs specifically allege that the reverberatory and blast furnaces are significant sources of air pollutants and hold Defendants responsible for violations of their operating permits, which include, but are not limited to, malodors emissions, sulfur dioxide exceedances, minimum afterburner temperature violations and non-compliance with reporting requirements. Pls.' Compl. at ¶¶ 30, 67, 71, 73, 75.

\*3 Finally, Plaintiffs allege that the Defendants have discharged effluents in violation of their National Pollutant Discharge Elimination System ("NPDES") permit limits. These effluents include toxic heavy metals such as antimony, cadmium, lead, iron, copper and silver, as well as suspended solids and dissolved solids. Pls.' Compl. at ¶¶ 83-99. These effluents are controlled by the wastewater treatment system and Defendants are required to monitor, report and operate the output of such effluents in accordance with their NPDES permit, No. PA 0014672. Defs.' Ex. 1.

### III. STANDARD OF REVIEW

The court shall render summary judgment “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.”*Fed.R.Civ.P. 56(c)*. This rule provides the court with a useful tool when the critical facts are undisputed, thereby facilitating the resolution of a pending controversy without the expense and delay of conducting a trial made unnecessary by the absence of factual dispute. *Peterson v. Lehigh Valley Dist. Council*, 676 F.2d 81, 84 (3d Cir.1982); *Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 573 (3d Cir.1976). Summary judgment is inappropriate, however, where the evidence before the court reveals a genuine factual disagreement requiring submission to the jury. An issue is “genuine” only if the evidence is such that a reasonable jury could find for a non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). At the summary judgment stage, “the judge’s function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” *Id.* at 249. However, if the evidence is merely “colorable” or is “not significantly probative,” summary judgment may be granted. *Id.* at 248-49.

In making its ruling on a summary judgment motion, the court must view all inferences in a light most favorable to the non-moving party, *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962); *Continental Ins. Co. v. Bodie*, 682 F.2d 436, 438 (3d Cir.1982), must resolve all doubts against the moving party, *Gans v. Mundy*, 762 F.2d 338, 341 (3d Cir.1985), and must take as true all allegations of the non-moving party that conflict with those of the movant, *Anderson*, 477 U.S. at 255.

#### IV. STATUTE OF LIMITATIONS

We must first address the scope of evidence which we may consider when examining these motions for summary judgment. The general five-year statute of limitations for federal actions contained in 28 U.S.C. § 2462 states: “[e]xcept as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued.” Although the RCRA, CWA and CAA contain no statute of limitations, courts have applied 28 U.S.C. § 2462 to citizen suits that seek civil penalties. See *Public Interest Research Group of New Jersey v. Powell Duffryn*, 913 F.2d 64, 75 (3d Cir.1990) (applied to the CWA); *Glazer v. American Ecology Env’tl. Servs.*, 894 F.Supp. 1029, 1044 (E.D.Tex.1995) (applied to the RCRA and CAA); *Bodne v. Geo A. Rheman Co., Inc.*, 811 F.Supp. 218, 221 (D.S.C.1993) (applied to the RCRA); *United States v. SCM Corp.*, 667 F.Supp. 1110, 1123 (D.Md.1987) (applied to the CAA). Courts have also held that the statute of limitations is tolled during the sixty-day notice requirements of the RCRA, see 42 U.S.C. § 6972(b)(1)(A), the CWA, see 33 U.S.C. § 1365(b)(2), and the CAA, see 42 U.S.C. § 7604(b)(2). See *Powell Duffryn*, 913 F.2d at 75; *Atlantic States Legal Found. v. Al Tech Speciality*, 635 F.Supp. 284, 288 (N.D.N.Y.1986); *Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517, 1523 (9th Cir.1987).

\*4 The more complicated issue, however, is how to determine when “a claim is first accrued” for purposes of 28 U.S.C. § 2462.<sup>FN1</sup> With respect to the CWA, the Third Circuit has held that the five year time period begins when the defendant files its Discharge Monitoring Report (“DMR”), “since the responsibility for monitoring effluent rests with the defendant, 33 U.S.C. § 1318(a)(4)(A), and the public cannot reasonably be deemed to have known about any violation until the permit holder files its DMRs.”<sup>FN2</sup> *Powell Duffryn*, 913 F.2d at 75. Such a rule balances the interests found in CWA cases where “many of the policy benefits of statutes of limitations are preserved as the Government cannot unreasonably delay in bringing an action, while the public is not harmed by an inability to prosecute claims for violations that could not reasonably have been discovered .” *Winward Properties, Inc.*, 821 F.Supp. 690, 695 (N.D.Ga.1993). Neither party

contests that the date of accrual for a claim under the CWA is equivalent to the date when the DMR is filed. *See* Pls.' Resp. at 96; Defs.' Resp. at 11. It seems clear, therefore, that Plaintiffs may claim any violations based on DMRs filed after February 15, 1991-five years and sixty days before the complaint in this action was filed.

**FN1.** We decline to address this issue for RCRA as Defendants do not argue that any of the Plaintiffs' claims brought under RCRA are barred by the statute of limitations.

**FN2.** The CWA provides EPA with the authority to issue NPDES permits which allow limited discharges of pollutants and impose requirements for monitoring, sampling, analyzing, and reporting compliance or non-compliance with the permit. 40 C.F.R. § 122.41. The report, or DMR, must be signed by a designated officer and verified as true under penalties of law. 40 C.F.R. § 122.22.

The matter is more complicated with respect to claims brought under the CAA. No courts have discussed whether the so-called "discovery rule" that applies to claims brought under the CWA should similarly be applied to claims brought under the CAA. *See SCM Corp.*, 667 F.Supp. at 1123; *Glazer*, 894 F.Supp. at 1044. The discovery rule, borrowed from tort law, states that a claim does not accrue until the plaintiff discovers or should have discovered the violation. *Powell Duffryn*, 913 F.2d at 75; *Winward Properties*, 821 F.Supp. at 694. A number of policy concerns motivated these courts to apply the discovery rule to claims under the CWA, including: (1) the difficulty of detecting such violations; (2) the inevitable reliance of government agencies on a system of permits and self-reporting to enforce the act; and (3) the act's overall goal to restore integrity to the Nation's waters. *Id.*; *Sierra Club*, 834 F.2d at 1521. We do not see why the so-called "discovery rule" should not apply to claims brought under CAA, as air pollution violations are also difficult for the public to detect, and the CAA's goal is similarly broad in its purpose "to protect and enhance the quality of the Nation's air resources."<sup>42</sup> U.S.C. § 7401(b)(1).

We find that the date on which a Notice of Violation ("NOV") is issued or quarterly reports of continuous emissions monitoring systems ("CEMS") data are submitted should be the date of accrual of a CAA claim under the five-year statute of limitations. 28 U.S.C. § 2462. Both the NOV and CEMS data are matters of public record, so it is reasonable to hold that "a plaintiff should have discovered the violation" from the date of its issuance. In the present case, any claim based on a NOV or CEMS data filed before February 15, 1991 is barred under the statute of limitations.

\*5 The CSL and APCA differ from their federal counterparts in that the statute of limitations for each is expressly defined within the statutory scheme. Under the APCA, the statute of limitations is seven years, and the statute explicitly states that the period is measured "from the date the offense is discovered."<sup>35</sup> P.S. § 4010.3. As for claims brought under the Pennsylvania CSL, the statute of limitations is five years as set forth in 35 P.S. § 691.605(c). While the statutory language under the CSL lacks the same explicit language as 35 P.S. § 4010.3 regarding the date of accrual, at least one court has held that the discovery rule similarly applies to the CSL. *Westinghouse v. Dep't of Env'tl. Protection*, 705 A.2d 1349, 1354 (Pa.Comm. Ct. 1998). The *Westinghouse* court rested its decision primarily on analogizing the CSL to the federal CWA and the fact that courts apply the discovery rule to CWA claims. *Id.* The CSL claims in this suit that are based on any DMRs filed after February 15, 1991 are therefore barred by the statute of limitations.

## V. RESOURCE CONSERVATION AND RECOVERY ACT

Under the citizen suit provision of RCRA, Plaintiffs have alleged that Defendants: (1) handled solid or hazardous waste in a way that may present an imminent and substantial endangerment to the environment, 42 U.S.C. § 6972(a)(1)(B); and

(2) violated Pennsylvania waste management standards, 42 U.S.C. § 6972(a)(1)(A).<sup>FN3</sup> See Pls.' Compl. at ¶¶ 51-60. In turn, Defendants have moved for summary judgment on both claims by arguing that: (1) the record shows that the conditions were not caused by Defendants' past or present management of solid or hazardous waste; and (2) Defendants' activities that may have violated the Pennsylvania Waste Hazardous Management Regulations are wholly in the past. Defs.' Br. at 6.<sup>FN4</sup> With respect to the facts alleged by both sides, when there is a conflict between facts, we will take the Plaintiffs' allegations as true because they are the non-moving party.

<sup>FN3</sup>. Plaintiffs' Complaint filed on April 17, 1996, is hereinafter referred to as "Pls.' Compl. at ¶ \_\_."

<sup>FN4</sup>. Motion for Summary Judgment of Defendants Exide and GBC filed on September 30, 1998, is hereinafter referred to as "Defs.' Br. at \_\_."

#### A. The Imminent and Substantial Endangerment Claim

We hold that Plaintiffs have sufficiently alleged claim I and that triable issues of fact remain that preclude the granting of summary judgment. Liability under the citizen suit provision, § 7002(a)(1)(B) of the RCRA, 42 U.S.C. § 6972(a)(1)(B), is imposed on any person:

who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment...

This provision was added by the 1984 RCRA amendments and legislative history has indicated that liability under this provision may be established by the same standards used to establish liability under § 7003 of the RCRA, 42 U.S.C. § 6973, under which the Administrator of the Environmental Protection Agency ("EPA") may bring suit on behalf of the government. H.R.Rep. No. 98-198, at 53, reprinted in 1984 U.S.C.A.A.N. 5576, 5612; see also *Middlesex County Bd. of Chosen Freeholders v. New Jersey*, 645 F.Supp. 715, 721 (D.N.J.1986). Moreover, the seminal case in the Third Circuit has read § 7003 of RCRA expansively where "this provision was intended to confer 'overriding authority to respond to situations involving a substantial endangerment to health or the environment.'" *United States v. Price*, 688 F.2d 204, 213-14 (3d Cir.1982); see also *Dague v. City of Burlington*, 935 F.2d 1343, 1355 (2d Cir.1991), rev'd in part on other grounds, 505 U.S. 557 (1992).

\*6 In deciding if Defendants' activities fall under RCRA, the first issue is whether spent lead-acid batteries and lead scrap can be considered "solid waste" because they are ultimately recycled. Courts have expansively interpreted "solid waste" in § 7002 of the RCRA to be broader than the EPA's regulatory definition of solid waste for its Subtitle C regulatory RCRA program. *Connecticut Coastal Fishermen v. Remington Arms*, 989 F.2d 1305, 1316 (2d Cir.1993); *Owen Elec. Steel Co. of South Carolina v. Browner*, 37 F.3d 146, 148 n.3 (4th Cir.1994); *Comite Pro Rescate De La Salud v. Puerto Rico Aqueduct & Sewer Auth.*, 888 F.2d 180, 187 (1st Cir.1989).

As to useful products, courts have broadly interpreted "solid wastes" to include material that could be useful. The term "solid waste" is defined at 42 U.S.C. § 6903(27) as follows:

The term "solid waste" means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous materi-

al resulting from industrial, commercial, mining and agricultural operations ....

The key term to interpret is the meaning of “discarded material,” because § 7002 of RCRA does not contain the terms “abandoned” or “disposed of” as does the regulatory definition of RCRA, *see* 40 C.F.R. §§ 261.2(a)(2), (b)(1). *Connecticut Coastal*, 989 F.2d at 1316. The definition of “discarded material” simply means that the material is discarded because it has been left to accumulate after serving its intended purpose. *Id.* The court in *Zands v. Nelson*, for example, found that gasoline contaminating soil was a solid waste for purposes of the RCRA although the original “intention in placing the gasoline into the underground tank was that it would be subsequently taken out of the tank and sold.” 779 F.Supp. 1254, 1262 (S.D.Cal.1991). Two circuit courts have found lead parts to be solid waste, where those lead parts had been reclaimed from spent car and truck batteries for recycling purposes. *United States v. ILCO, Inc.*, 996 F.2d 1126, 1131 (11th Cir.1993); *Catellus Dev. Corp. v. United States*, 34 F.3d 748, 752 (9th Cir.1994). The *ILCO* court further explains: [s]pent batteries, including their lead components, became “part of the waste disposal problem,” when the original consumer discarded the battery. It is unnecessary to read into the word “discarded” a congressional intent that the waste in question must be finally and forever be discarded, as *ILCO* seems to argue.

996 F.2d at 1131-32 (citations omitted).

It seems clear that the spent lead-acid batteries and lead scrap that are part of the secondary smelting operations of the Defendants are solid wastes under RCRA. The old batteries are emptied and the cases are shredded. The plastic materials are sent to an on-site recycling operation, the lead-bearing materials are removed and sent to storage piles and the acid is pumped into storage tanks for either off-site reclamation or treatment. *See* Pls. Ex. 4 at 2.<sup>FN5</sup> We therefore reject Defendants' arguments that their activities are not subject to 42 U.S.C. § 6972(a)(1)(B) because they do not engage in activities involving “solid waste.” The court is not bound by EPA's RCRA regulations that exempt the recycling process, *see* Defs.' Br. at 17, because, as we stated above, courts have interpreted the meaning of “solid wastes” in § 7002 of RCRA more broadly than has the EPA for its RCRA Subtitle C program.

<sup>FN5</sup>. Exhibits in Support of Plaintiffs' Motion for Partial Summary Judgment with Respect to Claims Arising under the Clean Water Act, the Pa. Clean Streams Law, the Clean Air Act, and the Pa. Air Pollution Control Act filed on October 1, 1998, will be hereinafter referred to as: “Pls.' Ex. \_\_\_.”

\*7 If anything, Defendants misread the statute by equating the term “solid waste” with the alleged environmental effects of their operations. For example, Defendants argue that solid waste excludes lead-contaminated soil. *See* Defs.' Br. at 11-12. Such an argument is inapposite because Plaintiffs are not alleging that soil itself is solid waste, but rather the *environment* which is contaminated by the handling of solid waste.<sup>FN6</sup> Pls.' Resp. at 6 n.4.<sup>FN7</sup>

<sup>FN6</sup>. We credit Plaintiffs logic on the issue: “If defendants' bizarre argument were accepted, a person engaged in improper hazardous waste activities could dump drums of highly toxic neurologically-damaging waste onto the ground in a children's playground, contaminating the playground with the neurotoxic waste, and then assert that there is no valid RCRA § 7002 ‘imminent and substantial endangerment’ claim because ‘soil’ is not ‘waste.’”

<sup>FN7</sup>. Plaintiffs' Response in Opposition to Motion for Summary Judgment of Defendants Exide and GBC filed on October 30, 1998, is hereinafter referred to as: “Pls.' Resp. At \_\_\_.”

Moreover, Defendants make an elaborate series of arguments claiming that uncontained gas emissions of lead and other materials are not solid waste.<sup>FN8</sup> *See* Defs.' Br. at 13-19. Again, Defendants misread the meaning of “solid waste” under

42 U.S.C. § 6972(a)(1)(B). Plaintiffs are not arguing that uncontained gas emissions are solid wastes, but rather that the handling of solid waste in the form of lead scrap and spent lead-acid batteries is what subjects Defendants to this provision of RCRA. *See, e.g., American Petroleum v. United States EPA*, 906 F.2d 729, 741 (D.C.Cir.1990); *American Mining Congress v. EPA*, 907 F.2d 1179, 1186-87 (D.C.Cir.1987); *compare American Mining Congress v. EPA*, 824 F.2d 1177 (D.C.Cir.1990) (materials passing in a continuous stream or flow from one production process to another for immediate reuse are not discarded). For the purposes of defending this summary judgment motion, Plaintiffs have sufficiently convinced this court that lead scrap and lead-acid batteries which are to be recycled are considered “discarded” solid waste.

FN8. Defendants seem to intermittently argue that uncontained gas emissions of lead and other materials are not environmental effects from solid waste handling, *see, e.g.,* Defs.' Br. at 17, 20, but we find that to be an issue of causation that is addressed below.

The next issue is whether Defendants' activities can be characterized as the “past or present handling, storage, treatment, transportation, or disposal ... which may present an imminent and substantial endangerment” as required under RCRA. 42 U.S.C. § 6972(a)(1)(B). As any person presently engaged in the foregoing activities would fall under RCRA, the Defendants' activities fall within the broad scope of “handling” solid wastes. Moreover, it is clear that after the 1984 RCRA amendments, this provision may target wholly past violations as distinguished from the “alleged to be in violation” language in 42 U.S.C. § 6972(a)(1)(A). *See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 64 (1987). The endangerment must be ongoing, but the conduct that created the endangerment need not be. *See, e.g., Connecticut Coastal*, 989 F.2d at 1316; *Ascon Properties, Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1159 (9th Cir.1989); *City of Toledo v. Beazer Materials & Servs., Inc.*, 833 F.Supp. 646, 654 (N.D.Oh.1993). Therefore, Defendants' assertions that the area of contamination was affected by past processes does not exempt the Defendants from falling under RCRA. *See* Defs.' Br. at 20-21; Defs.' Ex. 6.<sup>FN9</sup> The evidence before the court shows that the ongoing presence of lead in the off-site surface soil located around Exide's facility, resulting from the past handling of solid waste, is at least sufficient to leave an issue of material fact for the court as to ongoing endangerment. *See* Defs.' Ex. 6; Pls.' Ex. 4 at 4; Dep. Lebo 7/9/97 at 143-44. There is certainly no denial on the part of the Defendants that the presence of lead in the environment is harmful to the health and environment. Dep. Lebo 7/7/97 at 121-124.

FN9. Exhibits to Memorandum in Support of Defendants' Motion filed on September 30, 1998, is hereinafter referred to as: “Defs.' Ex. \_\_\_.”

\*8 The final issue in establishing a claim under RCRA is whether Plaintiffs have sufficiently alleged causation to show that Defendants' solid waste activities “may present an imminent and substantial endangerment.” 42 U.S.C. § 6972(a)(1)(A). Use of the word “may” was intended by Congress to provide the courts with broad equitable powers that are not limited to emergency-type situations, but rather extend to eliminating any risk posed. *Price*, 688 F.2d at 214. While the potential for harm should be great, neither the term “imminent” nor “endangerment” requires a showing of actual harm, but merely a risk of harm that is imminent. *Dague*, 935 F.2d at 1356; *United States v. Waste Indus., Inc.*, 734 F.2d 159, 166 (4th Cir.1984).

Defendants allege the environmental effects around the Defendants' facilities could not have been produced by the handling of solid waste, but rather are primarily the result of depositing uncontrolled air emissions. *See* Defs.' Br. at 20; Defs.' Ex. 6.<sup>FN10</sup> Defendants, however, do not go on to explain why uncontained air emissions are separated from the process of handling solid wastes. We surmise that uncontrolled air emissions are not entirely separated from solid waste handling. In fact, as Defendants' own expert did not deny that reverberatory and blast furnaces are significant sources of emis-

sions and part of the waste handling process of lead scrap and lead-acid batteries. Dep. Lebo 7/7/97 at 112-113; Pls.' Ex. 4 at 4-5.

**FN10.** Defendants argue that there is no statutory presumption available to Plaintiffs that contamination within 2500 feet of their facilities is caused by solid waste. *See* Defs.' Br. at 21. We decline to address this argument at the summary judgment phase because there are sufficient facts alleged to establish causation under [42 U.S.C. § 6972\(a\)\(1\)\(B\)](#).

Even presuming that stack emissions were entirely separated from waste handling activities, we reject this argument because Plaintiffs have alleged other handling, storage and disposal of solid wastes that have resulted in an unreasonable risk of harm. Compl. at ¶ 47; Pls.' Ex. 4 at 6. Plaintiffs, therefore, have presented evidence that leaves an issue of material fact as to whether the past smelter process stack emissions were the *only* sources responsible for making lead contamination around the facility. As Defendants have failed to point to any other evidence to refute these allegations, we cannot say that causation linking solid waste handling with environmental effects has not been established.

We find, therefore, that a triable issue of fact exists as to whether Defendants violated [42 U.S.C. § 6972\(a\)\(1\)\(B\)](#). As discussed above, it is clear that Defendants' activities do fall under the auspices of the RCRA citizen suit provision that regulates the handling of solid waste.

#### B. Violation of Pennsylvania Waste Management Standards

We hold that Plaintiffs have sufficiently alleged claim II, with respect to certain violations of the Pennsylvania Hazardous Waste Management Regulations, and that triable issues of fact remain that preclude the granting of summary judgment. It is worth noting, however, that Defendants have satisfied this court that a majority of the alleged violations of the Pennsylvania Hazardous Waste Management Regulations enumerated by the Plaintiffs, *see* Pls.' Compl. Ex. C, do not amount to violations under RCRA. Nevertheless, there are a handful of past and present violations, discussed below, that still present the court with a material dispute of fact as to whether they present ongoing environmental effects in violation of § 7002(a)(1)(A) of RCRA.

**\*9** Plaintiffs allege that Defendants' conduct is in violation of the various provisions of the Pennsylvania Hazardous Waste Management Regulations, 25 Pa.Code §§ 170-270, which the EPA granted final authorization to the Commonwealth of Pennsylvania in 1986. *See* Compl. at ¶ 55. Under § 7002(a)(1)(A) of the RCRA, codified at [42 U.S.C. § 6972\(a\)\(1\)\(A\)](#), liability is established as follows:

against any person ... who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter ....

A citizen suit may be brought under this provision for violation of state regulations which have become effective pursuant to the RCRA. *See* [42 U.S.C. § 6926\(b\)](#); *ee, e.g., Murray v. Bath Iron Works Corp.*, 867 F.Supp. 33, 43 (D.Me.1994); *Sierra Club v. Chemical Handling Corp.*, 824 F.Supp. 195, 197 (D.Colo.1993); *Lutz v. Chromatex, Inc.*, 725 F.Supp. 258, 261 (M.D.Pa.1989).

Defendants are correct to argue that wholly past violations of state regulations are not enforceable under [§ 6972\(a\)\(1\)\(A\)](#). Defs.' Br. at 22. The Supreme Court decision in *Gwaltney* held that the phrase "alleged in violation" in the Clean Water

Act (“CWA”) requires the Plaintiffs to show either an ongoing violation or a reasonable likelihood of future intermittent violations. 484 U.S. at 61. The focus on ongoing or prospective violations under this provision is sharply distinguished from the solid waste handling counterpart in 42 U.S.C. § 6972(a)(1)(B).

Both parties agree that the critical time for determining the existence of an ongoing violation or a reasonable likelihood of intermittent violations is when the complaint is filed. *See, e.g., Connecticut Coastal*, 989 F.2d at 1311; *Atlantic States Legal Found.*, 897 F.2d at 1134. While jurisdiction attaches on Plaintiffs good faith allegations of an ongoing violation, on a motion for summary judgment, a Defendant can win dismissal of the claim for lack of jurisdiction if it appears that Plaintiffs' allegations of continuing or a likelihood of intermittent violations “were a sham.” *Connecticut Coastal*, 989 F.2d at 1311-12. To avoid summary judgment, therefore, a Plaintiff must come forward with sufficient evidence to support its allegations. *Id.*

Moreover, certain past violations may be considered ongoing or to at least present a likelihood of intermittent violations if proper cleanup procedures are not put into effect. The court in *Fallowfield Dev. Corp. v. Strunk*, for example, held that past violations of improperly disposed hazardous waste can be considered an ongoing violation until proper disposal procedures are put into effect:

Because improperly disposed of hazardous waste remains a remediable threat to the environment, this Court believes that Congress intended to allow citizen suits under section 7002 of RCRA for past violations where the effects of the violation remain remediable.

\*10 Civ. A. No. 89-8644, 1990 WL 52745, at \*11 (E.D.Pa. Apr. 23, 1990). Courts have agreed that past violations can constitute a continuous violation as long as the environmental effects remain remediable. *Pottstown Indus. Complex v. P.T.I. Servs., Inc.*, Civ. A. No. 91-5660, 1992 WL 50084, at \*6 (E.D.Pa. Mar. 10, 1992); *Truck Components Inc. V. Beatrice Co.*, No. 94-C3228, 1994 WL 520939, at \*6 (N.D.Ill. Sept. 21, 1994); *Gache v. Town of Harrison, New York*, 813 F.Supp. 1037, 1041-42 (S.D.N.Y.1993); *City of Toledo*, 833 F.Supp. at 656; *but see Coburn v. Sun Chem. Corp.*, Civ. A. No. 88-0120, 1988 WL 120739, at \*9 (E.D.Pa. Nov. 9, 1988)(ongoing violation was not established with respect to a past operator of a facility that lacked permits for storage of hazardous waste).

Many of Plaintiffs' allegations as to ongoing violations under 42 U.S.C. § 6972(a)(1)(A) have already been addressed and remedied by the Defendants. In particular, the various violations of hazardous waste manifesting requirements in the past, *see* Pls.' Compl. Ex. C. violations dated 2/22/93, 12/12/92, 1/18/93, 6/24/93, and the present after the complaint was filed, *see* Defs.' Ex. 22, 23, do not appear to be ongoing violations. Defendants have shown that in response to such hazardous waste manifest review, they have paid fines and sought to remedy the problems by changes in policy. *See* Defs.' Ex. 10, 22, 23. Other violations related to waste management, *see* Pls.' Compl. Ex. C. violations dated 8/31/94, 6/27/94, 6/10/93, 12/16/92, 8/91 & 8/92, 6/23/92, 5/91 & 6/91, have been addressed by Defendants as follows: (1) by implementing remedial measures, Defs.' Ex. 8; (2) by thoroughly disputing such allegations without a response from the Pennsylvania Department of Environmental Resources, Defs.' Ex. 9; (3) via a consent decree dated March 31, 1994, Defs.' Ex. 12, 13; or (4) by implementing the recommendations proposed by the Department of Environmental Resources, Defs.' Ex. 14. We are convinced that such remedies sufficiently respond to these past and present violations and Plaintiffs fail to offer any specifics as to why such responses are inadequate or that there is a reasonable likelihood of intermittent violations in the future. *See* Pls.' Resp. at 22-23.

At the same time, by resolving any doubts with respect to the existence of continuing violations in favor of the Plaintiffs, *see Connecticut Coastal*, 989 F.2d at 1311, this court finds that other past and present violations leave a question of fact

as to whether ongoing environmental effects exist as a result of these violations. As stated above, even if violations are past, they are considered an ongoing violation of RCRA if the disposed hazardous waste remains on the property, unremedied. *Fallowfield*, 1990 WL 52745, at \*11. Moreover, as long as no proper disposal procedures are put into effect, the past improper disposal of hazardous waste can constitute a continuous RCRA violation. *City of Toledo*, 833 F.Supp. at 656; *Truck Components*, 1994 WL 520939, at \*6.

\*11 One violation alleged by the Plaintiffs, *see* Pls.' Ex. 136, caused by an accidental spill, has not been shown to be remedied by Defendants.<sup>FN11</sup> While the hazardous waste spill has been cleaned up, *see id.*, there has been no evidence presented by the Defendants that procedures or changes to equipment have been made to prevent future spillages from re-occurring. An ongoing violation also exists when proper procedures are not put into effect to diminish the likelihood that such violations will occur in the future. *See, e.g., City of Toledo*, 833 F.Supp. at 656; *Truck Components*, 1994 WL 520939, at \*6.

FN11. Plaintiffs are correct in arguing that Defendants' blanket claim, *see* Defs.' Br. at 28, that its past violations during 1992-1994 ended with the payment of an EPA administrative penalty and consent agreement of February 9, 1995, *see* Defs.' Ex. 24, is inapposite to many of the Plaintiffs' claims which were not addressed by that particular consent decree. Pls.' Resp. at 22 n.13.

Finally, there are a series of violations ranging from the release of hazardous waste contaminated with lead into the environment to the failure to comply with certain procedures for waste management alleged by the Plaintiffs, *see* Pls.' Compl. Ex. C. violations dated 3/5/94, 2/25/92, 7/30/91 & 8/1/91, 6/9/87, for which Defendants either claimed no knowledge, Defs.' Br. at 26, or offered no explanation, *id.* at 27. As we are to resolve doubts in favor of the Plaintiffs without further evidence, we cannot say that these violations have been addressed or remedied.

On the present record, this court cannot say as a matter of law that Plaintiffs cannot show a continuing violation under 42 U.S.C. § 6972(a)(1)(A).<sup>FN12</sup> There certainly is some evidence of an ongoing presence of lead in the off-site surface soil located around Defendants' facility. Defs.' Ex. 6; Pls.' Ex. 4. Plaintiffs' experts allege that various discharges and spills by Exide have contributed to the lead contamination of the surrounding environment. Pls.' Ex. 4. We offer no opinion on any of the evidence within the record, but merely recognize that the cause of such ongoing environmental effects, a fact material to Plaintiffs' claim of an ongoing violation, is disputed. Dep. Lebo 7/9/97 at 143-47. Therefore, we must deny Defendants' motion for summary judgment on this RCRA claim.

FN12. We also reject Defendants' argument that Plaintiffs' claims of personal injury and property damages, *see* Pls.' Compl. at ¶¶ 43-49, are not redressable under the citizen suit provisions, Defs.' Br. at 63-64. It is our understanding that Plaintiffs are not seeking traditional monetary damages, *see* Pls.' Compl. at ¶ 115, but rather civil penalties and declaratory and injunctive-type remedies that will require remedial actions by the Defendants if they are found to be in violation of § 7002(a)(1)(A) of the RCRA. Such relief to remedy the threat of the improper disposal of waste is within the auspices of this provision of RCRA. *See Pottstown Indus. Complex*, 1992 WL 50084, at \*6-7; *Truck Components Inc.*, 1994 WL 520939, at \*6. Moreover, we agree with the Plaintiffs that restricting evidence relating to alleged personal injuries or property damage has no basis in law. *See* Defs.' Br. at 64; Pls.' Resp. at 102-103.

## VI. AIR AND WATER POLLUTION CLAIMS

In very lengthy motions, both Plaintiffs and Defendants have independently argued for and against the merits of Plaintiffs' claims III, IV and V, *see* Pls.' Compl. ¶¶ 61-113, which involve alleged violations under: (1) the CAA and Pennsylvania APCA; (2) the CWA; and (3) the Pennsylvania CSL. In addition, both parties have raised procedural arguments relating to this court's ability to exercise jurisdiction over these claims, including issues relating to standing, *see* Pls.' Br. at 32-60; Defs.' Resp. 12-49, and abstention, Defs.' Br. at 55-60; Pls.' Resp. at 81-92. Therefore, prior to addressing the merits of summary judgment arguments with respect to claims under federal and state statutes regulating air and water pollution, we will first address these procedural issues.

#### A. Standing

In Defendants' reply to Plaintiffs' motion for summary judgment, Defendants stumble upon an issue that the court must now address—whether Plaintiffs have standing to assert claims under the various federal and state environmental statutes at issue.<sup>FN13</sup> By addressing the standing issue first, we will determine whether there is a “case or controversy” over which we may properly exercise jurisdiction. *Steel Co., a/k/a/ Chicago Steel & Pickling Co. v. Citizens for a Better Env't*, -U.S.-, 118 S.Ct. 1003 (1998).

<sup>FN13</sup> In the normal course of events, if a defendant wanted to challenge a plaintiff's standing to bring an action, the defendant could do so on a motion for summary judgment. *See Gwaltney*, 484 U.S. at 65-66. In the motions before this court, however, Defendants have not moved for summary judgment on the standing issue. Instead, Defendants have raised the standing issue in their response, *see* Defs.' Resp. at 12-49, to Plaintiffs' summary judgment motion which alleges facts in support of Plaintiffs' standing. Pls.' Br. at 32-60.

As standing is one of the most important jurisdictional doctrines, the federal courts are under an independent obligation to examine whether the parties before them have standing. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990); *Judges v. Vail*, 430 U.S. 327, 331 (1977). We find, therefore, that we are obliged to examine these issues.

\*12 Article III of the Constitution limits the jurisdiction of federal courts to an actual “case or controversy.” *Allen v. Wright*, 468 U.S. 737, 750 (1984). An “essential and unchanging” component of this jurisdictional prerequisite is that the plaintiff have standing to sue. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The primary focus of the standing issue is “on the party seeking to get his complaint before a federal court.” *Flast v. Cohen*, 392 U.S. 83, 99 (1968). The Supreme Court has laid out the constitutional requirements for standing:

Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an “injury in fact”—an invasion of a legally-protected interest which is (a) concrete and particularized; and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical.’” Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be “fairly ... trace [able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court.” Third, it must be “likely,” as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision.”

*Lujan*, 504 U.S. at 560-61 (citations omitted). In short, the three constitutional requirements are injury, causation and redressability.

The burden of proving these three elements of standing falls on the party invoking federal jurisdiction. *Id.* at 561. Establishing standing is more than just a mere pleading requirement but rather “an indispensable part of the plaintiff’s case.” *Id.* Each element must be supported “with the manner and degree of evidence required at the successive stages of litigation.” *Id.*

Defendants assert “since it is necessary for Plaintiffs to prove standing to bring this motion and obtain relief, they must do more than declare their injury. They must prove it.” Defs.’ Resp. at 13. At the summary judgment stage, however, “the plaintiff can no longer rest on such ‘mere allegations’ but must ‘set forth’ by affidavit or other evidence, ‘specific facts.’” *Lujan*, 504 U.S. at 561. Only if the parties do proceed to trial and the issue of standing is still contested, must it be “supported adequately by the evidence adduced at trial.” *See, e.g., id.* (quoting *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 115 n.31 (1979)); *Haven Realty Corp. v. Coleman*, 455 U.S. 363, 379 n.21 (1982); *United States v. SCRAP*, 412 U.S. 669, 688-89 (1973). It is clear, therefore, that while Plaintiffs do have to show they have standing with facts beyond mere allegations in their complaint, the level of proof at this stage of the litigation need not be as full-blown as evidence adduced at trial.

#### 1. Air Pollution

First, in order to satisfy the constitutional requirement of standing, Plaintiffs must show that they have suffered “injury in fact” by proving their injury to be “concrete and particularized” and “actual or imminent,” not merely “‘conjectural’ or ‘hypothetical.’” *Lujan*, 504 U.S. at 560 (citations omitted). We believe that a minority of the individual Plaintiffs have met this showing with respect to the air pollution claims.

\*13 Some of the individual Plaintiffs base their alleged injuries on the following facts. *See* Pls.’ Ex. 1, Decl. N. Tobias, Decl. Grillo, Decl. R. Shomo, Decl. S. Shomo, Decl. Blume. They all live nearby, ranging from one city block to 2500 feet from the Defendants’ facility. *Id.* All attested to a smell of offensive odors coming from the Defendants’ facility, including sulfurous odors which are similar to the odor of rotten eggs. *Id.* Such odors and visibility problems caused these Plaintiffs on many occasions to go indoors, and it resulted in constraining the extent of outdoor recreational activities they could participate in as homeowners. *Id.* Finally, they all alleged to have experienced varying degrees of health effects from emissions from Defendants’ facility including: burning nose and throat causing a cough, Decl. Blume ¶ 8; Decl. Grillo ¶ 6, sore throats that persist for several days and gagging as a result of nauseating odors, Decl. S. Shomo ¶ 8, and increasing difficulty in breathing and chest tightness in those with preexisting asthmatic conditions, Decl. Tobias ¶¶ 8, 10; Decl. R. Shomo ¶¶ 8-9.

The Supreme Court has long recognized that injury to a plaintiff’s health, environmental, recreational or aesthetic conditions constitute an injury sufficient to confer standing. *Sierra Club v. Morton*, 405 U.S. 727, 734 (1971). The “injury in fact” test requires that the party seeking review be directly among the injured. *Id.* at 734-35.

We are convinced that the individual Plaintiffs mentioned above do have a concrete and palpable injury because they have not only alleged a variety of health, aesthetic and recreational concerns, but are the individuals who have actually experienced such issues as homeowners near Defendants’ facility. Moreover, Defendants’ assertion that Plaintiffs have failed to show injury in fact because they “must show that they *use* the natural resources affected by the pollution which concerns them,” is truly perplexing. Defs.’ Resp. at 18. The cases Defendants cite concern actions where a plaintiff’s assertion of “injury in fact” was merely an injury to a cognizable interest from the standpoint of a concerned citizen. In *Morton*, for example, the Court held that the mere claim by plaintiffs of a change in the aesthetics and ecology of the area

was insufficient to establish standing as none of the plaintiffs in that case could show that they used the area of concern. [405 U.S. at 734-35](#). Here it is clear that the injury is not only direct, but that the individual Plaintiffs live and use the environment affected by the pollution they are complaining about. We cannot imagine a more direct and concrete injury than that alleged by the above Plaintiffs.

We must, however, dismiss the other individual Plaintiffs who have not been shown to have suffered any injury in fact, including: Michele Esterly, Thomas Esterly, Charles Tobias, Dorothy Golden, Melvin Gehris, Grace Gehris, Linda Katzenmoyer, Rodney Tyson, Cindy Gehris, and Stephen Werner. We are certainly confused as to why at this point of the litigation there were no specific allegations made as to how these particular individual Plaintiffs suffered “injury in fact,” *see* Pls.’ Ex. 1; Pls.’ Statement Facts at ¶¶ 1-5, but we must now dismiss them from this case, without prejudice, due to lack of standing.

\*14 For the remaining individual Plaintiffs, the second constitutional element of standing, causation, requires that a plaintiff’s injury be “fairly ... trace[able] to the challenged action of the defendant ....” [Lujan, 504 U.S. at 560-61](#). A plaintiff need not prove causation with absolute scientific rigor as the “fairly traceable” requirement is not equivalent to a requirement of tort causation. [Powell Duffryn, 913 F.2d at 72](#). Plaintiffs in this case must merely demonstrate that they are more than “concerned bystanders” and that there is a “substantial likelihood” that Defendants’ conduct caused Plaintiffs’ harm. *Id.* (quoting [Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 75 n.20 \(1978\)](#)).

While we cannot say for certain that Defendants’ activities are linked to the injuries that the Plaintiffs suffer from, we think there is a substantial likelihood that the emissions from Defendants’ facility have caused such injuries. We premise the link on the basis that Plaintiffs’ alleged injuries directly stem from the emissions from Defendants’ facility, which is at times visible. *See* Pls.’ Ex. 1. Ms. Tobias, like the other Plaintiffs, states that the injuries she suffers from air emissions that derive from the Defendants’ facility: “I can tell these emissions are coming from the Exide/General Battery Company facility because I can see the emissions coming from the Exide/General Battery smokestacks, [and] there are no other visible emissions from any other sources nearby ...” Pls.’ Ex. 1, Decl. Tobias ¶ 6. Moreover, Plaintiffs’ causation argument is supported by the fact that their experts have linked many of the odor complaints of the surrounding neighborhood with the multiple compliance violations of the Defendants’ emission limitations, monitoring and reporting requirements. *See* Pls.’ Ex. 4.

Defendants argue that there is no causation between Plaintiffs’ injuries and sulfur dioxide emissions because records from 1997 and 1998 show that exceedances beyond the compliance rate was fairly minimal. *See* Defs.’ Resp. at 35; Defs.’ Resp., Ex. 8. Defendants overlook, however, the plain language of the CAA, which allows citizen suits for both continuing violations and wholly past violations “alleged to have violated ... or to be in violation.” [42 U.S.C. § 7604\(a\)\(1\)](#). Even if we accept Defendants’ assertion that their sulfur dioxide emissions exceeding compliance levels were de minimus for the past two years, it does not diminish the substantial link that exists between Plaintiffs’ injuries and Defendants’ repeated violations—even if largely in the past. In other words, as long as injuries can be correlated with Defendants’ repeated violations, causation is satisfied for the purpose of standing.

The third constitutional element of standing requires a plaintiff to demonstrate that his injury is “likely” to be “redressed by a favorable decision.” [Lujan, 504 U.S. at 560-61](#). Defendants rely heavily on the recent Supreme Court decision in [Steel, 118 S.Ct. at 1003](#). In *Steel*, the Court held that plaintiffs failed to fulfill the standing requirement of redressability. *Id.* at 1020. The Plaintiffs in *Steel* had sued claiming that the defendant had failed to file the required reports under the Emergency Planning and Community Right-to-Know Act of 1986, (“EPCRA”), [42 U.S.C. § 11046\(a\)\(1\)](#), for seven years,

but had later complied with all the required reports before the lawsuit was filed. *Id.* at 1020. The Court held that plaintiffs lacked standing because the relief authorized by the citizen suit provision under EPCRA would not redress their alleged injury caused by the past violations. *Id.* at 1020. Moreover, the Court held that the requested declaratory and injunctive relief were inappropriate as there was no allegation of a continuing or imminent future violation. *Id.* at 1018-20. Nor could the award of civil penalties payable to the Treasurer of the United States be considered a remedy for Plaintiffs' past injury for purposes of Article III standing requirements. *Id.*

\*15 Defendants in the present case argue that Plaintiffs' allegations under the CAA and the Pennsylvania APCA are similarly unremediable by the relief requested in the complaint. Defs.' Resp. at 41-42. The complaint asks for: (1) a declaratory judgment that Defendants violated the CAA and the Pennsylvania APCA; (2) an injunction restraining Defendants from further and future violations; (3) an order requiring Defendants to perform analyses and studies to evaluate harm to human health and the environment caused by Defendants' actions; (5) civil penalties; and (6) attorney's fees and other litigation costs. Pls.' Compl. at ¶ 115. The question for this court, therefore, is whether the above relief would serve to reimburse Plaintiffs for losses caused by violations of the CAA and Pennsylvania APCA. *Steel Co.*, 118 S.Ct. at 1018-20.

We find that Plaintiffs lack standing for a portion of their air pollution claims under the CAA because the alleged injury is not redressable by this court. Plaintiffs have alleged multiple violations of the federal Prevention of Significant Deterioration ("PSD") permit, 78 PA 22. Pls.' Exs. 76, 77. In particular, Plaintiffs argue that Defendants have violated both minimum afterburner temperatures and sulfur dioxide emissions limitations contained within the federal PSD permit. <sup>FN14</sup> See Pls.' Compl., Ex. B. This permit, however, was rescinded on January 11, 1995. Defs.' Ex. 29. The issue before us is whether these past violations of the permit may be redressed by the relief requested.

FN14. Plaintiffs cannot now argue in their motion for summary judgment that the permit was wrongfully rescinded by the EPA. See Pls.' Br. at 75 n.17; Defs.' Resp. at 6.

The 1990 Amendments of the CAA expressly overruled the Supreme Court decision in *Gwaltney* by allowing a citizen suit to proceed on the basis of past repeated violations "against any person ... who is alleged to have violated (if there is evidence that the alleged violation has been repeated)." 42 U.S.C. § 7604(a). At the same time, the Supreme Court has held in *Steel* that plaintiffs lack Article III standing for wholly past violations because such violations are not redressable. 118 S.Ct. at 1018-20. While the CAA concept of past violations is seemingly at tension with the constitutional standing requirement in *Steel*, we find that the two concepts can be reconciled where past violations may meet the redressability requirement of standing only if they have the possibility of being repeated in the future. In other words, a plaintiff may assert random past violations of the CAA and satisfy the redressability requirement by a presumption that there is a potential ongoing compliance problem or a possibility that such violations may be repeated.

While Defendants admittedly violated the terms of their federal PSD permit with respect to afterburner temperatures and sulfur dioxide emission limitations in the past, any future violations of this permit are impossible because it is rescinded. In particular, if there is no ongoing compliance problem and no possibility of a future one, injunctive-type relief and declaratory relief become inappropriate. *Id.*; cf. *Satterfield v. J.M. Huber Corp.*, 888 F.Supp. 1561, 1565 (N.D.Ga.1994). Moreover, civil penalties under the CAA are not sufficiently particularized to redress claimed injuries, but merely constitute an "undifferentiated public interest." *Steel*, 118 S.Ct. at 1018; see also *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC) Inc.*, 149 F.3d 303, 306 (4th Cir.1998). Thus, according to the standards of *Steel*, no relief requested may properly redress the injury associated with past violations of 78 PA 22.

\*16 In contrast, Plaintiffs do have standing to assert the remaining air pollution claims because Plaintiffs' injuries arising

from malodors and afterburner temperature and sulfur dioxide emission violations of state permits are redressable by the relief requested. The remaining air pollution claims are unlike the past violations in *Steel*, which were neither continuing nor presented an imminent threat of a repeated violation. 118 S.Ct. at 1020. Once the report had been filed in *Steel*, the environmental violation alleged by the plaintiffs had been wholly remedied. *Id.* We find that Plaintiffs in the present case have sufficiently established that there exist repeated past violations and violations that occurred after the filing of the complaint that could be redressed by both declaratory and injunctive-type relief. Pls.' Statement Facts at ¶¶ 78-114, 126, 136. For instance, Defendants have even acknowledged that there have been ongoing exceedances of sulfur dioxide emission levels limited by their state permits, *see* Defs.' Resp. at 35; Defs.' Resp., Ex. 3.

Moreover, claims brought under the Pennsylvania APCA have an additional hook for redressability because civil penalties awarded under the statute are paid into the Clean Air fund or may be used to prevent air pollution in the county where the violation occurred. 35 P.S. § 4013.6(c). While civil penalties payable to the United States Treasury cannot themselves be the basis for meeting the redressability requirement of Article III, *see Steel*, 118 S.Ct. at 1018-19, the payment of penalties to the Clean Air Fund in Pennsylvania will directly remedy the effects of harm in the Plaintiffs' neighborhood. *Id.* As distinguished from civil penalties payable to the generalized United States Treasury under the CAA, <sup>FN15</sup> Plaintiffs have standing to assert all claims under the APCA because the award of penalties that directly target and remedy Plaintiffs' injuries certainly satisfy the redressability requirement of Article III.

<sup>FN15</sup> While we do note that under 42 U.S.C. § 7604(g)(2), a court may order up to \$100,000 of civil penalties for "beneficial mitigation projects" after soliciting the view of the EPA, we hold that the prospect of such generalized relief does not sufficiently redress the injuries specifically enumerated by the Plaintiffs.

We hold, therefore, that the injuries asserted by the Plaintiffs are likely to be redressed by a decision in their favor. We reserve our judgment on determining whether the Defendants in fact violated any federal or state air pollution statutes until our discussion of the substantive law below.

## 2. Water Pollution

To satisfy standing on their Water Pollution Claims, Plaintiffs must show that they meet the three-pronged constitutional standing inquiry of *Lujan*. Plaintiffs must first show that their injury-in-fact is "concrete and particularized." *Lujan*, 504 U.S. at 560. We note that Plaintiffs Michele Esterly, Thomas Esterly, Charles Tobias, Dorothy Golden, Cindy Gehris, Grace Gehris, Melvin Gehris, Linda Katzenmoyer, Robert Shomo, Sena Shomo, Clifton Blume, Rodney Tyson and Stephen Werner have not made any specific allegations nor have had any specific allegations made on their behalf regarding injuries related to their water pollution claims. We therefore dismiss without prejudice these Plaintiffs' from the alleged water pollution claims for lack of standing. The remaining two Plaintiffs, Nancy Tobias and Kathy Grillo, live 2500 and 500 feet, respectively, from the Defendants' facility and have made several specific allegations of injury pertaining to their water pollution claims. *See* Pls.' Ex. 1, Decl. N. Tobias, Decl. C. Grillo.

\*17 Plaintiff Nancy Tobias alleges that the Tributary was impacted by foaming and foreign materials from the Defendants' discharges and that, as a result of these discharges, the stream quality is degraded downstream. Pls.' Ex. 1, Decl. N. Tobias. Additionally, she claims she is not able to enjoy Bernhart Park because it has been closed to the public due to lead found in soil samples. *Id.* Finally, she alleges that she will not engage in recreation at the creek due to lead contamination. *Id.* We believe the injuries Nancy Tobias complains of are exactly the type of injuries sufficient to confer standing under *Morton*. 405 U.S. at 734.

Plaintiff Kathy Grillo lives 500 feet from Defendants' facility. Pls.' Ex. 1, Decl. C. Grillo. The Tributary, which receives the discharge from the Defendants' facility, flows less than 10 feet behind her property. *Id.* She alleges that wild ducks have been driven from the Tributary. *Id.* More significantly, she alleges that after the Tributary floods, dead patches of grass and spots of black material are left in her backyard. *Id.* She also states that testing shows that her backyard is contaminated with lead in concentrations of 3,600 mg/kg in the upper 3 inches and 2,100 mg/kg in the soil 3 to 10 inches below the surface. *Id.* After learning that her soil was contaminated with lead, she restricted the use of her backyard for recreation. *Id.* She no longer grows vegetables, has barbecues or is able to grow plants. *Id.* Like Ms. Tobias, Ms. Grillo complains of not being able to use Bernhart Park. We believe Ms. Grillo's injuries are also the types of injuries that satisfy the injury-in-fact requirement as envisioned by the Supreme Court in *Morton*.

Defendants cite the Third Circuit case of *Public Interest Research Group of New Jersey, Inc. v. Magnesium Elektron, Inc.*, 123 F.3d 111 (3d Cir.1997), for the proposition that citizen suits for NPDES violations must show actual injury or an imminent threat of injury to the stream receiving the discharge. Defs.' Resp. at 20. In *Magnesium Elektron*, Public Interest Research Group of New Jersey ("PIRG") and Friends of the Earth instituted a suit under the CWA against Magnesium Elektron in 1989 for violating the terms of its NPDES permit. 123 F.3d at 115. The Third Circuit believed Plaintiffs' assertions that PIRG members had engaged in various recreational activities along the Delaware River. *Id.* at 120. However, the court was unwilling to hold that the CWA creates a cause action to "maintain waterways in their 'pristine state' absent at least a plausible threat of imminent injury." *Id.*

Here, Plaintiffs assert more real injuries associated with the Tributary and Bernhart Creek. Pls.' Ex. 1. In the case of Ms. Tobias and Ms. Grillo, their "knowledge" is substantiated by allegations of harm not only against their personal property, but also the Tributary and Bernhart Creek. Now, neither Ms. Tobias nor Ms. Grillo is able to use Bernhart Park. They are both reluctant to use the creek for recreational purposes and Ms. Grillo is constrained in the use of her backyard. These are not the "knowledge of pollution" grievances which were dismissed by the Third Circuit in *Magnesium Electron*, but rather actual, concrete and particularized injuries. *Id.* We therefore hold that Plaintiffs have met the injury-in-fact requirement for standing.

**\*18** The Plaintiffs must next show that their individual injuries are "fairly trace[able] to the challenged action of the defendant ...." *Lujan*, 504 U.S. at 560-61. A plaintiff need only show a "substantial likelihood" that a defendant had caused its injuries. *Powell Duffryn*, 913 F.2d at 72. Specifically, such likelihood may be established by proof that a defendant has: (1) discharged a pollutant in a concentration greater than its permit; (2) into a waterway in which the plaintiff has an interest that is or may be affected; and (3) that this pollutant causes or contributes to the kinds of injuries alleged by the plaintiff. *Id.*

First, Plaintiffs have shown with voluminous tables that Defendants have discharged a number of pollutants above their NPDES permit limits. Defendants acknowledge that within the statute of limitations period and before the filing of this suit, the Defendants' facility discharged antimony, cadmium, lead, and other pollutants, a combined total of 59 times. Defs.' Resp. at 45-46. Defendants also acknowledge that in the three years since the filing of this suit, the Defendants' facility has discharged antimony, iron, TDS and zinc a combined total of 25 times. *Id.* at 47-48.

Second, both Plaintiffs Ms. Grillo and Ms. Tobias assert in their affidavits that Defendants' discharges in violation of their permits have affected the Tributary and Bernhart Creek and their enjoyment of the surrounding environs. Pls.' Ex. 1.

Moreover, Plaintiffs offer reports of two sets of experts who conclude that Defendants' violative discharges have had an appreciable detrimental effect on the Tributary and Bernhart Creek. The report of Plaintiffs' experts opines that Defend-

ants' discharges have affected the Tributary, Bernhart Creek and their environs. Pls.' Ex. 4. The report also recommends the provision of an alternative water supply to ensure that the public water will not be affected by Defendants' onsite spills. *Id.*

The report of Dr. Bruce Bell of Carpenter Environmental Associates, Inc. also concludes that environmental harm has likely been contributed to or caused by Defendants' violative discharges. Pls.' Ex. 7 at 12. Dr. Bell points out a 1995 stream survey by the State of Pennsylvania which found that Bernhart Creek was degraded downstream of the Tributary's confluence, much as Ms. Tobias and Ms. Grillo observed. *Id.*

Finally, Dr. Bell gives a thorough discussion of the toxicological and environmental effects of 10 different pollutants for which Exide has reported violations of effluent limit. Pls.' Ex. 7. These pollutants are all toxic to freshwater organisms and pose risks to human health. Effects, such as the decrease of wildlife in and near the Tributary and visible pollutants in the Tributary, are likely to have been caused by Defendants' violative discharges. These effects are also of the type Ms. Tobias and Ms. Grillo note in their affidavits.

Defendants, however, do not deny that they have discharged pollutants into the Tributary in excess of their NPDES permits. Instead, using the opinion of their expert Richard Sands, they argue that Exide's discharges were unlikely to have had any effect on Bernhart Creek, the Tributary or the lead contamination in Bernhart Park and Ms. Grillo's backyard. Defs.' Resp., Ex. 7. Defendants also offer alternative explanations for the phenomenon which the Plaintiffs have observed and conclude that it is unlikely that any of the environmental effects were caused by the Defendants' discharges in violation of their NPDES permit. *Id.*

\*19 On balance, we believe that Plaintiffs have satisfied the "substantial likelihood" test as elucidated in [Powell Duffryn](#), 913 F.2d at 72. Plaintiffs have certainly shown that Defendants have discharged effluents in a concentration greater than its permit, as well as into the Tributary and Bernhart Creek which is near the Plaintiffs' homes. *Id.* Moreover, Plaintiffs, through their experts, have presented sufficient evidence that the discharged effluents likely caused the kinds of injuries alleged by the Plaintiffs. *Id.* While Defendants' expert may have raised some questions as to whether Defendants' pollution contributes to all the injuries alleged by the Plaintiffs, we believe that a sufficient nexus exists between Plaintiffs' injuries and Defendants' violative discharges.

Finally, to satisfy the constitutional requirement of standing, Plaintiffs must show that their injuries are "likely" to be "redressed by a favorable decision." [Lujan](#), 504 U.S. at 560-561. The Plaintiffs seek the same remedies under the CWA and CSL as they do under the CAA and its state counterpart: (1) a declaratory judgment that Defendants are in violation of the CWA and CSL; (2) an injunction restraining Defendants from "further and future" violations of those statutes; (3) an order directing Defendants to perform analyses and studies to evaluate harm to human health and the environment; (4) civil penalties for the violations alleged in the complaint; <sup>FN16</sup> and (5) attorney's fees and other litigation costs. We must evaluate, under [Steel](#), whether the relief requested by Plaintiffs will redress their alleged injuries caused by Defendants' ongoing violations of the CWA and CSL. [Steel](#), 118 S.Ct. at 1003.

FN16. Defendants are correct in stating that civil penalties are unavailable under the CSL in a citizen suit. See [City of Philadelphia v. Stepan Chem. Co.](#), 544 F.Supp. 1135 (E.D.Pa.1982). Therefore, any civil penalties that may be appropriate must be assessed under the CWA.

First, we find that Plaintiffs lack standing with respect to their claims under the CWA and CSL claims, which are based on Defendants' discharges in violation of the iron limits in their NPDES permit. A revised NPDES permit was issued on

June 25, 1998, which raised the iron limits above the values previously reported as violations. Defs.' Ex. 34. Apparently no excursion of the iron limit has since occurred or is anticipated. Defs.' Ex. 28; Pls.' Br. at 137-38. Since a NPDES permit violation is not likely to reoccur as the revised permit has relaxed the parameter, injunctive relief with respect to that standard is moot.<sup>FN17</sup> See *Natural Resources Defense Council, Inc. v. Texaco Ref. & Mktg., Inc.*, 2 F.3d 493, 502 (3d Cir.1993). Accordingly, we dismiss Plaintiffs' claim under the CWA and CSL based on violative discharges of iron effluent.

**FN17.** Plaintiffs argue that there have been violations of even the new 1998 limits of iron in the past, see Pls.' Resp. at 54, providing no assurances that Defendants won't violate the new permit limits. Presuming, for a moment, that the 1998 permit was always in effect, all violations of the iron limits would be wholly past violations, with the last violation occurring in 1994. *Gwaltney*, 484 U.S. at 64. Since the complaint has been filed, there has been no excursion of iron that has come even close to exceeding the limits in the 1998 permit. Pls.' Resp. at 46-48. We find such evidence to be sufficient assurance that Defendants are unlikely to violate the higher limits in their NPDES permit in the future.

As for all of the remaining CWA and CSL claims, we believe that the claims are ongoing violations redressable by declaratory and injunctive relief. Defendants attempt to skirt the issue by asserting that although there have been 25 separate incidents of discharges in violation of their NPDES permit by their own account, these are infrequent and episodic, rather than continuing and ongoing violations. We hardly see the difference. Even if such violations are episodic, they have continued and there is no guarantee that they will cease. These ongoing violations are redressable by injunctive and declaratory relief under *Steel*.

**\*20** Defendants also argue that pursuant to their 1996 NPDES settlement, they are currently building a diversion of the facility's wastewater directly into the Schuylkill River. This would create a point source directly on the Schuylkill. Defendants claim that it is highly unlikely that they will violate any of the proposed NPDES limits once construction is completed in April of 1999. The present NPDES permit, however, remains in effect up to that point. As there is no assurance that there will be no violations until the diversion project becomes operational, all of the above types of relief are appropriate to redress Plaintiffs' claim.

In sum, Plaintiffs meet each of three minimal Article III requirements for standing recently detailed in *Lujan*. Again, as in the case of Plaintiffs' air pollution claims, we will reserve our discussion of Defendants' culpability and liability under the CWA and the CSL until our discussion of the substantive law.

### 3. Organizational Standing

Defendants also allege that the environmental organizations, L.E.A.D. Group of Berks and Clean Water Action, do not have standing to sue for alleged water and air pollution claims. We find, however, that these two organizations have standing to sue to the same extent as individual Plaintiffs have standing to sue.

In order for an organization to assert standing, it must be shown that: (1) the organization's members would have standing to sue on their own; (2) the interests the organization seeks to protect are germane to its purpose; and (3) neither the claim asserted nor the relief requested requires individual participation by its members. *Powell Duffryn*, 913 F.2d at 70; see also *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977); *Sierra Club*, 405 U.S. at 739 (organization whose members are sufficiently affected may sue on their behalf).

The first question this court must resolve is whether the members of Plaintiffs' organizations have a sufficient connection to this dispute such that they would have standing to sue in their own right. In the present case, members of both environmental organizations include individual Plaintiffs who have standing to sue in their own right. For instance, Ms. Tobias is a member of Clean Water Action who clearly has standing to sue as an individual. Pls.' Ex. 1, Decl. Tobias at ¶ 3. All the individual Plaintiffs, who we found had standing in this case, are members of L.E.A.D. of Berks County. *See, e.g., id., Decls. Tobias, Grillo, R. Shomo, S. Shomo, Blume.* Plaintiffs' organizations do have a sufficient connection to this dispute because their members have standing to sue as individual Plaintiffs.

Moreover the interests that the organizations seek to protect are germane to their purpose. The purpose of Clean Water Action is clearly to protect the public by preventing the pollution of water. *Id., Decl. Wendelgass at ¶ 1.* The L.E.A.D. Group of Berks County was formed in order to specifically address the environmental conditions caused by operations of the Defendants' facilities. *Id., Decl. Tobias at ¶ 2.* The current citizen suit under various air and water pollution laws, therefore, comports with the missions of both of these environmental organizations.

\*21 Finally, we do not find that the asserted claims *require* the participation of individual members. *See also* Pls.' Statement of Facts at ¶ 46. Thus, the organizational Plaintiffs have standing to sue to the same extent as the individual Plaintiffs in this action.

#### B. Abstention

Defendants also argue that this court should abstain from deciding claims under both the CWA (claim IV), *see* Def's. Br. at 55-60, and the CAA (claim III), *see* Def's. Resp. at 51-53, under the doctrines of primary jurisdiction and *Burford* abstention. In particular, Defendants claim that this court lacks jurisdiction because the DEP is the appropriate body to address CWA and CAA issues on the following grounds: (1) DEP has the duty and expertise to address NPDES permit violations; (2) DEP has developed a cooperative and comprehensive strategy for attacking and curing past effluent violations; (3) both NPDES permit and SO<sub>2</sub> emission exceedances are de minimus; <sup>FN18</sup> and (4) DEP is actively exercising its discretionary oversight.

<sup>FN18</sup> This court is unable to make sense out of Defendants' argument that abstention is proper because the alleged violations are de minimus. *See* Defs.' Resp. at 51-55. Such an assertion lacks any basis in law. It also appears that Defendants are arguing that injunctive relief is inappropriate for de minimus violations by citing *Arkansas Wildlife Fed'n v. Bekaert Corp.*, 791 F.Supp. 769, 784-85 (W.D.Ark.1992). Even if injunctive relief were inappropriate in this case, we hardly see what that has to do with common law abstention principles.

With respect to primary jurisdiction, we find that this doctrine is inappropriately applied to both claims brought under the citizen suit provisions of the CAA and CWA. The primary jurisdiction doctrine applies when "enforcement of the claim requires the resolution of issues which, under the regulatory scheme, have been placed within the special competence of an administrative body." *United States v. Western Pacific R.R. Co.*, 352 U.S. 59, 64 (1956). Many courts, however, have found the doctrine of primary jurisdiction inapplicable to cases brought under the citizen suit provisions of the CWA and the CAA. *See, e.g., Wilson v. Amoco Corp.*, 989 F.Supp. 1159, 1169-70 (D.Wyo.1998); *Sierra Club v. Tri-State Generation & Transmission*, 173 F.R.D. 275, 283-84 (D.Colo.1997); *California Sportfishing Protection Alliance v. City of West Sacramento*, 905 F.Supp. 792, 807 n. 21 (E.D.Cal.1995); *Illinois Public Interest Research Group v. PMC*, 835 F.Supp. 1070, 1076 (N.D.Ill.1993); *Merry v. Westinghouse Elec. Corp.*, 697 F.Supp. 180, 182-83 (M.D.Pa.1988); *Natural Resources Defense Council, Inc. v. Outboard Marine Corp.*, 692 F.Supp. 801, 809-10 (N.D.Ill.1988). Indeed, applying the

primary jurisdiction doctrine in citizen suits actions would greatly reduce the instances in which a plaintiff could pursue such an action to facilitate broad enforcement of the environmental-protection laws and regulations. *Illinois Public Interest*, 835 F.Supp. at 1076; *Tri-State Generation*, 173 F.R.D. at 284.

Moreover, Defendants have not sufficiently shown that the factors for primary jurisdiction are present. The factors include:

1. Whether the question at issue is within the conventional experience of judges or whether it involves technical or policy considerations within the agency's particular field of expertise;
2. Whether the question at issue is particularly within the agency's discretion;
- \*22 3. Whether there exists a substantial danger of inconsistent rulings;
4. Whether a prior application to the agency has been made.

*AT & T Corp. v. PAB, Inc.*, 935 F.Supp. 584, 589-90 (E.D.Pa.1996). While federal and state agencies, as the DEP, conventionally have the responsibility and discretion for enforcing the environmental laws, Congress intended that federal courts have jurisdiction over such matters by enacting citizen suit provisions. *See* 33 U.S.C. § 1365(b); 42 U.S.C. § 7604(b). In determining liability under the CWA or CAA, there are no determinations which require technical or policy considerations because we need only decide whether Defendants have violated the limitations required by their NPDES or air quality permits. Finally, there is no substantial danger of inconsistent rulings or a risk of interfering with federal and state administrative oversight because Congress has expressly set forth situations in which a citizen suit is precluded for those reasons under the CWA, *see* 33 U.S.C. § 1365(b)(1), and the CAA, *see* 42 U.S.C. § 7604(b)(1). In particular, these provisions require that Plaintiffs give notice to federal and state agencies 60 days before filing suit and precludes the filing of suit if an agency is already involved in diligently requiring compliance. *Id.* Defendants, however, do not argue that this suit is precluded under these provisions of the CAA or CWA. We find, therefore, that while DEP is actively exercising discretionary oversight, there is no evidence that abstention is required under the doctrine of primary jurisdiction.

The *Burford* doctrine states that where timely and adequate state court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar; or (2) where the exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern. *New Orleans Public Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 361 (1989) (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976)). The *Burford* doctrine is concerned with preventing federal court interference with complex state administrative processes. *Id.* at 362. Defendants contend that this court's exercise of jurisdiction would disrupt the DEP's oversight of air and water pollution.

We hold that the *Burford* abstention doctrine does not apply to citizen suits brought under the CAA and CWA because Congress has not designated the state as the exclusive repository of authority or expertise. *Outboard Maine Corp.*, 692 F.Supp. at 810. In fact, both the CWA and CAA are pervasive systems of federal regulation where the parameters of state regulation are explicitly carved out by the federal system. *See Brewer v. City of Bristol*, 577 F.Supp. 519, 524 (E.D.Tenn.1983). The considerations underlying *Burford* abstention simply do not apply to a scheme that contemplates

citizen suits as a supplement to state government action. *Culbertson v. Coats American, Inc.*, 913 F.Supp. 1572, 1578 (N.D.Ga.1995). Moreover, Defendants have failed to present any cases where *Burford* abstention was held to be appropriate for a case brought under the citizen suit provisions of the CWA or CAA.<sup>FN19</sup> Instead, courts have uniformly refused to apply abstention in cases involving the CWA. See, e.g., *id.* at 1577-78; *Outboard Maine Corp.*, 692 F.Supp. at 810; *Student Public Interest Research Group v. P.D. Oil & Chem. Storage, Inc.*, 627 F.Supp. 1074, 1085 (D.N.J.1986); *Brewer*, 577 F.Supp. at 524; *United States v. Cargill, Inc.*, 508 F.Supp. 734, 746-47 (D.Del.1981). We find, therefore, that *Burford* abstention is inapplicable to this case.

FN19. Defendants have presented this court with cases where abstention was held appropriate for a claim brought under RCRA. See *Friends of Santa Fe County v. Lac Minerals, Inc.*, 892 F.Supp. 1333, 1348-49 (D.N.M.1995); *Palumbo v. Waste Techs. Indus.*, 989 F.2d 156, 159 (4th Cir.1993). In both cases, however, the proceedings brought by the plaintiff were nothing more than an action requesting the federal court to review a permit decision already made by the state administrative agency. *Friends of Santa Fe County*, 892 F.Supp. at 1348; *Palumbo*, 989 F.2d at 160. In other words, Plaintiffs' argument does not resemble the above cases which involve a collateral attack on the issuance of a permit by a state administrative agency.

### C. Claims under Federal CAA and Pennsylvania APCA

\*23 Defendants and Plaintiffs each move independently for summary judgment relating to claim III. Defendants request summary judgment only for those portions of claim III which allege violations of air permit conditions requiring minimum afterburner temperatures and malodor emission regulations. On the other hand, Plaintiffs have requested summary judgment on claim III in its entirety because they assert that there are no outstanding issues of material fact as to Defendants' liability under the federal CAA and the Pennsylvania APCA. We will address each of these arguments in turn.

#### 1. Citizen Suit Provisions under the CAA and APCA

The CAA gives any person the authority to bring a civil action on his or her own behalf "against any person ... who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of ... an emission standard or limitation under [the CAA]." 42 U.S.C. § 7604(a)(1). An emission standard or limitation is "any other standard, limitation, or schedule established under any permit issued pursuant to subchapter V or under any applicable State implementation plan approved by the Administrator, any permit term or condition, and any requirement to obtain a permit as a condition to operations." 42 U.S.C. § 7604(f)(4). Therefore, a State Implementation Plan ("SIP"), for example, may be enforced through the citizen suit provision of the CAA. 42 U.S.C. § 7604(a)(1) and (f)(4).

Under 42 U.S.C. § 7410(a), each state may adopt and submit to the Administrator of the EPA a SIP, which provides for air quality maintenance, modeling and monitoring requirements. Pursuant to the requirements of the CAA, Pennsylvania submitted and received approval for its SIP. See 40 C.F.R. § 52.2020, part 52, Subpart NN.<sup>FN20</sup> Plaintiffs here allege that violations of the provisions of Pennsylvania's SIP, see Pls.' Compl. at ¶ 65, constitute violations of the CAA that can be redressed under 42 U.S.C. § 7604(a).

FN20. Pennsylvania's SIP includes air regulations, see, e.g., 25 Pa.Code Chapters 121, 123, 127, 129, 131, 135, 137, 139 and 141.

The 1990 Amendments of the CAA broadened the scope of the citizen enforcement provision. In particular, Congress partly overruled the Supreme Court's *Gwaltney* decision with respect to wholly past violations. 484 U.S. at 57. Thus, citizen suits can be brought against a defendant "who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation" to enforce relevant emission limitations and standards or permit conditions. 42 U.S.C. § 7604(a)(1). As a result, a citizen suit may be maintained if the plaintiff alleges that the defendant: (1) is "in violation" of the CAA by means of continuous or intermittent violations; or (2) has committed a past violation which has been repeated.

It is not entirely clear what kind or quantity of evidence citizens need to prove repeated violations. However, one court has stated that a repeated violation can be a past violation that has "occurred more than once." *Fried v. Sungard Recovery Servs., Inc.*, 916 F.Supp. 465, 467 (E.D.Pa.1996). Moreover, the court in *Satterfield* held that a past violation may only be considered repeated if it is in fact the same violation. 888 F.Supp. at 1565. Other courts have agreed that liability may be triggered by repeated violations that are wholly past, but have not defined the meaning of a repeated violation. *Glazer*, 894 F.Supp. at 1037-38; *Atlantic States v. Whiting Roll-Up Door*, 772 F.Supp. 745, 753 (W.D.N.Y.1991).

\*24 Moreover, the Pennsylvania APCA has a citizen suit provision similar to the CAA, which provides that:

any person may commence a civil action to compel compliance with this act or any rule, regulation, order or plan approval or permit or order issued by the department. In addition to seeking to compel compliance, any person may request the court to award civil penalties.

35 P.S. § 4013.6(c). A broader and more generalized provision under the APCA, 35 P.S. § 4008, prohibits unlawful conduct which includes "to cause air pollution." This provision is somewhat akin to common law nuisance where a defendant is liable for causing air pollution from the discharge of:

noxious or obnoxious acids, fumes, oxides, gases, vapors, odors, toxic, hazardous or radioactive substances ... in such place, manner or concentration inimical or which may be inimical to the public health, safety or welfare ... or which unreasonably interferes with the comfortable enjoyment of life or property.

35 P.S. § 4003. This court has supplemental jurisdiction over claims arising under the Pennsylvania APCA pursuant to 28 U.S.C. § 1367.

## 2. Defendants' and Plaintiffs' Claims for Summary Judgment

Defendants argue that they are entitled to summary judgment on the following air pollution claims: (1) claims of malodor violations under the CAA; (2) claims of malodor violations under the Pennsylvania APCA; (3) claims of minimum afterburner temperature violations of DEP state air operating permit, No. 06-319-020.<sup>FN21</sup> Defs.' Br. at 29-34. Plaintiffs also request summary judgment on the very same claims, *see* Pls.' Br. at 91-100, and counter Defendants' arguments for summary judgment, *see* Pls.' Resp. at 25-43. We will grant partial summary judgment for the Plaintiffs on the single malodor violation. With respect to malodor violations under the APCA and afterburner temperature requirements, we deny summary judgment for both the Defendants and Plaintiffs on the grounds that outstanding issues of material fact warrant further examination of these claims.

<sup>FN21</sup>. We note here that this court lacks jurisdiction over the violations of minimum afterburner temperature of the federal PSD permit, No. 78 PA 22, on the basis that Plaintiffs lack standing to assert this claim. *See* discus-

sion above, VI.A.1.

*a. Malodor Violations*

Defendants essentially argue that the malodor claims alleged by the Plaintiffs have not been documented by the DEP, EPA or by Exide in self-monitoring reports. Instead, the majority of the Plaintiffs' claims of such malodor violation, are based on the subjective observations of individuals that cannot support a claim under the CAA.

We agree with Defendants in so far as the informal observations by the Plaintiffs, *see* Pls.' Compl., Ex. B; Pls.' Statement of Facts at ¶¶ 37-42, are insufficient to support liability under the CAA. Although the provisions of the Pennsylvania APCA may recognize subjective observations of individuals, the CAA only allows for redress based only on alleged violations of objective regulations, e.g., 25 Pa.Code § 123.31(b). *See Satterfield*, 888 F.Supp. at 1567. Moreover, only NOV's of malodor violations that have been issued within the five-year statute of limitations, under 28 U.S.C. § 2462, are admissible.

\*25 Plaintiffs have presented evidence of a recent malodor violation of 25 Pa.Code § 123.31 that took place after the Complaint in this action was filed. All that is required to find a violation under the CAA is either a repeated past violation or an ongoing violation. 42 U.S.C. § 7604(a); *Fried*, 916 F.Supp. at 467. The crucial date for determining an ongoing violation is if Defendants' violations occurred subsequent to the date the Complaint was filed. *Connecticut Coastal*, 989 F.2d at 1311. Clearly the notice of violation dated April 9, 1998, *see* Pls.' Ex. 12, is sufficient to show that Defendants are in violation under the CAA. The notice of violation states: "On March 27, 1998 at about 4:30 p.m., General Battery Corporation (GBC) caused, suffered, or permitted a violation of Section 123.31(b) of Chapter 123 and Section 121.7 of Chapter 121 of the Rules, Regulations of the Department of Environmental Protection." *Id.* As this notice of violation is clear evidence that Defendants violated the regulations that are part of Pennsylvania's SIP, we must hold that this violation may be redressed under 42 U.S.C. § 7604(a). We grant summary judgment for the Plaintiffs with respect to this violation and the appropriate remedy can be determined in further proceedings.

Plaintiffs separately argue that they have documented malodor violations and that Defendants' liability may also be established under the Pennsylvania APCA. We find that Plaintiffs are correct in stating that they possess a basis for claiming that Defendants are potentially in violation of Section 8 of the APCA, codified at 35 P.S. § 4008, for emission of malodors.<sup>FN22</sup> This provision contains a kind of common law nuisance standard where Defendants' conduct can constitute a violation of the APCA if it is shown that the Defendants caused the discharge of noxious or obnoxious acids, fumes, oxides, gases, vapors, odors which may not only be inimical to the public health, safety or welfare, but also unreasonably interfere with the comfortable enjoyment of life or property for neighboring residents. 35 P.S. § 4003. To lend support to their argument, Plaintiffs have amassed documentary support of personal subjective observations, *see* Pls.' Compl., Ex. B; Pls.' Statement of Facts at ¶¶ 37-42; Pls.' Ex. 1, that detail malodors emanating from the Defendants' facility.

<sup>FN22</sup> Here, when claims fall under the Pennsylvania APCA, the relevant seven-year statute of limitations applies. *See* 35 P.S. § 4010.3. A 1990 NOV for a malodor incident, *see* Pls.' Compl. Ex. B, that is time-barred under the CAA, may be considered by the APCA. We decline, however, to grant Plaintiffs summary judgment on this violation under the APCA as Plaintiffs have not submitted the actual NOV, but only tabulated its existence on its voluminous lists submitted to this court.

At this point, however, we find that sufficient evidence does not exist for this court to find the Defendants liable under 35 P.S. § 4008. While we find that Plaintiffs have documented quite extensive effects, there is little explanation accompanying such findings precisely linking such observations to the Defendants' facility.<sup>FN23</sup> Moreover, contrary to the assertions of the Defendants, while subjective observations rather than scientific evidence may be used to prove a violation of the APCA, *see Commonwealth v. Locust Point Quarries, Inc.*, 396 A.2d 1205, 1210 (Pa.1979); *Midway Coal Co. v. Commonwealth*, 413 A.2d 1139, 1140-41 (Pa.Comm. Ct.1980), we were unable to find any state court cases where an action brought under 35 P.S. § 4008 had established liability solely by subjective observations without a finding by the state environmental agency that there had been a malodor violation. *See, e.g., Scurfield Coal, Inc. v. Commonwealth*, 582 A.2d 694, 697 (Pa.Comm. Ct.1990); *Eureka State Quarry, Inc. v. Commonwealth*, 544 A.2d 1129, 1130 (Pa.Comm. Ct.1988). We presume that the finding of a violation by a state environmental agency is significant because it lends an impartial legitimacy that the odor is objectionable to the public according to the meaning of 35 P.S. § 4003. *Cf. Chester Residents Concerned for Quality Living v. Delcora Sewage Treatment Plant*, No. Civ. A. 94-5639, 1994 WL 618476 (E.D.Pa. Nov. 8, 1994). It would be patently unfair to not allow the Defendants to cross-examine the witnesses who have allegedly experienced such malodors. Finally, we also question the sufficiency of Plaintiffs' evidence on the basis that, after repeated notifications of the DEP regarding complaints of malodors, the DEP has only issued a notice of violation twice in 1990 and 1998. *See Lebo Dep. 7/9/97 at 243-45*. Thus, until further clarification on this issue, we deny Plaintiffs' and Defendants' motions for summary judgment on this claim.

<sup>FN23</sup>. Furthermore, we do not find that causation is explained by the conclusive statement of Plaintiffs' experts. *See Pls.' Br. at 94-95; Pls.' Ex. 4*.

#### *b. Afterburner Temperature Violations*

\*26 Both parties have moved for summary judgment on Plaintiffs' claim that Defendants violated the minimum afterburner temperature required by the Pennsylvania DEP Air Quality Operating Permit Nos. 06-319-020, 06-319-020A, 06-319-020B. *See Pls.' Br. at 98-100; Defs.' Br. at 29-30; Pls.' Exs. 119, 120, 122; Defs.' Ex. 25*. We find that neither party has shown that their position is undisputed as both parties have successfully identified portions of the record that demonstrate disputes of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Defendants, for example, argue that their alleged violations of minimum afterburner temperatures are misplaced because the recent DEP Permits from 1997 and 1998 include an exception in condition number seven. *See Defs.' Ex. 25; Pls.' Ex. 122*. This exception essentially states that the minimum afterburner temperature is not required when "the reverberatory furnace is not operating and the blast furnace is being charged with reverberatory furnace slag only." *Id.* Plaintiffs, however, are correct in noting that this exception did not exist in previous state permits. *See, e.g., Pls.' Exs. 119, 120*. Even more significantly, we are perplexed as to how this exception exculpates Defendants from all alleged violations of the minimum afterburner temperature requirements. Indeed, Defendants have failed to present any evidence as to why this court should presume that, at every instance of a presumed afterburner temperature violation, the Defendants were operating the blast furnace with reverberatory furnace slag within the exception.<sup>FN24</sup> Thus, we find that there are unresolved material issues of fact as to the correlation between the Defendants' afterburner temperature violations and the exception.

<sup>FN24</sup>. Defendants did submit evidence as to their near compliance during three months of 1998. *Defs.' Ex. 27*. Such evidence is hardly sufficient to show that Defendants have always been in compliance. *See Pls.' Resp. at 28-29*.

At the same time, Plaintiffs have also failed to show that there is no genuine issue of material fact as to whether the Defendants have violated minimum afterburner temperatures required by the DEP permit. Plaintiffs offer a conclusory statement that “[d]uring the past five years, the facilities have violated these minimum afterburner temperature requirements numerous times.” *See* Pls.’ Compl. at ¶ 71. With the exception of the laundry list of violations of the federal permit that was rescinded in 1995 and never included the reverberatory furnace slag exception, they fail to present specific evidence showing NOV’s of the DEP permit. *See generally* Pls.’ Compl., Ex. B. At this time, we find that there still exist questions of material fact as to whether Defendants violated the afterburner temperatures required by the DEP permit.

### 3. Other Air Pollution Violations

Plaintiffs request summary judgment on their claims that Defendants have violated: (1) sulfur dioxide limitations required by their state operating permits, Pls.’ Br. at 68-69; (2) the data reporting requirement for their continuous emissions monitoring system (“CEMS”), *id.* at 85-86; and (3) other air quality requirements arising under the Pennsylvania SIP, *id.* at 100-101. We grant summary judgment for the Plaintiffs with respect to violations of state permit sulfur dioxide emission requirements,<sup>FN25</sup> as well as for violations of the data reporting requirements. However, we deny summary judgment for the Plaintiffs on their remaining claims of air quality violations under the Pennsylvania SIP. As the Plaintiffs have moved for summary judgment on these claims, we must resolve all doubts against them. *Gans*, 762 F.2d at 341.

<sup>FN25</sup>. This court lacks jurisdiction over the violations of sulfur dioxide emission limitations of the federal PSD permit, No. 78 PA 22, on the basis that Plaintiffs lack standing to assert this claim. *See* discussion above, VI.A.1.

#### a. Sulfur Dioxide Emissions

\*27 Defendants were issued a series of state air quality operating permits by the Pennsylvania DER, Operating Permit Nos. 06-319-020, 06-319-020A, 06-319-020B. *See* Pls.’ Exs. 58, 119, 120, 122; Defs.’ Ex. 25. Such permits regulated Defendants’ secondary lead smelting operations and required that emissions of sulfur dioxide should not exceed 110 ppm.<sup>FN26</sup> Such a permit is issued by the DER pursuant to 25 Pa.Code Chapter 127 and must be monitored in accordance with 25 Pa.Code Chapter 139. Plaintiffs allege that Defendants have violated the CAA by exceeding their allowances for sulfur dioxide emissions in violation of their state permit issued pursuant to the Pennsylvania State Implementation Plan. Plaintiffs’ also allege state pendent claims under the Pennsylvania APCA which arise from the same factual situation alleged to exist in the federal claims.

<sup>FN26</sup>. We note that we are unable to find within the documents submitted to this court, any air quality operating permits by the Pennsylvania DER that were in effect from September 1991 to August 1993.

Under the CAA, Plaintiffs may sue to remedy the alleged violations of “an emission standard or limitation,” which includes any emission limitations or standards established pursuant to the State Implementation Plan. *See* 42 U.S.C. § 7604. It is noteworthy, however, that civil penalties have already been assessed by the DER and DEP for the majority of sulfur dioxide emission violations alleged by the Plaintiffs. Under the citizen suit provision, 42 U.S.C. § 7604(b)(1)(B), we are mindful that the litigation of claims is precluded “if the Administrator or State has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the standard.” *Id.* However, the

Third Circuit has held that the Pennsylvania Environmental Hearing Board is not a “court of a State” because it lacks the same enforcement powers equivalent to that of a state court. See *Baughman v. Bradford Coal Co., Inc.*, 592 F.2d 215, 218 (3d Cir.1979); *Proffitt v. Commissioners, Township of Bristol*, 754 F.2d 504, 506-7 (3d Cir.1985). Thus, the fact that Defendants have already paid civil penalties for sulfur dioxide emissions violations does not preclude this action.

Moreover, evidence of alleged violations must be based on “credible evidence” pursuant to 42 U.S.C. § 7413. The Senate Report explained the meaning of “credible evidence” as follows:

[t]he amendment clarifies that courts may consider any evidence of violation or compliance admissible under the Federal Rules of Evidence, and that they are not limited solely to consideration of evidence that is based solely on the applicable test method in the State implementation plan or regulation. For example, courts may consider evidence from continuous monitoring systems, expert testimony, and bypassing and control equipment malfunctions, even if these are not the applicable test methods. Thus, the amendment overrules the ruling in *United States v. Kaiser Steel Corp., No. 82-2623-IH* [1984 WL 186690] (C.D.Cal. January 17, 1984) to the extent that the court in that case excluded the consideration of such evidence.

\*28 *Sierra Club v. Public Serv. of Colorado, Inc.*, 894 F.Supp. 1455, 1461 (D.Colo.1995) (quoting S.Rep. No. 101-288, at 366 (1989), reprinted in 1989 U.S.C.C.A.N. 3749). It is clear, therefore, that CEMS data are probative under the strict liability regime of the CAA. *Sierra Club*, 894 F.Supp. at 1459; *Unitek Envtl. Servs., Inc. v. Hawaiian Cement*, No. 95-00723, 1996 WL 808154, 27 Env'tl. L. Rep. 20483, 20485 (D.Haw. Aug. 17, 1996). Plaintiffs proffer of CEMS data, therefore, is entirely appropriate evidence of Defendants multiple violations of the sulfur dioxide emission limitations in their state permits. FN27

FN27. Plaintiffs claims are subject to the federal five year statute of limitations under the CAA. 28 U.S.C. § 2462. See discussion above, IV. As CEMS data is a matter of public record, 42 U.S.C. § 7414(c), the date of accrual for purposes of the statute of limitations is when the CEMS data is reported by the Defendants. Any claims based on CEMS data reported before February 15, 1991, therefore, are barred by the statute of limitations.

From the first quarter of 1991 through the first quarter of 1997, Defendants violated the 110 ppm requirement over 500 times. See, e.g., Pls.' Exs. 19, 27-28, 33-34, 85-88, 92, 94, 96, 98-100, 103-104, 111, 135. Both the DEP and DER have negotiated consent decrees with the Defendants for payment of civil penalties with respect to a majority of these violations. See, e.g., Pls.' Exs. 42, 49, 65, 56, 84, 93, 95, 97, 101, 105, 106, 110. Moreover, Defendants have also violated data availability requirements for CEMS during the fourth quarter of 1996 and the second quarter of 1997. See Pls.' Exs. 111, 113.

Defendants do not refute that such violations exist. They do, however, argue that three recent quarters in 1997 and 1998 experienced a minimal amount of exceedances where compliance was in the 99% range. Defs.' Resp. at 34-35. They also present graphic data highlighting this point. *Id.*, Ex. 3. Moreover, Defendants assert that the costly installation of the secondary scrubber in 1994-95 has resulted in the dramatic decrease of their sulfur dioxide emission exceedances. *Id.*

Such arguments, while compelling, do not dispute the basic evidence that Defendants continue to violate the sulfur dioxide emission limitation required by their state permit. Indeed, such drastic improvements evidenced after 1996, may mean that the solution, in order to be in *complete* compliance, will not require drastic and costly measures. Although such exceedances since the installation of the secondary scrubber have been de minimus, this detail does not absolve Defendants from liability. The fact still remains that they have violated the requirements 57 times from the beginning of

1995 through the first quarter of 1998. *See* Pls. Statement of Facts at ¶¶ 103-110, 112, 113; Defs.' Resp. at 35. Thus, we grant summary judgment in favor of the Plaintiffs on their CAA claim that Defendants: (1) violated the sulfur dioxide limitations in their state permit pursuant to [25 Pa.Code § 127.25](#); and (2) violated the data availability requirements for their CEMS in accordance with [25 Pa.Code § 139](#). An appropriate remedy will be determined in further proceedings.

Plaintiffs assert that liability may alternatively be established under [35 P.S. § 4008](#) for unlawful conduct due to failure to comply with “the rules and regulations adopted under this act.” Sulfur dioxide emissions in exceedance of state permit limitations constitute violations of [25 Pa.Code §§ 121.7, 127.25](#), while failure to maintain data availability under CEMS violates [25 Pa.Code § 139](#). A citizen suit is barred, however, when “the department has commenced and is diligently prosecuting a civil action in a Federal or State court or is in litigation before the hearing board to require the alleged violator to comply with this act.” [35 P.S. § 4013.6\(c\)](#).

\*29 The Pennsylvania DER and DEP have entered into a series of consent decrees with Defendants for civil penalties pursuant to [35 P.S. § 4009.1](#). *See* Pls.' Statement of Facts at ¶¶ 77-110. These consent decrees are the product of diligent prosecution by the DER and DEP, and they constitute voluntary settlement agreements between the parties in order to avoid full litigation before the Pennsylvania Environmental Hearing Board. *See* [35 P.S. § 4009.1\(b\)](#). Plaintiffs' claims under the APCA are therefore barred because the civil penalties paid by the Defendants are to redress the violations of [25 Pa.Code § 127.25](#), beginning from the first quarter of 1991 through the fourth quarter of 1996.

Moreover, we hold that a material issue of fact exists as to whether Plaintiffs may hold Defendants liable under the Pennsylvania APCA for sulfur dioxide emission exceedances in the first and second quarters of 1997, and also for the failure to meet the data availability requirement of CEMS for the fourth quarter of 1996 and the second quarter of 1997. *See* Pls.' Statement of Facts at ¶¶ 111-114. While it is clear that such violations exist, *see* Pls.' Exs. 111, 112, 113, the DEP has also stated that “[u]nless the Department is contacted within 30 days of this letter, the standard ‘Consent Assessment of Civil Penalty’ will be drafted and sent to the company.” *Id.* Until there is further clarification on this issue of whether Plaintiffs' action is barred because the DEP has commenced or is actively litigating such a claim, we cannot grant summary judgment for the Plaintiffs on these violations under the Pennsylvania APCA.

#### *b. Other Air Quality Requirements*

Plaintiffs additionally allege violations of other air quality requirements established under the Pennsylvania SIP, including: [25 Pa.Code § 123.41](#) (opacity limitations); [25 Pa.Code § 123.1](#) (fugitive emission limitations); and [25 Pa.Code § 127.25](#) (only with respect to maintenance regulations for operation of air cleaning devices). *See* Pls.' Br. at 100-101; Pls.' Compl. at ¶ 75. Most of the allegations made by Plaintiffs that various provisions of the Pennsylvania SIP have been violated are little more than vague and conclusory assertions.

We have scrutinized Plaintiffs' rather abstruse discussion of these regulations and have generally been unable to find any elucidation as to the precise manner in which they have been violated. Such a laundry list of violations, without further explanation, is insufficient to support a motion for summary judgment on these claims. For instance, while Plaintiffs claim that they have adduced evidence of these violations, *see* Pls.' Compl., Ex. B; Pls.' Statement of Facts at ¶ 142, the evidence shows only that Defendants' sulfur dioxide emissions exceeded permitted allowances. Instead, Plaintiffs must describe, with some particularity, the link between sulfur dioxide exceedances and these other violations (e.g., opacity violations required by [25 Pa.Code § 123.41](#)). We find, therefore, that Plaintiffs are not entitled to summary judgment on these other air quality requirements.

#### D. Claims under the Federal CWA and Pennsylvania CSL

**\*30** Plaintiffs and Defendants have each filed motions for summary judgment on Plaintiffs' water pollution claims under the CWA and CSL. Plaintiffs argue that they are entitled to summary judgment with respect to Defendants' discharges in violation of their NPDES permit. Pls.' Br. at 111-169; Pls.' Resp. at 43-64. Defendants refute such liability by requesting summary judgment on the basis that this court lacks jurisdiction under the CWA, *see* 33 U.S.C. 1319(g), because Plaintiffs' claims have already been diligently prosecuted by a state environmental agency. Defs.' Br. at 43-54. In the alternative, Defendants argue that: (1) the majority of the violations alleged by the Plaintiffs are wholly past and thus cannot be addressed by the CWA; and (2) the remaining post-complaint violations alleged by the Plaintiffs are de minimus and likely to disappear with the diversion of the wastewater discharge in 1999. *Id.* at 34-43; Defs.' Resp. at 43-48, 52-55.

First, we find that there is no jurisdictional bar to Plaintiffs' CWA claims because the Pennsylvania DEP has not diligently enforced such claims within the meaning of 33 U.S.C. § 1319(g). Next, we find that a material issue of fact remains as to whether Defendants' wholly past violations of certain parameters are ongoing and deny summary judgment for both Plaintiffs and Defendants with respect to those parameters. Finally, we grant Plaintiffs' partial summary judgment regarding Defendants' ongoing violations of their NPDES permit for the following parameters: TDS, zinc and anti-mony.

##### 1. Diligent Prosecution

The CWA was amended in 1987 to include a diligent prosecution defense for administrative actions, where citizen suits cannot be commenced if the subject matter of the suit has already been addressed by a state agency. The CWA specifically provides a jurisdictional limitation for civil penalty actions pursuant to 33 U.S.C. § 1365, if the violation is one “with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection.” 33 U.S.C. § 1319(g)(6)(A)(ii). The legislative history concerning this amendment clearly demonstrates that Congress wanted to avoid subjecting violators to dual enforcement actions or penalties for the same violation. S.Rep. No. 99-50, at 28 (1985).

While courts have wrestled with the interpretation of this amendment, many have pointed to its function in preventing suits from significantly curtailing the governing agency's discretion to act in the public interest. *See, e.g., Arkansas Wildlife Fed'n v. ICI Americas, Inc.*, 29 F.3d 376, 380 (8th Cir.1994); *North & South Rivers Watershed Ass'n, Inc. v. Scituate*, 949 F.2d 552, 557 (1st Cir.1991); *Washington Public Interest Research Group v. Pendleton Woolen Mills*, 11 F.3d 883, 885 (9th Cir.1993). The Supreme Court in *Gwaltney* elucidated that the purpose of citizen suits is not to supplant governmental enforcement by subjecting a defendant to duplicative enforcement, but to step in when local agencies fail to exercise their enforcement responsibility. 484 U.S. at 60.

**\*31** The bar against citizen suits operates only when the state has brought an action comparable to the CWA under 33 U.S.C. § 1319(g). Thus, we must determine whether the state law, the Pennsylvania CSL, is “comparable” to the CWA. A comparable state law does not mean that its provisions are identical to the CWA. *North & South Rivers Watershed Ass'n*, 949 F.2d at 556. Rather, the comparability requirement may be satisfied if:

the state law contains comparable penalty provisions which the state is authorized to enforce, has the same overall enforcement goals as the federal CWA, provides interested citizens a meaningful opportunity to participate at significant stages of the decision-making process, and adequately safeguards their legitimate substantive interests.

*ICI Americas*, 29 F.3d at 381. Some courts have taken a more restrictive view by comparing the precise statutory provision pursuant to which the state was acting, rather than the state statutory scheme as a whole. *Citizens for a Better Env't-California v. Union Oil Co. of California*, 83 F.3d 1111, 1118 (9th Cir.1996). In order to mirror the procedure of 33 U.S.C. § 1319(g), the large majority of courts agree that a state law must include public participation or public notice relating to the administrative enforcement procedure. *See, e.g., id.*; *North & South Rivers Watershed Ass'n*, 949 F.2d at 556 n.7; *ICI Americas*, 29 F.3d at 381; *Public Interest Research Group of New Jersey, Inc. v. GAF Corp.*, 770 F.Supp. 943, 951 (D.N.J.1991); *Natural Resources Defense Council, Inc. v. Vygen Corp.*, 803 F.Supp. 97, 101 (N.D. Ohio 1992); *Atlantic States Legal Found., Inc. v. Universal Tool & Stamping Co.*, 735 F.Supp. 1404, 1415 (N.D. Ind.1990); *but see Saboe v. Oregon*, 819 F.Supp. 914, 918 (D.Or.1993); *Sierra Club v. Port Townsend Paper Corp.*, No. C87-316C, 1988 WL 160580 (W.D. Wash. May 2, 1988).

Here, Defendants argue that the CSL has comparable provisions for public participation to the CWA. Defs.' Br. at 49-54. While the administrative penalty provisions of the CSL need not be identical to the CWA, *see North & South Rivers Watershed Ass'n*, 949 F.2d at 556, we note that the CWA allows the public to participate in the process by: (1) requiring public notice; (2) allowing any person to comment or present evidence before the issuance of a civil penalty; and (3) allowing any person to petition for a hearing within 30 days of the issuance of a civil penalty. *See* 33 U.S.C. § 1319(g)(4). The existence of such provisions alone does not satisfy the comparability requirement if the specific facts of the case "demonstrate that the state denied an interested party a meaningful opportunity to participate in the administrative enforcement process." *ICI Americas*, 29 F.3d at 382.

With respect to public participation, Defendants argue that the opportunities for public comment prior to the issuance of their NPDES permit and subsequent revisions, *see, e.g.,* 25 Pa.Code §§ 92.61, 92.63, 92.67, are sufficiently comparable to the public participation provisions in 33 U.S.C. § 1319(g)(4). Such provisions in the CSL, however, allow for public comment only on parameter limits contained within a NPDES permit. We fail to see how public participation in the NPDES permitting scheme can replace opportunities for public comment, notice or participation when the DEP issues civil penalties against the Defendants for actual violations of their NPDES permit. *See* Defs.' Ex. 45; Pls.' Resp. at 74-75. Nowhere in the civil penalty scheme of the CSL, *see* 35 P.S. § 691.605, does the public have a meaningful opportunity to participate in the civil penalty phase of the administrative enforcement process. We find, therefore, that since Plaintiffs lacked any meaningful opportunity to participate in the assessment of civil penalties against the Defendants, the CSL is not "a State law comparable" to the CWA.

\*32 We decline to address the issue of whether there has been diligent prosecution by the DEP, since the CSL is not a comparable state law under 33 U.S.C. § 1319(g).<sup>FN28</sup> We find, therefore, that Plaintiffs' claims are not subject to the jurisdictional bar of 33 U.S.C. § 1319(g)(6)(A)(ii).

FN28. We do, however, reject Plaintiffs' analysis of the Third Circuit's standard for diligent prosecution. Plaintiffs' citation of cases such as *Proffitt* and *Baughman* are inapposite to the diligent prosecution bar of 33 U.S.C. § 1319(g). Pls.' Br. at 66-70. These cases were decided before the 1987 amendment to the CWA. Most notably, the analysis of such cases turns on the language of the phrase a "court of a State" which still exists in the CAA, but has since been amended in the CWA. *Proffitt*, 754 F.2d at 506-7; *Baughman*, 592 F.2d at 218.

## 2. Establishing Violations under the CWA and CSL

Plaintiffs have moved for summary judgment regarding whether Defendants' are liable for past and present violations of

their NPDES permit. Section 505 of the CWA provides that any citizen may commence a civil action against any person “who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation.”<sup>FN29</sup> 33 U.S.C. § 1365(a)(1). The CWA established the NPDES where permits are issued either by the Administrator of the EPA or by an approved state permit program. 33 U.S.C. § 1342. The citizen suit provision of the CWA permits this court to enforce the terms of the Defendants’ NPDES permit and order civil penalties under 33 U.S.C. § 1319(d). See 33 U.S.C. § 1365(a).

FN29. Similar to the CWA, the citizen suit provision of the CSL provides that:

[n]o person ... shall place or permit to be placed, or discharged or permit to flow, or continue to discharge or permit to flow, into any of the waters of the Commonwealth any industrial wastes, except as hereinafter provided in this act.

35 P.S. § 691.301. Section 601 also provides that any person having an interest which “may be adversely affected” can commence a civil action “on his own behalf to compel compliance” with the CSL. 35 P.S. § 691.601(c). This court has supplemental jurisdiction over claims arising under the Pennsylvania CWA pursuant to 28 U.S.C. § 1367.

The parties agree that Defendants were issued a NPDES permit under the aegis of 33 U.S.C. § 1342(b). Pursuant to the NPDES permit, Defendants are required to establish and maintain records, to install and use monitoring equipment, to sample effluents and to report on a regular basis regarding the discharge of pollutants through their DMRs. 33 U.S.C. § 1318. These records are also to be made generally available, with some exceptions, to the Administrator, the public and to Congressional committees. *Id.*

To violate a NPDES permit is to violate the CWA. *Envtl. Protection Agency v. State Water Resources Control Bd.*, 426 U.S. 200, 205 (1976); *Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369, 1374-77 (D.C.Cir.1977). Required reports such as DMRs may be used as admissions in court to establish a defendant’s liability. See, e.g., *Atlantic States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1135 (11th Cir.1990); *Sierra Club v. Union Oil Co. of California*, 813 F.2d 1480, 1491-92 (9th Cir.1987) [“*Union Oil I* ”], *rev’d on other grounds*, 485 U.S. 931, *amended by* 853 F.2d 667 (9th Cir.), *remanded to*, 716 F.Supp. 429 (N.D.Cal.1988) [“*Union Oil II* ”]; *Sierra Club v. Simkins Indus., Inc.*, 847 F.2d 1109, 1115 n.8 (4th Cir.1988); *Student Public Interest Research Group of New Jersey, Inc. v. Fritzsche, Dodge & Olcott, Inc.*, 579 F.Supp. 1528, 1538 (D.N.J.1984), *aff’d on other grounds*, 759 F.2d 1131 (3d Cir.1985); *Public Interest Research Group of New Jersey v. Monsanto Co.*, 600 F.Supp. 1479, 1485 (D.N.J.1985); *Chesapeake Bay Found. v. Bethlehem Steel Corp.*, 608 F.Supp. 440, 451 (D.Md.1985). The conclusion that DMRs may be used to establish liability is consistent with the legislative history and the policy of the CWA:

\*33 [o]ne purpose of the [monitoring] requirements is to avoid the necessity of lengthy fact finding, investigations, and negotiations at the time of enforcement. Enforcement of violations of requirements of this Act should be based on relatively narrow fact situations requiring a minimum of discretionary decision making or delay.

*United States v. CPS Chemical Co., Inc.*, 779 F.Supp. 437, 442 (E.D.Ark.1991) (quoting S.Rep. No. 92-414, at 64 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3730). Congress intended to keep enforcement actions simple and speedy, where monitoring and reporting requirements were added because of a recognized need to obtain accurate information for enforcement purposes. *Chesapeake Bay Found.*, 608 F.Supp. at 451-53.

*a. Wholly Past Violations*

In *Gwaltney*, the Supreme Court stated that the CWA does not permit citizen suits that are based on “wholly past violations.” 484 U.S. at 64. This holding was based on the language of section 505 of the CWA, which is worded in the present tense only, allowing citizen suits against any person “alleged to be in violation” of the CWA. 33 U.S.C. § 1365(a). While past violations may also be addressed by the CWA, such violations must be continuous or intermittent. 484 U.S. at 64. For a party to show that continuous or intermittent violations exist, one must: (1) prove that violations continue on or after the date the complaint is filed, or (2) adduce evidence from which a reasonable trier of fact could find a continuing likelihood of a reoccurrence in intermittent or sporadic violations.<sup>FN30</sup> *Texaco*, 2 F.3d 493, 501 (3d Cir.1993).

<sup>FN30</sup>. We note here that there is no case law interpreting the CSL as to whether it covers past violations. The CSL mirrors the present tense language of the CWA, where liability is established for those who are “alleged to be in violation.” 35 P.S. § 691.601(c). We find, therefore, that wholly past violations are not within the scope of the CSL and that other violations alleged by the Plaintiffs may be addressed by the CSL to the same extent as under the CWA.

Defendants have violated their NPDES limits for TDS, zinc and antimony since the filing of the complaint in April of 1996.<sup>FN31</sup> Both parties agree that multiple violations of these parameters have occurred as reported in Defendants' DM-Rs from 1997 to 1998. *See* Defs.' Exs. 37, 38. This court, therefore, may address all past and present violations of TDS, zinc, and antimony because the violations of such parameters are ongoing or intermittent pursuant to *Gwaltney*.<sup>FN32</sup>

<sup>FN31</sup>. The post-complaint violations of the iron limits in the NPDES permit are moot. *See* discussion above, VI.A.

<sup>FN32</sup>. *See* the liability section below for further discussion, VI.D.2 .b.

Plaintiffs also argue that Defendants' NPDES permit must be viewed as a whole, such that good faith allegations of ongoing violations of any aspect of the permit, such as TDS, zinc and antimony, will be enough to establish jurisdiction over past and present violations of all parameters. Pls.' Resp. at 49-50. Defendants, on the other hand, argue that in order to establish jurisdiction under *Gwaltney*, Plaintiffs must be able to make good faith allegations of ongoing violations as to each separate parameter. Defs.' Br. at 37-38. The Third Circuit has addressed the issue by applying a modified by-parameter approach, which is defined as follows:

a plaintiff can establish at trial that violations are continuous or intermittent in either of two ways: first, by proving a likelihood of recurring violations of the same parameter; or second, by proving a likelihood that the same inadequately corrected source of trouble will cause recurring violations of one or more different parameters.

\*<sup>34</sup> *Texaco*, 2 F.3d at 499. Thus, with the post-complaint violations of TDS, zinc and antimony, we may consider all past violations if Plaintiffs can adduce evidence that a generalized source of trouble has been the cause of all past and present violations. In the alternative, Plaintiffs must show that each and every past parameter violation, independent of TDS, zinc and antimony, is likely to reoccur.

Plaintiffs document wholly past violations of parameters, such as lead, total suspended solids (“TSS”), copper and cadmium. *See* Pls.' Statement of Facts at ¶¶ 159-204. Plaintiffs allege that the source of the problem for all violations, past

or present, is the “inadequate treatment plant.” Pls.’ Resp. at 50. Moreover, they argue that by varying pH levels, Defendants may elect to remove a single metal at the expense of other metals and that “the varying limits for cadmium, copper, iron, lead and zinc result from the same underlying cause.” Pls.’ Ex. 7.

Defendants, however, assert that they have been improving their treatment plant facilities. Defs.’ Br. at 35; Defs.’ Ex. 33. They constructed a stormwater collection system on March 8, 1998, and are scheduled to complete a diversion of its wastewater discharge by April 8, 1999. *Id.* Moreover, Defendants have apparently made continued improvements on the operational performance of the wastewater treatment facility. Defs.’ Ex. 28.

While we do not agree with Plaintiffs that Defendants must show that “there is absolutely no potential for repetition of the violations,” *see* Pls. Resp. at 50-51, we find that there is a genuine dispute of material fact as to whether the wastewater treatment facility is the potential source of recurrent violations of all parameters. Both Plaintiffs and Defendants assert conclusory allegations, but neither explain nor adduce enough particularized evidence on this issue. We therefore deny summary judgment for both Plaintiffs and Defendants on the issue of liability for parameters with wholly past violations, such as TSS, cadmium, lead and copper.

#### *b. Liability for Ongoing Violations*

We find that Defendants have discharged TDS, zinc and antimony in violation of the limits established in their NPDES permit. As discussed above, the Supreme Court held that continuous or intermittent violations can be shown “by proving violations that continue on or after the date the complaint is filed.” *Texaco*, 2 F.3d at 501. Moreover, proof of these violations may be established by Defendants DMRs. *Atlantic States Legal Found.*, 897 F.2d at 1135; *Union Oil I*, 813 F.2d at 1491-92; *Simkins Industries*, 847 F.2d at 1115 n.8.

Defendants have some ten post-complaint violations of their NPDES permit limits of TDS, zinc and antimony reported in their DMRs: 4/96, 11/96, 12/96, 2/97, 3/97, 6/97, 3/98. *See* Defs.’ Exs. 37, 38; Pls.’ Resp. at 46-48; Defs.’ Br. at 39.<sup>FN33</sup> Moreover, Defendants have violated such parameters before filing their complaint some seventeen times: 10/91, 12/91, 1/92, 7/92, 9/92, 11/92, 1/93, 2/93, 3/93, 9/93, 6/94, 8/94, 9/94, 11/94, 1/96, 2/96. *See* Pls.’ Statement of Facts at ¶¶ 184-194, 196-200, 203; Pls.’ Compl., Ex. A. We are not considering the DMRs filed before February 15, 1991 as evidence of Plaintiffs’ claims under the CWA because such claims are barred by the five-year statute of limitations pursuant to 28 U.S.C. § 2462. Since the responsibility of monitoring the effluent rests with the defendant, the filing date of the DMR is deemed to be the date of accrual for purposes of the statute of limitations. *Powell Duffryn*, 913 F.2d at 75.

<sup>FN33</sup> We are uncertain of the exact number of violations because Defendants have curiously failed to include their DMRs from each and every month for the relevant period. *See* Defs.’ Exs., labeled “Discharge Monitoring Reports.” We are basing the number of violations, therefore, on the uncontested statements made in Plaintiffs’ and Defendants’ motions, Plaintiffs’ Complaint and the DMRs that have actually been filed with this court.

\*35 Defendants attempt to refute their violations by arguing that they have continually made improvements to their wastewater system, *see* Defs.’ Br. at 38-39, and that the current violations are merely episodic. *See id.* at 40-41. Pursuant to a 1996 stipulation with the DEP, construction of the stormwater collection system was completed in March of 1998. Defs.’ Br. at 38; Defs.’ Ex. 28. Defendants have also implemented tighter operational controls since 1996. *Id.* Since that time, only around ten violations of Defendants’ NPDES permit have occurred. Pls.’ Br. at 46-48. By April 1999, Defendants plan to complete the process of relocating its treated wastewater discharge from the Tributary to the storm sewer

which flows into the Schuylkill River. Defs.' Ex. 35.

Defendants, however, have not shown that there exists any genuine issue of material fact regarding the exceedances in the DMRs which they themselves have reported. Defs.' Br. at 39. Indeed, such drastic improvements evidenced after 1996, and expected in 1999, may mean that the solution for complete compliance will not require additional drastic and costly measures to be implemented by the Defendants. Evidence of exceedances of limits in their NPDES permit, without more, establishes a violation of the CWA. *State Water Resources Control Bd.*, 426 U.S. at 205.

Courts have awarded summary judgment on the issue of liability based on a reading of a defendant's DMRs. *See, e.g., Hudson Riverkeeper Fund, Inc. v. Yorktown Heights Sewer District*, 949 F.Supp. 210, 212 (S.D.N.Y.1996); *Connecticut Fund for the Env't, Inc. v. Upjohn Co.*, 660 F.Supp. at 1409; *Student Public Interest Research Group v. Georgia-Pacific Corp.*, 615 F.Supp. 1419, 1429-31 (D.N.J.1985); *Chesapeake Bay Found.*, 608 F.Supp. at 452. Summary judgment is appropriate because "the exceedances have been self-reported by the discharger, as such reports constitute not merely prima facie evidence, but rather are 'conclusive evidence of an exceedance of a permit limitation.'" *Union Oil II*, 716 F.Supp. at 434 (quoting *Union Oil I*, 813 F.2d at 1492; *see also Public Interest Research Group of New Jersey, Inc. v. New Jersey Expressway Auth.*, 822 F.Supp. 174, 185 (D.N.J.1992)).

While we find that Defendants are also liable under the CSL, we note that such a finding does not afford Plaintiffs any additional relief. The statute of limitations and the coverage of ongoing violations under the CSL mirror that of the CWA. Moreover, both parties agree that Plaintiffs cannot request civil penalties under the CSL. *See* Defs.' Br. at 60; Pls.' Resp. at 93. Relief under the CWA is more generous in this regard. *See* 33 U.S.C. § 1319(d).

Defendants, therefore, are liable for ongoing violations of effluent limitations of TDS, zinc and antimony in their NPDES permit. An appropriate remedy will be determined in future proceedings.

#### ORDER

AND NOW, on this 19th day of February 1999, upon consideration of Motion for Summary Judgment of Defendants Exide Corporation and General Battery Corporation filed on September 30, 1998, Plaintiffs' Motion for Partial Summary Judgment with Respect to Claims Arising under the Clean Water Act, the Pa. Clean Streams Law, the Clean Air Act and the Pa. Clean Streams Law and Plaintiffs' Statement of Facts and Conclusions of Law both filed on October 1, 1998, Plaintiffs' Response in Opposition to Motion for Summary Judgment of Defendants Exide Corporation and General Battery Corporation filed on October 30, 1998, Defendants' Memorandum of Law and Fact in Reply to Plaintiffs' Motion for Partial Summary Judgment filed on October 30, 1998, and attached exhibits to all motions, consistent with the foregoing memorandum we hereby ascertain, find and order as follows:

(A) The court GRANTS the following motions for summary judgment:

\*36 (1) Under the CAA, Plaintiffs are GRANTED partial summary judgment with respect to the malodor violation on March 27, 1998 as set forth in claim III;

(2) Under the CAA, Plaintiffs are GRANTED partial summary judgment with respect to sulfur dioxide emission exceedances and CEMS data reporting requirements required by Defendants' state permits as set forth in claim III;

(3) Under both the CWA and CSL, Plaintiffs are GRANTED partial summary judgment with respect to Defendants' violations of the NPDES permit limitations for TDS, zinc and antimony as set forth in claims IV & V.

(B) The court determines and orders the following with respect to standing:

(1) Plaintiffs, Michele Esterly, Thomas Esterly, Charles Tobias, Dorothy Golden, Melvin Gehris, Grace Gehris, Linda Katzenmoyer, Rodney Tyson, Cindy Gehris, and Stephen Werner, lack standing to assert any claims under the CAA or Pennsylvania APCA as set forth in claim III and these Plaintiffs are DISMISSED from this suit without prejudice;

(2) All Plaintiffs lack standing to assert any claims with respect to federal PSD permit, No. 78 PA 22, under the CAA or Pennsylvania APCA as set forth in claim III and such claims are DISMISSED with prejudice;

(3) Plaintiffs, Michele Esterly, Thomas Esterly, Charles Tobias, Dorothy Golden, Melvin Gehris, Grace Gehris, Linda Katzenmoyer, Rodney Tyson, Cindy Gehris, Stephen Werner, Clifton Blume, Robert Shomo and Sena Shomo lack standing to assert any claims under the CWA or Pennsylvania CSL as set forth in claims IV & V and these Plaintiffs are DISMISSED from this suit without prejudice;

(4) All Plaintiffs lack standing to assert any claims with respect to iron discharges in violation of the NPDES Permit No. PA 0014672, under the CWA or Pennsylvania CSL as set forth in claims IV & V and such claims are DISMISSED with prejudice;

(C) All other motions for summary judgment are DENIED including, but not limited to:

(1) Defendants are DENIED summary judgment with respect to [42 U.S.C. § 6972\(a\)\(1\)\(B\)](#) as set forth in claim I;

(2) Defendants are DENIED summary judgment with respect to [42 U.S.C. § 6972\(a\)\(1\)\(A\)](#) as set forth in claim II;

(3) Under the APCA, Plaintiffs and Defendants are DENIED summary judgment on the remaining malodor violations as set forth in claim III;

(4) Under the CAA and the APCA, Plaintiffs and Defendants are DENIED summary judgment on afterburner temperature violations as set forth in claim III;

(5) Under the APCA, Plaintiffs are DENIED summary judgment with respect to the sulfur dioxide emission exceedances and CEMS data reporting requirements required by Defendants' state permits as set forth in claim III;

(6) Under the CAA and APCA, Plaintiffs are DENIED summary judgment with respect to the remaining air pollution violations ([25 Pa.Code §§ 123.41, 123.1, 127.25](#)) as set forth in claim III;

(7) Under the CWA and CSL Plaintiffs and Defendants are DENIED summary judgment for claims brought under the CWA and the Pennsylvania CSL with respect to parameters with wholly past violations, such as TSS, cadmium and copper as set forth in claims IV & V.

\*37 Where relevant, an appropriate remedy will be determined in future proceedings after further briefing.

Not Reported in F.Supp.2d  
Not Reported in F.Supp.2d, 1999 WL 124473 (E.D.Pa.)  
**(Cite as: 1999 WL 124473 (E.D.Pa.))**

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E.D.Pa.,1999.  
L.E.A.D. (Lead Environmental Awareness Development v. Exide Corp.  
Not Reported in F.Supp.2d, 1999 WL 124473 (E.D.Pa.)

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