UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

GEORGES RIVER TIDEWATER ASSOCIATION, et al.,	)	
Plaintiffs	)	
v.	)	***Docket No. 00-92-P-H***
WARREN SANITARY DISTRICT,	)	
Defendant	)	

RECOMMENDED DECISION ON DEFENDANT'S MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS

The defendant in this action alleging violation of the Clean Water Act, 33 U.S.C. § 1251 *et seq*., seeks judgment on the pleadings to the effect that any claims based on effluent discharge data reported by the defendant under its National Discharge Elimination System permit before January 21, 1995 are barred by the five-year statute of limitations set forth in 28 U.S.C. § 2462. I recommend that the court grant the motion.

This action is brought under the citizen suit provisions of the Clean Water Act ("the Act") set forth in 33 U.S.C. § 1365. Complaint (Docket No. 1) ¶¶ 2-3. The plaintiffs seek civil penalties for the defendant's alleged violations of the Act and injunctive relief. *Id*. at 19. On January 21, 2000 the plaintiffs provided notice of their intent to file suit against the defendant under the Act's citizen suit provisions, *id*. ¶ 53 & Exh. C; Answer, etc. (Docket No. 2) ¶ 53, as required by 33 U.S.C. § 1365(b). They allege that the defendant has committed 349 violations of the Act since the commencement of operation of its treatment facility. Complaint ¶ 55 & Exh. B. Many of these alleged violations

occurred before January 21, 1995. *Id*. Exh. B. The defendant contends that action on any such violations is barred by the five-year statute of limitations set forth in 28 U.S.C. § 2462, which provides:

> Except 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 if, within the same period, the offender or the property its found within the United States in order that proper service may be made thereon.

Not surprisingly, the plaintiff disagrees.

Before addressing the merits of the parties' respective positions on this issue, it is necessary to discuss the plaintiffs' contention that this motion is "premature," Plaintiffs' Memorandum in Opposition to Defendant's Motion for Partial Judgment on the Pleadings ("Plaintiffs' Opposition') (Docket No. 9) at 1 n.1, although the plaintiffs do not suggest that any particular consequence follows from this asserted error. Motions for judgment on the pleadings are governed by Fed. R. Civ. P. 12(c), which provides, in relevant part: "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." The plaintiffs contend that the instant motion, filed on May 12, 2000, was filed before the pleadings were closed, because this court's scheduling order allowed amendment of the pleadings until May 23, 2000. Scheduling Order (Docket No. 3) at 1. However, closing of the pleadings within the meaning of Rule 12(c) is not determined by each district court's imposition of a deadline for amendment of the pleadings, or lack thereof.

> Rule 7(a) provides that the pleadings are closed upon the filing of a complaint and answer, unless a counterclaim, cross-claim, or third-party claim is interposed, in which event the filing of a reply, cross-claim answer, or third-party answer normally will mark the close of the pleadings.

5A C. Wright & A. Miller, *Federal Practice and Procedure* § 1367 (2d ed. 1990) at 512-13. In this case, no counterclaim, cross-claim or third party claim has been filed. The pleadings closed with the filing of the answer on April 18, 2000. The defendant's motion is not premature, and no purpose would have been served in any event by requiring it to wait until May 24, 2000 to file this motion.

The parties agree that the Clean Water Act does not include a statute of limitations. The defendant contends that 28 U.S.C. § 2462 serves that purpose for the plaintiffs' claims; the plaintiffs argue that Maine's general six-year statute of limitations for civil actions, 14 M.R.S.A. § 752, applies. The only federal circuit courts of appeals that have addressed this issue in reported decisions agree with the defendant. *Public Interest Research Group of New Jersey v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 74-75 (3d Cir. 1990); *Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517, 1521-23 (9th Cir. 1987).

The First Circuit has provided clear guidance to its district courts faced with the task of choosing a limitation period when the operative federal statute is silent.

> When Congress fails to furnish an express statute of limitations in connection with enforcement of a federal right, a court's initial look must be to state law to isolate the most closely analogous rule of timeliness. But, as we have cautioned, the glance in the direction of the state-law cupboard should not be an automatic or reflexive one. State limitation periods may on occasion be unsatisfactory vehicles for the enforcement of federal law and can frustrate or interfere with the implementation of federal policies. When such dangers loom, a limitation period borrowed from elsewhere in federal law may be applied if two preconditions are met: (1) some federal rule of limitations provides a closer analogy than state alternatives, and (2) the federal policies at stake and the practicalities of litigation render the federal rule more suitable. Before we switch from a state-law to a federal-law focus, however, the borrowed federal rule must seem, all things considered, significantly more appropriate.

Posadas de Puerto Rico Assocs., Inc. v. Asociacion de Empleados de Casino de Puerto Rico, 873 F.2d 479, 480-81 (1st Cir. 1989) (citations and internal punctuation omitted).

For the purposes of citizen suits to enforce the Clean Water Act, state statutes of limitations are unsatisfactory vehicles. "The application of a state statute of limitations would produce non-uniform citizen suit enforcement from state to state. . . . If courts were to borrow state statutes of limitations the enforcement of the Act would vary from state to state." *Chesapeake Bay Found. v. Bethlehem Steel Corp*., 608 F. Supp. 440, 447 (D. Md. 1985). The application of a state statute of limitations to citizen suits would also be inconsistent with enforcement actions instituted by the EPA, which would be subject to the five-year limit. *Id*. at 448; *Powell Duffryn*, 913 F.2d at 74. Section 2462, which is applicable by its terms to action for enforcement of civil fines and penalties, clearly provides a "closer analogy" to 33 U.S.C. § 1365 than does 14 M.R.S.A. § 752, which applies to "[a]ll civil actions." The practicalities of litigation are better served by a single statute of limitations for such actions. All things considered, the federal statute of limitations does seem significantly more appropriate for citizen suits under the Clean Water Act.

The plaintiffs attempt to distinguish the two circuit court opinions and several reported district court opinions, all of which adopt section 2462 for these purposes, on the ground that they involved state statutes of limitations with a period shorter than five years or the lack of any state statute of limitations. Plaintiffs' Opposition at 5-6. The Third Circuit rejected this argument in *Powell Duffryn*, 913 F.2d at 75, and I find its reasoning persuasive. The plaintiffs also argue that application of the six-year state statute of limitations would result in the filing of fewer lawsuits. Plaintiffs' Opposition at 5. Even if that were the case, the plaintiffs do not explain how the filing of fewer lawsuits in Maine than might occur otherwise serves the purposes of the Clean Water Act or provides a benefit that would outweigh the lack of uniformity in citizen suit procedures across the states.

Accordingly, for the foregoing reasons, I recommend that the defendant's motion for partial judgment on the pleadings be **GRANTED.**

NOTICE

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

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

Date this 28th day of June, 2000.

_____

David M. Cohen
United States Magistrate Judge

GEORGES RIVER TIDEWATER ASSOCIATION plaintiff	JAMES T. KILBRETH, ESQ. [COR LD] SEAN MAHONEY, ESQ. [COR LD NTC] VERRILL & DANA 1 PORTLAND SQUARE P.O. BOX 586 PORTLAND, ME 04112 774-4000
NATURAL RESOURCES COUNCIL OF MAINE plaintiff	JAMES T. KILBRETH, ESQ. (See above) [COR LD] SEAN MAHONEY, ESQ. (See above) [COR LD NTC]
ANTHONY ANTOLINI plaintiff	JAMES T. KILBRETH, ESQ. (See above) [COR LD] SEAN MAHONEY, ESQ. (See above) [COR LD NTC]
FREDERIC L CAREY plaintiff	JAMES T. KILBRETH, ESQ. (See above) [COR LD] SEAN MAHONEY, ESQ. (See above) [COR LD NTC]

MAC DEFORD	JAMES T. KILBRETH, ESQ.
plaintiff	(See above)
	[COR LD]
	SEAN MAHONEY, ESQ.

Proceedings include all events.
2:00cv92 GEORGES RIVER TIDE, et al v. WARREN SANITARY

STNDRD	
	(See above)
	[COR LD NTC]
ROBERT MATUS	JAMES T. KILBRETH, ESQ.
plaintiff	(See above)
	[COR LD]
	SEAN MAHONEY, ESQ.
	(See above)
	[COR LD NTC]
LINDSAY N ROME	JAMES T. KILBRETH, ESQ.
plaintiff	(See above)
	[COR LD]
	SEAN MAHONEY, ESQ.
	(See above)
	[COR LD NTC]
WESTERN TODD	JAMES T. KILBRETH, ESQ.
plaintiff	(See above)
	[COR LD]
	SEAN MAHONEY, ESQ.
	(See above)
	[COR LD NTC]
ROBERT BERNSTEIN	JAMES T. KILBRETH, ESQ.
plaintiff	(See above)
	[COR LD]
	SEAN MAHONEY, ESQ.
	(See above)
	[COR LD NTC]
SUZANNE CAREY	JAMES T. KILBRETH, ESQ.
plaintiff	(See above)
	[COR LD]
	SEAN MAHONEY, ESQ.
	(See above)
	[COR LD NTC]

JOHN DUNCAN plaintiff	JAMES T. KILBRETH, ESQ. (See above) [COR LD] SEAN MAHONEY, ESQ. (See above) [COR LD NTC]
KARIN DUNCAN plaintiff	JAMES T. KILBRETH, ESQ. (See above)

Proceedings include all events.
2:00cv92 GEORGES RIVER TIDE, et al v. WARREN SANITARY

STNDRD	[COR LD] SEAN MAHONEY, ESQ. (See above) [COR LD NTC]
CARTER NEWELL plaintiff	JAMES T. KILBRETH, ESQ. (See above) [COR LD] SEAN MAHONEY, ESQ. (See above) [COR LD NTC]
WICKHAM SKINNER plaintiff	JAMES T. KILBRETH, ESQ. (See above) [COR LD] SEAN MAHONEY, ESQ. (See above) [COR LD NTC]
ALICE SKINNER plaintiff	JAMES T. KILBRETH, ESQ. (See above) [COR LD] SEAN MAHONEY, ESQ. (See above) [COR LD NTC]
TERRY WALSH plaintiff	JAMES T. KILBRETH, ESQ. (See above) [COR LD] SEAN MAHONEY, ESQ. (See above) [COR LD NTC]

DONALD WINCHENBACH plaintiff	JAMES T. KILBRETH, ESQ. (See above) [COR LD] SEAN MAHONEY, ESQ. (See above) [COR LD NTC]
R STACE BURCKES plaintiff	JAMES T. KILBRETH, ESQ. (See above) [COR LD] SEAN MAHONEY, ESQ. (See above) [COR LD NTC]

Proceedings include all events.
2:00cv92 GEORGES RIVER TIDE, et al v. WARREN SANITARY

STNDRD

JAMES B DAVENPORT plaintiff	JAMES T. KILBRETH, ESQ. (See above) [COR LD] SEAN MAHONEY, ESQ. (See above) [COR LD NTC]
BENJAMIN FULLER plaintiff	JAMES T. KILBRETH, ESQ. (See above) [COR LD] SEAN MAHONEY, ESQ. (See above) [COR LD NTC]
CAROL ROHL plaintiff	JAMES T. KILBRETH, ESQ. (See above) [COR LD] SEAN MAHONEY, ESQ. (See above) [COR LD NTC]
DIANE SMITH plaintiff	JAMES T. KILBRETH, ESQ. (See above) [COR LD] SEAN MAHONEY, ESQ. (See above)

	[COR LD NTC]
CHRIS WELLS plaintiff	JAMES T. KILBRETH, ESQ. (See above) [COR LD] SEAN MAHONEY, ESQ. (See above) [COR LD NTC]
TRACY WELLS plaintiff	JAMES T. KILBRETH, ESQ. (See above) [COR LD] SEAN MAHONEY, ESQ. (See above) [COR LD NTC]
v.	
WARREN SANITARY DISTRICT defendant	PETER W. CULLEY [COR LD NTC] JARED S. DES ROSIERS, ESQ.

Proceedings include all events.
2:00cv92 GEORGES RIVER TIDE, et al v. WARREN SANITARY

STNDRD

[COR LD NTC]
PIERCE, ATWOOD
ONE MONUMENT SQUARE
PORTLAND, ME 04101-1110
791-1100
