

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION**

**CHESAPEAKE BAY FOUNDATION,
INC.**

6 Herndon Ave
Annapolis, MD 21403

and

JAMES RIVER ASSOCIATION

211 Rocketts Way, Suite 200
Richmond, VA 23231

Plaintiffs,

v.

COUNTY OF HENRICO

4301 East Parham Road
Henrico, VA 23228

Defendant.

Civil Action No.: 3:21-cv-00752-DJN

**HENRICO COUNTY’S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS
FOR LACK OF SUBJECT MATTER JURISDICTION AND FOR FAILURE TO
STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED**

I. INTRODUCTION

This motion seeks dismissal of Plaintiffs’ Clean Water Act (“CWA”) citizen suit because the Commonwealth of Virginia, acting through its Department of Environmental Quality (“DEQ”) pursuant to the CWA and State Water Control Law, has taken and completed its own enforcement action resolving the compliance issues associated with Henrico County’s wastewater collection and treatment facilities. *See* “State Water Control Board Enforcement Action – Order by Consent Issued to County of Henrico” executed by Henrico County on August 25, 2021 and by DEQ on December 15, 2021 (the “Enforcement Order”) (Attachment A hereto).

Like other urban localities throughout Virginia and the United States, Henrico is confronting the challenge of renewing aging public infrastructure and is investing heavily to do so.¹ This challenge is compounded by the recent effects of climate change, including more frequent severe weather events and increased amounts of precipitation,² which infiltrates underground sewer lines and requires new and improved infrastructure to convey and treat properly. Indeed, the vast majority of the sanitary sewer overflow (“SSO”) volume at issue occurred during the third (2018) and fourth (2020) wettest years on record with approximately 64 inches of rainfall compared to average rainfall in the Richmond region of approximately 44 inches per year. *See* “Enforcement Item Summary for the State Water Control Board Meeting on December 14, 2021” (Attachment B hereto) (responding to comments regarding “SSO Volumes” in Consolidated Response to Comments).

Henrico is responding aggressively. The County achieved a remarkable 90 percent reduction in SSO volume in the short period between these two near record-setting extreme rainfall years. *See id.* As additional context for the Richmond region, DEQ explained that the 2020 overflow volume from the Henrico system is only 0.09% of the overflow volume from the adjacent City of Richmond system. *Id.* Henrico has also upgraded its Water Reclamation Facility to add advanced nutrient removal technology to do its part to protect the Chesapeake Bay and has consistently complied with its Chesapeake Bay Total Maximum Daily Load nutrient load limits.

Looking ahead, DEQ describes its Enforcement Order as “aggressively address[ing] SSOs” by requiring “high performance” through the improvements it mandates. *Id.* Henrico itself

¹ *See Report Card for America’s Infrastructure: Wastewater*, AMERICAN SOCIETY OF CIVIL ENGINEERS (2021), <https://infrastructurereportcard.org/cat-item/wastewater/>.

² *Extreme weather gets a boost from climate change*, ENV’T. DEF. FUND, <https://www.edf.org/climate/climate-change-and-extreme-weather> (last visited Dec. 27, 2021).

acknowledges the need for additional infrastructure upgrades and has been fully cooperative with DEQ as to all related issues within DEQ's jurisdiction. During DEQ's prosecution of its enforcement action over the past couple years, the parties negotiated, and DEQ recently finalized through the Enforcement Order, a comprehensive \$224 million program of specific capital improvements to renew and increase the resiliency of the County's wastewater infrastructure. *See* Declaration of Bentley P. Chan, P.E., para. 17 (Attachment C hereto) (*hereinafter* Att. C). DEQ also imposed a substantial civil penalty, which Henrico has since paid. *See id.*, para. 29.

The Plaintiffs' duplicative litigation creates significant uncertainty and the potential to disrupt or delay the substantial infrastructure improvements under the DEQ Enforcement Order that Henrico must design, finance, and construct at major public expense. *See* Att. B (DEQ responding to Plaintiffs' comments requesting certain "Sewer System Plans & Measures" as "a redundant effort resulting in added costs and delays in implementation of corrective action" and rejecting "Pretreatment Requirement" comments on the grounds that "[t]he projects and programs in the [now-final] Order have been determined to be the most appropriate path to durable compliance"). Because the State diligently prosecuted its own enforcement action and Henrico is moving forward to comply with the resulting Enforcement Order, the citizen groups' competing enforcement action is barred by 33 U.S.C. § 1319(g)(6) and must be dismissed for lack of subject matter jurisdiction.

Even if the citizen groups' were allowed to re-open and re-litigate the complex infrastructure solutions that the State has resolved, in no case may they sue over "wholly past violations" the County has already remedied. *Gwaltney v. Chesapeake Bay Found.*, 484 U.S. 49 (1987). Therefore, Counts 1 and 2 must be dismissed for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted.

II. LEGAL STANDARDS APPLICABLE TO RULE 12(B) MOTIONS

A. FRCP 12(b)(1) Motion to Dismiss for Lack of Subject Matter Jurisdiction

A party may file a motion to dismiss when the court lacks proper subject matter jurisdiction over the case. Fed. R. Civ. Pro. 12(b)(1). The plaintiff has the burden of establishing the existence of subject matter jurisdiction. *Richmond, Fredericksburg & Potomac R.R. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991). The court should grant a motion to dismiss when the material jurisdictional facts of the case are not disputed and the moving party is entitled to judgment as a matter of law. *Id.* When considering whether subject matter jurisdiction exists, “the district court is to regard the pleadings’ allegations as mere evidence on the issue, and may consider evidence outside the pleadings.” *Id.*

B. FRCP 12(b)(6) Motion to Dismiss for Failure to State a Claim

A party may file a motion to dismiss when the complaint fails to assert a claim upon which the court can grant relief. Fed. R. Civ. Pro. 12(b)(6). A court reviewing a motion to dismiss for failure to state a claim must determine whether the complaint alleges sufficient facts that go beyond speculation and state a claim that is “plausible on its face.” *Schneider v. Donaldson Funeral Home, P.A.*, 733 F. App’x 641, 644-45 (4th Cir. 2018). The court should accept all well-pleaded material facts as true and draw inferences in favor of the plaintiff, but should not give a presumption of truth to mere conclusory statements. *Id.* When reviewing a motion to dismiss for failure to state a claim, a court may consider (1) documents that are explicitly incorporated into the complaint by reference; (2) documents that are attached to the complaint as exhibits; (3) documents “attached to a motion to dismiss as long as they are ‘integral to the complaint’ and ‘authentic;’” and (4) documents that are “matters of public record” of which the court takes judicial notice. *Id.* (first

quoting *Goines v. Valley Cmty. Servs. Bd.*, 822 F.3d 159, 166 (4th Cir. 2016); and then quoting *Goldfarb v. Mayor & City Council of Balt.*, 791 F.3d 500, 505 (4th Cir. 2015)).

III. ARGUMENT

A. Plaintiffs' Citizen Suit is Barred by the State's Diligent Prosecution of Its Own Administrative Enforcement Action

The purpose of a CWA citizen suit pursuant to 33 U.S.C. § 1365 is to abate pollution when government regulators cannot or will not command compliance. *Gwaltney v. Chesapeake Bay Found.*, 484 U.S. 49, 62 (1987). In other words, the proper role of citizen enforcement is to “supplement rather than supplant governmental action.” *Id.* at 60. Congress expected the States to actively enforce the CWA and thus determined that “citizen suits are proper only ‘if the Federal, State, and local agencies fail to exercise their enforcement responsibility.’” *Id.* (quoting S. Rep. No. 92-414, at 64 (1971)). But when a State takes an active role in enforcing the CWA, as is the case here, there is simply no purpose served by adjudicating a duplicative citizen suit. To prevent “duplicative civilian action” against parties that have already been subjected to State enforcement action, the CWA expressly bars citizen suits where the State has issued a “final order not subject to further judicial review” or has at least “commenced and is diligently prosecuting” an administrative enforcement action against the defendant under State law comparable to the CWA’s administrative enforcement scheme. 33 U.S.C. § 1319(g)(6)(A)(ii)-(iii); *Sierra Club*, 662 F. Supp. 2d at 530 (quoting *North & S. Rivers Watershed Ass’n v. Scituate*, 949 F.2d 552, 556 (1st Cir. 1991)). The CWA provides a narrow exception to this jurisdictional bar that applies only when citizen plaintiffs either (i) file a civil action *prior to* the State commencing its enforcement action, or (ii) provide notice of their intent to sue *prior to* the State commencing its enforcement action and subsequently bring suit within 120 days of providing notice. 33 U.S.C. § 1319(g)(6)(B)(i)-(ii).

As discussed below, DEQ commenced its administrative enforcement action against Henrico at least as of June 2020 and diligently prosecuted its action according to State enforcement authorities and procedures comparable to those of the CWA until the process was successfully concluded by issuance of the final Enforcement Order on December 15, 2021. As Plaintiffs did not file their notice of intent to sue Henrico until *after* DEQ had commenced the State enforcement action, Plaintiffs' duplicative litigation is jurisdictionally barred.

1. DEQ Commenced Its Enforcement Action Prior to Plaintiffs Providing the Required Notice of Intent to Sue

As described in DEQ's Enforcement Item Summary (Att. B hereto) at page 1 under "Discussion of Current Enforcement Action for SSO Events" and at page 2 under "Discussion of Current Enforcement Action for Effluent Limit Violations," DEQ has documented that it issued several Notices of Violation ("NOVs") in response to Henrico's reports of noncompliance. Similarly, in the Enforcement Order (Att. A hereto) at "Section C: Findings of Fact and Conclusions of Law" in paragraphs 9 through 18, DEQ again confirms having issued several NOVs. This is a significant step under DEQ's Civil Enforcement Manual, which provides that issuance of a NOV "serves as the referral of a case from [the] compliance [Division] to the Division of Enforcement." *DEQ Civil Enforcement Manual, Chapter 2 – General Enforcement Procedures*, VA. DEP'T OF ENV'T QUALITY (Dec. 1, 2016).³

Having referred Henrico for enforcement, DEQ conducted an enforcement conference with Henrico on June 24, 2020, as memorialized in both the Enforcement Order, *see Att. A*, para. C.20., and the Enforcement Item Summary, *see Att. B*, at 2. Both documents also record that in the

³ Available at https://townhall.virginia.gov/L/GetFile.cfm?File=C:\TownHall\docroot\GuidanceDocs\440\GDoc_DEQ_4432_v6.pdf.

enforcement conference Henrico acknowledged the need for filter rehabilitation and initiated certain interim and long-term corrective actions. *See also* Att. C, para. 12.

On August 26, 2020, DEQ transmitted a draft enforcement order (Att. C-1 hereto) to Henrico by email from Mr. Frank Lupini, DEQ Enforcement Specialist Senior. *See* Att. C, para. 13. The draft order imposed in Paragraph D.2. a civil charge of \$65,835 and required in Appendix A that Henrico submit a proposed Corrective Action Plan with an implementation schedule for DEQ's review and approval. *See* Att. C, para. 14; Att. C-1, app. A.

DEQ allowed Henrico until September 8, 2020 to provide comments on the draft order, *see* Att. C, para. 14, which with Henrico's concurrence could be issued more expeditiously on a consent basis under Virginia Code § 62.1-44.15(8d) and (8f) in lieu of an adversarial administrative hearing under Virginia Code § 62.1-44.15(8a) or judicial action under Virginia Code §§ 62.1-44.23 (injunctions) and 62.1-44.32 (civil penalties).

The Fourth Circuit has never ruled on when exactly an administrative enforcement action is deemed to have commenced. A recent case from within the Fourth Circuit held that a State enforcement action that culminated in a Consent Agreement commenced upon the State's issuance of a Notice of Alleged Violation ("NOAV"). *Naturaland Trust v. Dakota Fin.*, 531 F. Supp. 3d 953, 961 (D.S.C. 2021).

In the Henrico matter administered by DEQ under the State Water Control Law and in accordance with the *DEQ Civil Enforcement Manual*, *supra*, enforcement referral is triggered by NOV issuance. DEQ acted upon the enforcement referral by conducting an enforcement conference with Henrico on June 24, 2020. In that enforcement conference, DEQ confirmed Henrico's cooperation and secured Henrico's recognition of facility rehabilitation needs and commitment to interim and long-term corrective action. DEQ prepared and delivered a draft

enforcement order to Henrico on August 26, 2020, which included a requirement to develop a Corrective Action Plan and implementation schedule subject to DEQ’s approval as well as payment of a substantial civil charge. By this point in time – approximately one year prior to Plaintiffs’ August 11, 2021 notice of intent to sue – DEQ clearly had commenced enforcement. *See Naturaland Trust*, 531 F. Supp. 3d at 961; *see also Piney Run Pres. Ass’n v. Cnty. Comm’rs.*, 532 F.3d 453, 459 (4th Cir. 2008), *citing Karr v. Hefner*, 475 F.3d 1192, 1198 (10th Cir. 2007) (“citizen plaintiffs must meet a high standard to demonstrate that [a government agency] has failed to prosecute a violation diligently”) and *Friends of Milwaukee’s Rivers*, 382 F.3d 743, 760 (7th Cir. 2004) (this presumption “is due not only to the intended role of the [government] as the primary enforcer of the [CWA], but also to the fact that courts are not in the business of designing, constructing or maintaining sewage treatment systems”) (parenthetical revisions in original).

2. DEQ Diligently Prosecuted the State Enforcement Action from June 2020 through Issuance of the December 2021 Enforcement Order

A State must be “diligently prosecuting” an enforcement action (or have reached the point of issuing a final order) when a plaintiff files a citizen suit for the jurisdictional bar to apply. 33 U.S.C. § 1319(g)(6)(A)(ii)-(iii). The Fourth Circuit has stated that the “diligence” of a State’s prosecution is presumed, and that the plaintiff has the burden of disproving the State’s diligence. *Piney Run Pres. Ass’n v. Cnty. Comm’rs.*, 532 F.3d 453, 459 (4th Cir. 2008). Diligent prosecution does not require the agency action to be “far-reaching or zealous. It requires only diligence.” *Id.* (quoting *Karr v. Hefner*, 475 F.3d 1192, 1198 (10th Cir. 2007)). An enforcement prosecution will ordinarily be considered “diligent” if the judicial action “is capable of requiring compliance with the Act and is in good faith calculated to do so.” *Id.*

As noted above, in mid-2020 DEQ acted on the NOV enforcement referral, held a consequential enforcement conference with Henrico, and issued a draft enforcement order with a

requirement for a Corrective Action Plan and substantial civil penalty. Over the ensuing 12 months, DEQ's enforcement staff engaged Henrico in its prosecution of this enforcement action. *See Att. C*, para. 15. The enforcement process involved various activities on the part of DEQ and Henrico to identify specific projects for the Water Reclamation Facility, identify specific projects for the collection system, and even develop a supplemental environmental project to address private property sewage disposal problems beyond Henrico's CWA responsibilities. *See Att. C*, paras. 15-19. In the process, DEQ increased the civil charge substantially. *See Att. C*, para. 18. Each of these four categories of expanded and more specific requirements of the Enforcement Order are described in more detail in the following paragraphs.

First, as to the Water Reclamation Facility, DEQ expanded the Corrective Action Plan requirement to mandate 10 specific major projects with an estimated capital cost of \$106 million to Henrico ratepayers. *See Att. C*, para. 16. These projects, which are set forth in Schedule of Compliance Appendix C: Henrico County WRF Upgrade Schedule and Statement of Work of the Enforcement Order, include (a) Clarifier Replacement Project Phase I; (b) Boiler Burner Replacement; (c) Clarifier Replacement Project Phase II; (d) Asset Management Program; (e) Return Activated Sludge Pump Replacement; (f) Supervisory Control and Data Acquisition Replacement Project; (g) Plant Main Drain Sewage Pumping Station Replacement; (h) Filter Project Phase I; (i) Clarifier Replacement Project Phase III; and (j) Clarifier Replacement Project Phase IV. *See Att. A*, app. C; *Att. C*, para. 16.

Second, as to the collection system, DEQ added Schedule of Compliance Appendix B: Henrico County SSO Repair and Maintenance Schedule and Statement of Work, which mandates 28 specific major projects with an estimated capital cost of \$118 million to Henrico ratepayers. *See Att. A*, app. B; *Att. C*, para. 17. Together with the Water Reclamation Facility projects, this

represents DEQ's binding order and Henrico's obligation to invest an unprecedented \$224 million in public wastewater facilities to address the aging infrastructure and climate change-driven challenges described above. *Id.*

Third, as to the civil charge, DEQ more than tripled the draft civil charge of \$65,835 to the final amount of \$207,680, as shown in Paragraph D.2. of the Enforcement Order. *See Att. A*, para. D.2.; *Att. C*, para. 18. The final amount is significant in that it represents what it is believed to be the highest such civil charge imposed by DEQ against any locality and other government-owned wastewater utility in Virginia over at least the past five years. *See Att. C*, para. 18. DEQ describes the civil charge as "one of the largest in comparison to other orders entered against local governments" for similar violations. *See Att. B* (response to comments regarding "Civil Charge Amount").

Fourth, DEQ secured and added an innovative Supplemental Environmental Project at Appendix D of the Enforcement Order, which involves Henrico County directing \$155,760 of the increased civil charge to extend public wastewater infrastructure to un-served properties to take off-line private septic systems discharging on-site and convey the wastewater to the Water Reclamation Facility for advanced treatment, including nitrogen and phosphorus removal for James River and Chesapeake Bay protection. *See Att. A*, app. D; *Att. C*, para. 19. Henrico County has no obligation under the CWA or State law to provide this type of public improvement to address these private property discharges. *See id.*

Given the results that DEQ achieved from mid-2020 to mid-2021 in the context of a large wastewater system requiring complex planning and engineering and substantial capital construction projects as identified in Appendices B and C of the Enforcement Order, clearly DEQ was diligently prosecuting its enforcement action at the time Plaintiffs filed their notice of intent

to sue on August 11, 2021. Plus, there cannot be any doubt as to whether DEQ would continue to be diligent in its enforcement because, in the time since Plaintiffs' notice, DEQ actually prosecuted the matter to completion. The final steps in the latter half of 2021 were as follows.

On August 25, 2021, DEQ obtained Henrico's commitment to the expanded Enforcement Order as evidenced by the signature of Mr. John A. Vithoulikas, Henrico County Manager, the County's chief administrative officer. *See Att. A*, p. 12; *Att. C*, para. 20.

On September 13, 2021, DEQ published notice of the proposed enforcement order for public comment in the *Virginia Register of Regulations* (Volume 38, Issue 2, Page 315) and received comments through October 13, 2021. *See Att. C*, para. 20; *Att. C-2*.

Before the December 14, 2021 State Water Control Board meeting, DEQ reviewed and evaluated 36 public comments (including lengthy comments from the Plaintiffs as discussed below), and prepared a thorough and well-reasoned "Consolidated Response to Comments from EIP, JRA, CBF and Individual Constituents for Henrico County WRF Consent Order."⁴ *See Att. B*.

On December 14, 2021, DEQ presented the final Enforcement Order to the State Water Control Board, explained the enforcement process it had conducted since 2020, and recommended Board approval. *See Att. C*, para. 24. After hearing testimony from the Plaintiffs, the Board accepted DEQ's recommendation and voted unanimously to approve the Enforcement Order. *See Att. C*, para. 27. DEQ's Action Report of the State Water Control Board's December 14, 2021 meeting confirms the Board's approval decision. *See Att. C-4*.

⁴ "EIP" refers the Environmental Integrity Project, which serves as counsel to the James River Association in this litigation. "JRA" refers to the James River Association and "CBF" refers to the Chesapeake Bay Foundation.

On December 16, 2021, DEQ transmitted to Henrico the fully executed Enforcement Order dated December 15, 2021. *See* Att. C, para. 28.

On January 5, 2022, Henrico made timely payment of \$51,920 of the civil charge by check payable to the Treasurer of Virginia as required by Paragraph D.2. of the Enforcement Order. *See* Att. C, para. 29; Att. C-5.

The course and progress of this DEQ enforcement proceeding leave no doubt that DEQ diligently prosecuted it from start to finish. In the time since Plaintiffs filed their citizen suit, DEQ even completed the State action. Plaintiffs cannot meet their burden of disproving DEQ's diligence in enforcing the CWA in this case.

3. Plaintiffs Actively Participated in DEQ's Enforcement Process

By this citizen suit, Plaintiffs are attempting to reach the result they sought unsuccessfully from the expert administrative agency, DEQ, and its State Water Control Board. As noted above, DEQ gave public notice of the proposed Enforcement Order on September 13, 2021 and allowed a 30-day comment period. Plaintiffs jointly filed extensive comments in which they raised essentially the same issues and same requests as in their Complaint. *See* Att. C-3 (Plaintiffs' Comments on Enforcement Order).

DEQ considered and thoroughly responded to their comments in a lengthy response document published prior to the December 14, 2021 State Water Control Board meeting. *See* Att. B (DEQ's Consolidated Response to Comments). In DEQ's response, the agency summarized the main issues and concerns raised in the public comments and explained point-by-point how the Enforcement Order appropriately addressed those issues or concerns or how a given comment was inappropriate, counterproductive, or otherwise not helpful to resolving the matter in DEQ's judgment. *Id.* Because DEQ determined that none of the comments raised valid issues that were

not already addressed sufficiently in the Enforcement Order, DEQ did not make any revisions. *See id.*

At the December 14, 2021 Board meeting, the Board received testimony from the public in its hearing on the proposed Enforcement Order. Representatives of both the James River Association and the Chesapeake Bay Foundation testified raising objections and asking the Board to forego the State government's issuance of the Enforcement Order in deference to their preferred approach, namely the CWA citizen litigation that they had filed the week prior to the Board meeting. *See Att. C*, para. 26. After hearing their testimony, the Board accepted DEQ's recommendation and voted unanimously to approve the Enforcement Order. *See Att. C*, para. 27; *Att. C-4*.

Plaintiffs have had ample opportunity to comment and testify to express their interests and concerns regarding the terms of the Enforcement Order. The simple fact is that they have failed to add anything constructive to this process to improve upon DEQ's comprehensive resolution for this major wastewater system. Astonishingly, according to a statement reported by the *Richmond Times Dispatch* shortly after Plaintiffs filed this lawsuit, "[l]awyers from the conservations [sic] organizations said they don't know exactly what remedy they hope the lawsuit will achieve."⁵

In bringing this lawsuit, Plaintiffs are inappropriately attempting to take over the State's lead role in CWA enforcement after DEQ has undertaken and completed a complex enforcement action, including a \$224 million capital improvement program that DEQ described in its Consolidated Response to Comments as "fully consistent with its Enforcement Manual," as

⁵ Eric Kolenich, *Federal lawsuit from conservation groups calls for Henrico County to end decades of pollution in the James River*, RICHMOND TIMES-DISPATCH (Dec. 6, 2021), https://richmond.com/news/local/federal-lawsuit-from-conservation-groups-calls-for-henrico-county-to-end-decades-of-pollution-in/article_0777c86c-cdd6-5f58-9742-c2e426067c39.html.

“aggressively address[ing] SSOs,” as “require[ing] high performance,” as “establish[ing] a comprehensive scope of work,” as designed to “achieve durable compliance and meet or exceed regulatory requirements,” as supporting “orderly design and construction” and “maintaining effective treatment throughout rehabilitation and upgrades,” and – bottom line – “the most appropriate path.” *See Att. B.*

In summary, the Court is not faced with a situation where the State has failed to exercise its enforcement responsibility and citizen plaintiffs should be allowed to supplement the State’s implementation of the CWA. *See Gwaltney*, 484 U.S. at 60. Instead, Plaintiffs seek to supplant DEQ and risk upsetting its substantial enforcement effort and detailed plan for Henrico’s wastewater infrastructure improvements. Because DEQ commenced its enforcement action prior to Plaintiffs’ notice of intent to sue, diligently prosecuted its action, and, better yet, completed it, Henrico County respectfully submits that this citizen suit is barred under 33 U.S.C. § 1319(g)(6) and must be dismissed with prejudice for lack of subject matter jurisdiction.

B. Counts 1 and 2 of the Complaint Must Be Dismissed for Lack of Subject Matter Jurisdiction and Failure to State a Viable Claim Because They Concern Wholly Past Violations

A proper citizen suit may be brought against a party in violation of an effluent limitation under the CWA, 33 U.S.C. § 1365(a)(1), but the Supreme Court has ruled that the CWA “does not permit citizen suits for wholly past violations.” *Gwaltney of Smithfield v. Chesapeake Bay Found.*, 484 U.S. 49, 64 (1987). A citizen suit must be based on “a state of either continuous or intermittent violation – that is, a reasonable likelihood that a past polluter will continue to pollute in the future.” *Id.* at 57. An ongoing violation may be established by proving that a defendant has violated its permit on or after the date of filing the complaint or by providing evidence of a “continuing likelihood” of intermittent or sporadic violations. *Chesapeake Bay Found. v. Gwaltney*

of *Smithfield*, 844 F.2d 170, 171-72 (4th Cir. 1988). Past violations cease to be “ongoing” on “the date when there is no real likelihood of repetition.” *Id.*

Counts 1 and 2 of the Complaint concern the Water Reclamation Facility’s frequent exceedance of maximum mass load (Count 1) and concentration (Count 2) effluent limitations for two non-toxic pollutant parameters, Total Suspended Solids (“TSS”) and Carbonaceous Biological Oxygen Demand (“CBOD”), for many months from 2019 to March 2021, as self-reported by the County to DEQ on monthly VPDES Permit Discharge Monitoring Reports. *See* Complaint, at 28-31, tbls. 1-8; *see also* Att. C, para. 30.

These exceedances were associated with the aged condition of the Facility’s tertiary filters, which provide an advanced stage of treatment to meet the Facility’s stringent TSS and CBOD effluent limitations. *See* Att. C, para. 31. To correct this problem, Henrico conducted significant rehabilitation work on the Facility’s tertiary filter system. *Id.*, para. 32. As a result of the County’s corrective action, the Facility has achieved and maintained a consistent state of compliance with the TSS and CBOD load limits (Count 1) and concentration limits (Count 2) since April 2021. *See id*; *see also* Att. C-6 (relevant excerpts of Henrico’s Discharge Monitoring Reports filed with DEQ from April 2021 to present showing consistent compliance with TSS and CBOD limits). Similar information on the Facility’s consistent compliance with the TSS and CBOD limits is also available from U.S. EPA’s Enforcement and Compliance History Online (“ECHO”) database.⁶ A PDF of the U.S. EPA database entry for the Henrico County Water Reclamation Facility downloaded on January 3, 2021 confirms its compliance with TSS or CBOD load limits (Count 1) and concentration limits (Count 2) since April 2021. *See* Att. C-7.

⁶ EPA’s ECHO database for Henrico’s Water Reclamation Facility is available at <https://echo.epa.gov/detailed-facility-report?fid=110008189762>.

In light of the County's corrective actions taken and consistent record of compliance maintained since April 2021, Counts 1 and 2 should be dismissed with prejudice because these claims are based on wholly past violations.

IV. CONCLUSION

DEQ has diligently prosecuted a State enforcement action that provides a timely, appropriate, and comprehensive resolution of CWA noncompliance and bars this citizen suit. Therefore, Henrico County respectfully requests that the Court enter an order dismissing Plaintiffs' Complaint with prejudice. Alternatively, the Court should enter an order dismissing Counts 1 and 2 of with prejudice as based on wholly past violations.

Date: January 6, 2022

Respectfully submitted,

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