IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

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

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

INTRODUCTION

In response to the Complaint filed by the Chesapeake Bay Foundation, Inc. and the James River Association ("Plaintiffs"), Henrico County ("Henrico" or "Defendant") has filed a Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Henrico's Motion relies on inaccurate legal conclusions and irrelevant factual observations in order to assert that this action is barred by the diligent prosecution provisions under the Clean Water Act ("CWA"). Henrico further asserts that if the Court determines that this action is not barred, Counts One and Two of Plaintiffs' Complaint should be dismissed. Defendant's Motion fails to articulate a sufficient factual or legal basis for its claims and should be denied.

While many urban localities have had to invest in infrastructure maintenance and improvements to address aging sewage systems, Henrico stands out, but not for the reasons touted in Defendant's Motion to Dismiss. Unlike other cities and counties,[1] Defendant has avoided being subject to consent decrees that would require Henrico to create, secure approvals for, and implement studies and long-term control plans to find sustainable solutions to stop its sanitary sewer overflows ("SSOs") or to provide notifications to inform the public about SSO events. Commonwealth of Va. Dep't of Env't Quality State Water Control Bd. Hr'g. Tr. (Dec. 14, 2021) [hereinafter Hr'g Tr.], at 113–120 (attached hereto as Attachment A). Over the past 28 years, Defendant has failed to undertake appropriate upgrades and continues to violate its Virginia Pollutant Discharge Elimination System ("VPDES") permit through recurring, significant Total Suspended Solids ("TSS") and Carbonaceous Biological Oxygen Demand ("CBOD") effluent violations and illicit discharges of raw sewage and filter bypasses. These unlawful discharges of TSS, CBOD, and sewage pose significant harm to human health, aquatic species, other wildlife, and the ecological integrity of the James River and its tributary creeks and streams. Compl. ¶ 5, ECF No. 1.

Now, Defendant wishes to escape responsibility once again by asking this Court to dismiss the citizen suit brought by Plaintiffs, whose members include swimmers, waders, fishermen, boaters, other recreationalists, and business owners who use and enjoy the James River and its tributaries downstream of Defendant's Water Reclamation Facility ("WRF" or

[1] *See* Third Amended Consent Decree, *United States v. Hampton Rds. Sanitation Dist.*, No. 2:09-cv-481 (E.D. Va., Aug. 26, 2014), *available at* https://www.hrsd.com/sites/default/files/assets/Documents/pdfs/EPA/ThirdAmendedCD-Executed.pdf; Consent Decree, *United States v. Balt. Cty.*, No.1:05-cv-02028 (D. Md. Sept. 21, 2005), *available at* https://resources.baltimorecountymd.gov/Documents/Public_Works/consentdecreefinal.pdf.

"Facility") and downstream of illicit SSOs from Defendant's sewage collection system and who depend on the waterways for their livelihood. *See id.* ¶ 33. These individuals fear Henrico's unlawful pollution and its effect on their health and that of their families, community, clients, and the ecosystem of the James River. *Id.*

The CWA's citizen suit provision has a "central purpose of permitting citizens to abate pollution when the government cannot or will not command compliance." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 62 (1987). Citizen suit provisions, such as 33 U.S.C. § 1365 of the CWA, "ma[k]e clear that citizen groups are not to be treated as nuisances or troublemakers but rather as welcomed participants in the vindication of environmental interests," and such provisions "reflect[] a deliberate choice by Congress to widen citizen access to the courts." *Friends of the Earth v. Carey*, 535 F.2d 165, 172 (2d Cir. 1976) (quoting *NRDC v. Train,* 510 F.2d 692, 700 (1975)); *see also* Statement of Sen. Bayh on the Conference Report on S. 2770, *Legis. History* at 217 ("[C]itizen suits can be a very important a tool for keeping industry and Government alike from letting standards and enforcement slip.").

In its attempt to dismiss Plaintiffs' citizen suit, Defendant mischaracterizes and brushes aside relevant and determinative facts and case law. Contrary to Defendant's assertions, this lawsuit will not "create significant uncertainty and the potential to disrupt or delay the substantial infrastructure improvements. . . ." Def.'s Mem. in Supp. of Mot. to Dismiss [hereinafter Def.'s Mem. in Supp.] at 3, ECF No. 13. In fact, the Commonwealth of Virginia approved the consent order in question on December 14, 2021 and executed the order on December 15, 2021 [hereinafter Final Administrative Consent Order] with the understanding that the order would run

parallel with, and not bar, Plaintiffs' lawsuit.[2] *See infra*, Factual Background. As explained further below, the Court should deny Defendant's Motion because the Virginia Department of Environmental Quality ("DEQ") did not commence any administrative penalty action prior to Plaintiffs' Notice of Intent to Sue letter ("NOI"), the final consent order does not serve as a diligent prosecution bar to Plaintiffs' citizen suit, and Defendant's TSS and CBOD ongoing effluent violations remain unresolved.

FACTUAL BACKGROUND

By releasing excessive TSS,[3] CBOD,[4] and untreated sewage into the James River and its tributaries, Defendant's unlawful pollution poses significant harm to human health, aquatic species, other wildlife, and the ecological integrity of these waterways. Compl. ¶ 5. TSS pollution significantly threatens waterways and the aquatic organisms that inhabit them, by smothering them or blocking sunlight, inhibiting their growth. *Id.* ¶ 6. Suspended solids can also carry bacteria and other toxic substances threatening the health of impacted waterways and humans using those rivers, creeks, and streams. *Id.* Increased levels of CBOD correspond to a decrease in the available oxygen in an affected waterbody, effectively suffocating resident aquatic organisms. *Id.* ¶ 7. Raw sewage can contain an array of viruses, bacteria, and parasites,

[2] It is unclear to Plaintiffs why Defendant is astonished that Plaintiffs do not know the exact upgrade and improvement projects necessary to stop Henrico's continuous and significant SSO, filter bypass, and effluent violations, *see* Def.'s Mem. in Supp. at 13, as Plaintiffs have clearly stated the Final Administrative Consent Order is deficient because it lacks requirements to undertake system-wide studies and develop a long-term control plan to identify the exact remedies to bring Defendant into compliance.

[3] TSS refers to the amount of insoluble particles floating in suspension in wastewater. Compl. ¶6.

[4] CBOD refers to the consumption of dissolved oxygen by microorganisms when they convert organic material into carbon dioxide via respiration. Compl. ¶ 7.

presenting a significant health risk to humans exposed to this waste, and impairs waterways. *Id.* ¶ 8.

Defendant has been provided numerous opportunities, over approximately 28 years, to address its egregious and consistent pollution through administrative consent orders in collaboration with DEQ. Compl. ¶¶ 9, 70–82. In fact, prior to the 2021 Final Administrative Consent Order, Defendant has been subject to four separate administrative consent orders—and several amendments to those orders. *Id.* ¶ 10. After completing the work required under these consent orders, Defendant has failed each time to develop effective pollution controls or prevent discharges prohibited or in excess of the terms established by its VPDES permit. *Id.*

Although Defendant lauds an apparent decrease in SSO volumes in 2020 compared to 2018 to argue that the consent orders are achieving compliance, Defendant conveniently omits key pieces of information that expose why this comparison should not elicit praise. *First*, Defendant completed all the projects listed in its 2010 consent order in early 2018—by April of that year. Compl. ¶ 82. *Second*, Defendant fails to mention that it discharged 48,981,418 of the 48,993,824 total gallons of sewage released in 2018 (i.e., 99.97 percent of the sewage released that year) through SSO events *after* Henrico completed the 2010 consent order projects aimed at resolving these types of overflows. *See id.* Ex. J, ECF No. 1-11. And although Defendant was supposed to fix the Facility's TSS and CBOD violations through the 1994 consent order amendment (to the 1993 consent order), the 2003 consent order, and the 2010 consent order, these violations repeatedly re-emerged—as demonstrated by Defendant's unlawful release of over 1 million pounds of TSS in 2020 beyond what its VPDES permit allows. Compl. ¶ 75, 80; Ex. B at 14, ECF No. 1-3; Ex. E at 1, ECF No. 1-6.

On August 11, 2021, Plaintiffs sent their NOI for Defendant's significant and ongoing violations to Defendant and other recipients as required by the CWA, 33 U.S.C. § 1365(b)(1)(A). Compl. ¶ 12.

On September 13, 2021, DEQ issued a proposed consent order, after it was signed by Defendant on August 25, 2021 [hereinafter Proposed Administrative Consent Order]. Def.'s Mem. in Supp. at 11. The Proposed Administrative Consent Order was remarkedly similar to the four past consent orders entered into by DEQ and Defendant, which failed to stop Defendant's water pollution violations and bring it into compliance. Hr'g. Tr. at 122.

On December 6, 2021, Plaintiffs filed this lawsuit against Defendant. *See generally* Compl. On December 14, 2021, the State Water Control Board, the agency tasked with reviewing and accepting consent orders before they can be finalized and executed, held a hearing to discuss the Proposed Administrative Consent Order. *See generally* Hr'g Tr. Plaintiffs expressed concerns over the Proposed Administrative Consent Order's failure to require the development and implementation of any analyses or long-term control plans to stop Defendant's violations and to require Defendant to issue public notifications to warn members of the public about releases of raw sewage into their local creeks and streams. *Id*. at 113–120. After hearing concerns raised by Plaintiffs, the Board agreed that Defendant's violations were "a serious situation . . . that needs to be addressed," and approved the Proposed Administrative Consent Order with the understanding that such approval would not address the concerns identified in the lawsuit filed by Plaintiffs:

> You've got litigation pending in federal court. . . . And that process is going to take quite some time to work out even if you do wind up in a negotiated settlement with Henrico County. I don't see any reason why this consent order is incompatible with your efforts. In other words, Henrico County can start on the schedule on the consent order right away

> and be working toward that. And that you can come up with some other things as a result of a negotiated settlement in the litigation . . . .While I certainly am in sympathy with your goals, I don't think we're going to do anything to – to [sic] harm them. . . . So I'm going to move that we go ahead and approve the staff recommendation and approve the consent order and have it put into effect.

Hr'g Tr. (Mr. Hayes, State Water Control Board Member) at 121–122.

In fact, the State envisioned that the Proposed Administrative Consent Order would proceed on a parallel path and would not bar Plaintiffs' lawsuit, as evidenced by testimony given by Assistant Attorney General David C. Grandis, counsel to the Board. *See id.* at 123 ("It's my understanding that those—the administrative order and the litigation will proceed on parallel paths."); *see also id.* at 124 (in which Grandis confirmed State Water Control Board Member Jasinski's statement that "the only State action that would bar th[e] federal case from going forward would be actual court action . . . [whereas] . . . *an administrative consent*, like we're looking at today, would not prevent [Plaintiffs] from proceeding along with their federal lawsuit." (emphasis added)).

On December 15, 2021, more than a week after Plaintiffs' Complaint was filed, DEQ executed the Final Administrative Consent Order by countersigning the order. *See* Def.'s Mem. in Supp. Attach. A, ECF No. 13-1. On December 16, 2021, DEQ sent the Final Administrative Consent Order to Henrico. Def.'s Mem. in Supp. at 12.

STANDARD OF REVIEW

"[A] motion to dismiss for failure to state a claim for relief should not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim."[5] *Rogers v. Jefferson-Pilot Life Ins. Co.*, 883 F.2d

[5] When considering a 12(b)(6) motion, a court must accept all of the complaint's factual allegations as true and draw all reasonable inferences therefrom in favor of the plaintiff. *See*

324, 325 (4th Cir. 1989) (citation omitted) (quoting *Conley v. Gibson*, 355 U.S. 41, 48 (1957); *Johnson v. Mueller*, 415 F.2d 354, 355 (4th Cir. 1969)). "In considering a motion to dismiss, the court should accept as true all well-pleaded allegations and should view the complaint in a light most favorable to the plaintiff." *Mylan Laboratories, Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993); *see also Ibarra v. United States*, 120 F.3d 474, 474 (4th Cir. 1997).

When reviewing a motion to dismiss, under Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim upon which relief may be granted, a court must determine whether the factual allegations contained in the complaint "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests," and, when accepted as true, "raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley* 355 U.S. at 47; 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1216 (3d ed. 2004)). "[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Twombly*, 550 U.S. at 563. As the Fourth Circuit has explained, "to withstand a motion to dismiss, a complaint must allege 'enough facts to state a claim to relief that is plausible on its face.'" *Painter's Mill Grille, LLC v. Brown*, 716 F.3d 342, 350 (4th Cir. 2013) (quoting *Twombly*, 550 U.S. at 570).

Kensington Volunteer Fire Dep't, Inc. v. Montgomery Cnty., Md., 684 F.3d 462, 467 (4th Cir. 2012).

ARGUMENT

I. Defendant Cannot Rely on 33 U.S.C. § 1319(g)(6) to Escape Responsibility for its Continuous and Significant Water Pollution Violations.

In its attempt to dismiss Plaintiffs' lawsuit, Defendant relies on 33 U.S.C. § 1319(g)(6)(A)(ii), which states that a citizen action for civil penalties can be barred if "a State has commenced and is diligently prosecuting an action under a state law comparable to this subsection [on administrative penalty actions]." This provision requires both that a State commence an administrative penalty action *and* for the State to be diligently prosecuting such an action in order to preclude a citizen suit for civil penalties. *See id.* However, if notice of a citizen suit is given through a NOI "prior to commencement of an action under this [administrative penalty] subsection" and a lawsuit "is filed before the 120th day after the date" of the NOI, then that citizen suit for penalties will not be barred. *Id.* § 1319(g)(6)(B)(ii). Defendant's argument that Plaintiffs' citizen suit is barred by 33 U.S.C. § 1319(g)(6)(A)(ii) fails in several ways.

At the time the Plaintiffs filed their Complaint, the State was not diligently prosecuting an action under State law. *First*, despite Defendant's wishcasting, DEQ did not commence an administrative penalty action prior to Plaintiffs' NOI, as neither the Notices of Violations ("NOVs") nor circulation of drafts of the consent order between DEQ and Defendant before the NOI constitute "commencement" of an administrative penalty action. Because DEQ did not commence an administrative penalty action prior to Plaintiffs' NOI, this lawsuit is not barred. *Second*, a court's inquiry in finding diligent prosecution is based on whether a final consent order has been issued at the time of a complaint's filing. Here, Plaintiffs' lawsuit can also move forward as DEQ had not filed the Final Administrative Consent Order prior to Plaintiffs' Complaint. Moreover, the Final Administrative Consent Order does not amount to diligent prosecution because it will not resolve Plaintiffs' claims. In fact, the Final Administrative

Consent Order does not even include a date, certain or estimated, by which Defendant must cease its violations. *Third*, assuming arguendo that Plaintiffs are precluded from seeking civil penalties, the limitations in 33 U.S.C. § 1319(g)(6)(A) apply only to civil penalty actions and do not bar Plaintiffs' requests for injunctive and declaratory relief. *Fourth*, Plaintiffs' participation in the public comment process on the Proposed Administrative Consent Order has no bearing on their right to pursue the claims presented or the diligence of the State's enforcement efforts.

A. DEQ did not commence an administrative penalty action against Defendant prior to Plaintiffs' Notice of Intent to Sue letter.

Pursuant to 33 U.S.C. §§ 1319(g)(6)(A)(ii) and 1319(g)(6)(B)(ii), citizen suits for civil penalties are barred only if a State has (1) already "commenced" prior to an NOI *and* (2) "is diligently prosecuting" an administrative penalty action. None of the actions taken by DEQ prior to Plaintiffs' NOI constitute "commencement" of an administrative penalty action.

First, contrary to Defendant's assertions, the NOVs do not constitute "commencement" of an administrative penalty action. Courts have refused to find that an administrative penalty action "commenced" when a State has issued an NOV if such notices lack finality. *See Pub. Int. Rsch. Grp. of N.J., Inc. v. Elf Atochem N. Am., Inc*., 817 F. Supp. 1164, 1173 (D.N.J. 1993) (in which the court denied a defendant's motion to dismiss a citizen suit by rejecting the defendant's claim that a series of NOVs sent prior to NOI "commenced" a State enforcement action). In *Molokai Chamber of Com. v. Kukui Inc.*, 891 F. Supp. 1389, 1404 (D. Haw. 1995), the court found that a Notice of Apparent Violation did not "commence" a state enforcement action because "penalties were contemplated but not yet initiated, as indicated by the letter itself . . . ." *See id*. at 1396 (in which the NOV stated that "[f]ailure to [take action to prevent further recurrence] *may* lead to *more stringent enforcement action* by the Department." (first emphasis added)). Here, each of the NOVs issued by DEQ to Defendant state that "Henrico County *may be*

asked to enter into a Consent Order with the Department" and "if *informal* discussions do not lead to a satisfactory conclusion, [Defendant] may request in writing that DEQ take all necessary steps to issue a final decision or fact finding under the APA on whether or not a violation has occurred." *See, e.g.*, Compl. Ex. L at 4–5, ECF No. 1-13 (Apr. 3, 2020 NOV) (emphasis added). DEQ itself recognizes that its NOVs lack finality. *See* DEQ, Enforcement webpage, (emphasis added) *accessible at* https://www.deq.virginia.gov/permits-regulations/enforcement (last accessed Jan. 13, 2022) ("A Notice of Violation (NOV) is correspondence from DEQ that is sent to a person when an inspection or a review of agency records indicate that a violation of a law or regulation *may have* occurred. An NOV is *not a case decision or final agency action*.").

Courts have also refused to find that a NOV "commences" an administrative penalty action if the notice merely requests—not demands—information or certain actions. In *Gulf Restoration Network v. Hancock Cty. Dev., LLC*, No. 1:08CV186-LG-RHW, 2009 WL 3841728 (S.D. Miss. Nov. 16, 2009), a defendant also attempted to dismiss a citizen suit by arguing that a NOV served as the commencement of an administrative penalty action. Although the NOV mentions the relevant civil penalty authorities that could be used to assess a penalty, it stopped short of assessing a penalty amount and instead, "request[ed] information 'to determine' how it wanted to 'resolve' the case," which indicated to the court "that the [regulating authority] was not commencing a 1319(g) administrative civil penalty action." *Id.* at *5. Here, DEQ's NOVs inform Defendant that "DEQ staff wishes to discuss all aspects of their observations with [Defendant]" and ask Defendant to "please advise [DEQ] if [Defendant] dispute[s] any of the observations recited herein or if there is other information of which DEQ should be aware." Compl. Ex. L at 4.

In fact, the sole case cited and relied upon by Defendant is distinguishable from the instant lawsuit on this point. *See* Def.'s Mem. in Supp. at 7–8. In *Naturaland*, the NOV at issue *demanded* that the defendant attend "an enforcement conference [that] has been scheduled for Wednesday, September 25, 2019" and notified the defendant "that failure to attend the scheduled enforcement conference may result in the issuance of an Administrative Order without its consent." Mot. to Dismiss for Def. Ex. 3 at 2, 5, *Naturaland Tr. v. Dakota Fin., LLC*, No. 6:20-CV-01299-JD, 2021 WL 1688844 (D.S.C. Mar. 31, 2021) (ECF No. 9-3); *see also Sierra Club v. Colo. Ref. Co.*, 852 F. Supp. 1476, 1485 (D. Colo. 1994) (in which a court found an NOV "commenced" an administrative penalty action because it "demanded submission of a specific correction plan . . . ."). Therefore, DEQ's NOVs did not "commence" an administrative penalty action against Defendant as they lack finality and request, not demand, information from Defendant.

Second, Defendant fails to point to any case law to support its argument that circulation of draft consent orders between a State and violator constitutes "commencement" of an administrative penalty action. Instead, district courts within the Fourth Circuit have held that the *issuance* of proposed consent orders for notice and comment constitutes "commencement." *See Ohio Valley Env't Coal., Inc. v. Hobet Mining, LLC,* 723 F. Supp. 2d 886, 906 (S.D.W. Va. 2010) (in which the Southern District of West Virginia found that the State "commenced" an enforcement action "when the agency released the proposed modified consent order in the Boone County action for notice and comment."); *Ohio Valley Env't Coal. v. Lexington Coal Co.*, No. CV 3:19-0573, 2021 WL 1093631, at *2 (S.D.W. Va. Mar. 22, 2021) (in which the Southern District of West Virginia recognized that an enforcement action "commenced" when the regulating agency issued a proposed consent order and found that the plaintiffs' lawsuit was not

barred by 33 U.S.C. § 1319(g)(6) because the plaintiffs sent their June 2019 NOI prior to the issuance of the December 2020 proposed consent order). Here, Plaintiffs sent their NOI on August 11, 2021, *before* DEQ released the Proposed Administrative Consent Order for public comment on September 13, 2021.

Thus, Plaintiffs' citizen suit for civil penalties is not barred because their NOI was sent prior to DEQ's commencement of its administrative penalty action and Plaintiffs filed their lawsuit within 120 days of the NOI. *See* 33 U.S.C. § 1319(g)(6)(B)(ii).

B. Plaintiffs' citizen suit is not barred by diligent prosecution because Plaintiffs filed their lawsuit prior to the Final Administrative Consent Order, and the order fails to sufficiently require Defendant to resolve Plaintiffs' claims.

As stated above, under 33 U.S.C. § 1319(g)(6)(A)(ii), citizen suits for civil penalties are barred only if a State (1) already "commenced" prior to a NOI *and* (2) "is diligently prosecuting" an administrative penalty action. In other words, Defendant's Motion to Dismiss fails if it cannot meet *both* prongs. Since Plaintiffs sent their NOI prior to DEQ's commencement of any administrative penalty action and filed the Complaint within 120 days of their NOI, 33 U.S.C. § 1319(g)(6)(B)(ii) allows their citizen suit to go forward and this should be the end of the Court's inquiry. However, out of an abundance of caution, Plaintiffs provide additional reasons why Defendant's other arguments lack merit.

In order to bar a citizen suit for civil penalties, 33 U.S.C. § 1319(g)(6)(A)(ii) also requires diligent prosecution by a State. Defendant's diligent prosecution arguments fail for three reasons. *First*, Plaintiffs' lawsuit is not precluded by diligent prosecution because Plaintiffs filed their citizen suit on December 6, 2021, *before* the Final Administrative Consent Order was fully executed on December 15, 2021. Circuit courts, including the U.S. Court of Appeals for the Fourth Circuit, have established that whether a State is diligently prosecuting its own

enforcement action against a violator is a question of "jurisdiction [that] is normally determined as of the time of the filing of a complaint." *Chesapeake Bay Found. v. Am. Recovery Co.*, 769 F.2d 207, 208 (4th Cir. 1985); *see also Cal. Sportfishing Prot. All. v. Chico Scrap Metal, Inc.*, 728 F.3d 868, 877 (9th Cir. 2013) (citing *Knee Deep Cattle Co. v. Bindana Inv. Co.*, 94 F.3d 514, 516 (9th Cir. 1996)) (finding that the bar for diligent prosecution "is assessed [at] the time the citizen-suit complaint is filed," *not* continuously re-evaluated over the course of the case).

Courts look to whether a final state enforcement action was filed or executed at the time of the complaint to determine whether there is a diligent prosecution bar. *See Am. Recovery Co.*, 769 F.2d at 208 (holding that a final state enforcement action filed three hours after a citizen suit was filed did not preclude the citizen suit from going forward); *see also Conn. Fund for the Env't v. Upjohn Co.,* 660 F.Supp. 1397, 1402–1404 (D.Conn. 1987) (in which a court ruled that a final state enforcement action filed three days after a citizen suit was filed in federal court did not preclude the citizen suit from going forward by concluding that it "must apply an inflexible rule which determines jurisdiction from the time of filing the complaint."); *Wild Fish Conservancy v. Cooke Aquaculture Pac., LLC*, 2019 WL 6310660 (W.D. Wash. 2019) (in which a court found that the 33 U.S.C. § 1319(g)(6) bar to a plaintiff's action did not apply where the plaintiff filed its federal court lawsuit before the State executed a consent decree with defendants). Here, at the time of Plaintiffs' Complaint, there was no diligent prosecution because the Final Administrative Consent Order had yet to be approved, executed, and finalized by the State.

Second, the Final Administrative Consent Order as a whole does not amount to diligent prosecution because it is not sufficiently capable of ensuring Defendant will return to compliance with its VPDES permit to resolve the violations alleged in Plaintiffs' lawsuit, even if Defendant completes the requirements found in the order. A CWA enforcement action will ordinarily be

considered "diligent" if the action "is capable of requiring compliance with the Act and is in good faith calculated to do so." *Piney Run Pres. Ass'n v. Cnty. Comm'rs Of Carroll Cnty., Md.*, 523 F.3d 453, 459 (4th Cir. 2008). Courts have found a lack of diligent prosecution when consent agreements do not offer a realistic assurance of resolving a plaintiff's claims. *See also Hobet Mining, LLC*, 723 F. Supp. 2d at 907–08 (holding that a consent decree that did little to address or prevent the violations of the permit constituted a failure to act in a manner reasonably calculated to require compliance and served as grounds for finding a lack of diligence in prosecution); *Ohio Valley Env't Coal. v. Indep. Coal Co.*, 2011 WL 1984523 (S.D. W.Va 2011) (finding that a consent decree did not have a realistic prospect of achieving compliance with a NPDES permit's effluent limitations).

Here, the Final Administrative Consent Order does not offer a realistic prospect of achieving compliance to resolve the claims raised in Plaintiffs' lawsuit. In fact, the Final Administrative Consent Order does not include a date, certain or estimated, by which Defendant must cease its illicit filter bypasses, TSS and CBOD effluent violations, or unlawful SSOs. In addition, the schedule of projects is remarkedly similar to the projects required by DEQ in Defendant's four previous administrative consent orders that have failed to address the violations identified in the Complaint. *Compare* Def.'s Mem. in Supp. Attach. A *with* Compl. Exs. D–I, ECF Nos. 1-5–1-10. Despite completing work required by four consent orders and several amendments to those orders, Defendant failed to maintain compliance for any meaningful period of time. More specifically, SSOs continue to recur unabated despite completion of projects purported to address these sewage overflows in the 1998, 2003, and 2010 consent orders, and effluent violations due to TSS and CBOD exceedances continue despite the 1993, 2003, and 2010 consent orders that were supposed to address them. Compl. ¶¶ 73–80; Ex. E.

After Defendant completed the projects required under the 2010 Consent Order, Defendant released over 56 million gallons of sewage from May 2018 to the present, Compl. ¶ 82, and discharged over 1 million pounds of TSS in 2020 beyond what its VPDES permit allows, *id*. Ex. B at 14. Further, unlike other sewage consent agreements,[6] the Final Administrative Consent Order does not require Defendant to create or undertake a comprehensive study or long-term control plan to implement sustainable, lasting solutions for these violations. Hr'g Tr. at 119–120. Defendant has not and cannot state that its violations will cease upon completion of the work in the Final Administrative Consent Order. Moreover, Defendant has failed to provide sufficient evidence to rebut Plaintiffs' arguments to show why the list of projects differs from those required under previous consent orders.

Third, the Final Administrative Consent Order fails to serve as a diligent prosecution bar because the order's required projects do not address the same claims alleged by Plaintiffs' Complaint. Courts have rejected diligent prosecution arguments when a consent agreement's requirements do not respond to the same claims raised in a plaintiff's lawsuit. *See Chesapeake Bay Found. v. Severstal Sparrows Point*, LLC, 794 F. Supp. 2d 602, 617 (D. Md. 2011) (in which a court found that a citizen suit was not precluded by diligent prosecution because the consent decree "does not appear responsive to [the same] claims" raised by plaintiffs). In *Severstal Sparrows Point*, although the State and plaintiff alleged the same violations in their complaints, the court denied the defendant's motion to dismiss for certain claims because the State's "[c]onsent [d]ecree does not appear responsive to these claims"). *Id.* Here, the Final Administrative Consent Order fails to state which project(s) are aimed to resolve Defendant's

[6] *See* supra note 1.

TSS exceedances, CBOD exceedances, or illicit filter bypasses. Therefore, even though the Final Administrative Consent Order and Plaintiffs' Complaint both list Defendant's TSS, CBOD, partial filter bypass, and SSO violations, there is "insufficient evidence" the Final Administrative Consent Order responds to and resolves these claims. *See id.* Meanwhile, the State Water Control Board agreed that Defendant's violations are "a serious situation . . . that needs to be addressed," after hearing concerns raised by Plaintiffs, and approved the Proposed Administrative Consent Order with the understanding that such approval would not conflict with the instant lawsuit filed by Plaintiffs. Hr'g Tr. at 121–122 ("I don't see any reason why this consent order is incompatible with your efforts. In other words, Henrico County can start on the schedule on the consent order right away and be working toward that. And that you can come up with some other things as a result of a negotiated settlement in the litigation . . . .").

For these reasons, the Final Administrative Consent Order does not amount to diligent prosecution.

C. 33 U.S.C. § 1319(g)(6) does not bar Plaintiffs' requests for injunctive and declarative relief.

For the sake of argument, even if Plaintiffs were barred from seeking civil penalties, 33 U.S.C. § 1319(g)(6) does not impair their right to seek injunctive or declaratory relief. The statute expressly states that violations which the State has commenced and is diligently prosecuting "shall not be the subject of a *civil penalty* action. . . ." 33 U.S.C. § 1319(g)(6)(A)(ii) (emphasis added). However, the CWA's citizen suit provision allows citizens to sue for various forms of injunctive relief in addition to civil penalties. *Id.* § 1365(a). District courts within the Fourth Circuit, Second Circuit, and Ninth Circuit have stated that injunctive and declarative relief should be separated from civil penalties when considering whether a CWA citizen suit is barred. *See Hobet Mining, LLC*, 723 F. Supp. 2d at 909 n.10 ("When considering whether a

citizen suit has been mooted by government action, a court should consider injunctive relief separate from civil penalties.") *see also City of Newburgh v. Sarna*, 690 F. Supp. 2d 136, 155–156 (S.D.N.Y. 2010) ("Section 1319(g)(6) does not bar [p]laintiff's CWA suit in its entirety. . . .[as the] limitation on citizen suits applies only to CWA claims for civil penalties, not to claims for declaratory judgments or injunctive relief."); *Sierra Club v. Hyundai Am., Inc.*, 23 F. Supp. 2d 1177, 1180 (D. Or. 1997) ("It would require a significant departure from the plain meaning of the statute to find plaintiffs' case for injunctive or declaratory relief barred by section 1319(g)(6)(A)."). Thus, the Court should allow Plaintiffs' citizen suit for injunctive and declaratory relief to go forward even if the Court bars the request for civil penalties.

D. Plaintiffs' participation in the public comment process has no bearing on their right to pursue the claims presented or the diligence of the State's enforcement efforts.

Plaintiffs' participation in the public comment process demonstrates Plaintiffs' efforts to exhaust all potential remedies before proceeding with litigation and is irrelevant to this Court's assessment of the validity of the claims presented. Neither Plaintiffs' participation in the public comment period—nor the State's response to Plaintiffs' participation—translates to an acknowledgment or acceptance of diligent prosecution by the State, and Defendant fails to articulate any legal argument to that effect. The question before this Court is whether the State is diligently prosecuting the alleged violator for the same claims, not whether the Plaintiffs have had an opportunity to raise concerns through a process Defendant would prefer. As discussed above, Plaintiffs issued a NOI to Defendant prior to release of the Proposed Administrative

Consent Order and commenced this lawsuit within the statutorily designated timeframe identified in 33 U.S.C § 1319(g)(6).

Defendant mischaracterizes DEQ's response to comments and the views of the State Water Control Board. Defendant suggests that DEQ identified why each comment was "inappropriate, counterproductive, or otherwise unhelpful." Def.'s Mem. in Supp. at 12. This assertion is patently misleading as DEQ's "response to comment" document does not identify any individual commenter in its response and further makes no qualitative assessment of the strength of those comments. *See generally* Def.'s Mem. in Supp. Attach. B, ECF No. 13-2. Additionally, DEQ's decision not to incorporate comments received into the Final Administrative Consent Order does not render those comments irrelevant or inappropriate. *See generally Friends of Buckingham v. State Air Pollution Control Bd.,* 947 F. 3d 68 (4th Cir. 2020) (noting that DEQ failed to adequately assess information received by commenters and the Virginia Air Board, in adopting DEQ's reasoning, acted arbitrarily and capriciously). Defendant's argument reveals only its fundamental misunderstanding of the public comment process rather than any meaningful assessment of Plaintiffs' right to bring this action or the State's efforts in addressing ongoing violations from the WRF or sewage collection system.

Indeed, the State Water Control Board recognizes the merits of this litigation and acknowledges its value as an independent action. In response to comments provided by representatives of Plaintiffs' respective organizations, State Water Control Board member Hayes stated that he didn't see "any reason why [the] consent order is incompatible with [Plaintiffs'] efforts." Hr'g Tr. at 121. Hayes went on to say that approving the administrative consent order "would not be incompatible at all with [Plaintiffs'] goals." *Id.* at 122. Further, when the Board's counsel was asked by a second member of the Board, Ms. Jasinski, to confirm Mr. Hayes'

assessment, counsel described this litigation and the consent order as proceeding on "parallel paths" and noted that this Court "could grant additional leave to *supplement* what the Board does today." *Id.* at 123 (emphasis added). Upon receiving this confirmation from counsel, Mr. Hayes said that he "would not want to stop [Plaintiffs] from being able to proceed with [the litigation]." *Id.* Following this discussion, the Proposed Administrative Consent Order was approved by the Board with the understanding and desire that their actions would have no impact on this lawsuit.

Through its discussion of Plaintiffs' engagement in the public participation process, Defendant proves only that Plaintiffs have demonstrated a concrete interest in this matter and sought to reach a practical solution before pursuing litigation. Following the issuance of its NOI and submittal of public comments, Plaintiffs initiated this litigation in accordance with 33 U.S.C. § 1319(g)(6), granting this Court subject matter jurisdiction over this suit. Accordingly, Defendant's Motion to Dismiss for lack of subject matter jurisdiction should be denied.

II. Counts One and Two of Plaintiffs' Complaint Allege Ongoing and Continuous Violations and Are Not Barred by the Supreme Court's Decision in *Gwaltney*.

Counts One and Two of Plaintiffs' Complaint address violations of effluent load limitations and effluent concentration limitations set in Defendant's VPDES permit, respectively. *See* Compl. ¶¶ 109–126. In order to establish jurisdiction, citizen-plaintiffs must prove the existence of a "continuous or intermittent violation" that is not "wholly past." *See Gwaltney* 484 U.S. at 57. This can be accomplished by "adducing evidence from which a reasonable trier of fact could find a continuing likelihood of a recurrence in intermittent or sporadic violations. Intermittent or sporadic violations do not cease to be ongoing until the date when there is no real likelihood of repetition." *Am. Canoe Ass'n v. Murphy Farms, Inc.*, 412 F. 3d 536, 539 (4th Cir. 2005) (citing *Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd.*, 844 F. 2d 170, 171–172

(4th Cir. 1988)). In light of Defendant's extensive history of serial non-compliance, prior inadequate enforcement efforts by the State, and the most recent consent order's acknowledgement of the likelihood of continued violations, there is a "reasonable likelihood" that Henrico will continue to violate the CWA and pollute the James River at a level which is incompatible with its ecological integrity, the goals of the Chesapeake Bay Total Maximum Daily Load program, and the CWA.

A. The violations alleged in Counts One and Two are not "wholly past" and are likely to recur.

Count One (violations of effluent load limitations) and Count Two (violations of effluent concentration limitations) of Plaintiffs' Complaint address violations from the WRF that are likely to recur. In *Gwaltney*, the Supreme Court established the standard of review for claims brought pursuant to the citizen suit provision of the CWA. The *Gwaltney* Court clarified that the CWA did not authorize citizen suits for "wholly past" violations but, as the Court noted, that holding did not necessarily dispose of the allegations presented by the conservation organizations in that case. *Gwaltney*, 484 U.S. at 64. Instead, the Court held that § 505 of the CWA conferred jurisdiction over good-faith allegations of continuous or intermittent violations and remanded the case for further consideration consistent with its holding. *Id*. On remand, the district court for the Eastern District of Virginia evaluated the merits of citizen-plaintiff's allegations and the operations of the waste-generating facility in question. The district court noted that "[d]espite Gwaltney's improved wastewater treatment facilities, there was no degree of certainty [at the time the suit was filed] that the risk of continued violations had been eradicated." *Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd.* 688 F. Supp. 1078, 1079 (E.D. Va. 1988). As a result, the court held that the citizen-plaintiffs' claims were not moot. The district court's assessment of

likelihood of continuing violations was further upheld by the Fourth Circuit on appeal. *See Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd.* 890 F. 2d 690 (4th Cir. 1989).

The timeline of violations in *Gwaltney* is particularly relevant here. The citizen-plaintiffs in *Gwaltney* based their claims on repeated violations that occurred between October 1981 and May 1984, with the last violation occurring approximately one month before the suit was filed in June of 1984. *Gwaltney*, 688 F. Supp. at 1079. Similarly, Plaintiffs in this case have based their claims on violations occurring at the Henrico WRF between March 2019 and March 2021. Plaintiffs issued a NOI to Defendant in August 2021 and filed this suit in December 2021. In reaching its conclusion, the district court in *Gwaltney* found that the evidence presented by the plaintiffs and the doubts of future compliance held by Gwaltney's own witness provided sufficient support for the allegations made. *Id*. The same is true in the present case. Plaintiffs have provided detailed evidence of Defendant's ongoing history of noncompliance and Henrico County has revealed its own doubts by agreeing to undertake projects that purport to address violations at the WRF.[7] Thus, in light of the facts presented by Plaintiffs in their Complaint, this court should find, as it did in *Gwaltney*, that there is a "very real danger and likelihood of further violation[s]" from the Henrico Facility. *Id*. at 1079.

As the Court established in *Gwaltney,* the burden is on the defendant, not the plaintiff, to demonstrate that it is "*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur." *Gwaltney* 484 U.S. at 66 (citing *United States v. Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968)). In support of their Motion, Defendant argues that the Facility has

[7] As described in Section II.B above, although Plaintiffs have articulated why the Final Administrative Consent Order's projects will *not* resolve Plaintiffs' claims, the existence of these projects *does* demonstrate that DEQ and Henrico's acknowledgment that the TSS and CBOD violations remain ongoing and unresolved.

maintained compliance since April 2021 and therefore the violations alleged in Counts One and Two of Plaintiffs' Complaint are "wholly past." Def.'s Mem. in Supp. at 14. But this is simply not the case. In the Proposed Administrative Consent Order released for public comment on September 13, 2021, and executed on December 15, 2021, Defendant and the State reached the conclusion that the Facility was likely to continue to experience effluent violations and that the extent of those violations would require approximately seven years of targeted action to address. *See* Def.'s Mem. in Supp. Attach. A ¶ 33 ("In order for Henrico to *return* to compliance DEQ staff and representatives of Henrico have agreed to the following schedules of compliance. . . ." (emphasis added)). In fact, these problems have continued to reemerge over the past 28 years. Compl. Ex. E ("This is an amendment to [the 1993 consent order]. . . .[T]he facility has been unable to meet Permit limits for [TSS] and [CBOD]. . . ."); Compl. ¶ 74 ("On November 2, 2001, a NOV was issued to Henrico for violations of TSS and CBOD reported by the County . . . ."); *id.* ¶ 75 ("On January 7, 2003, the DEQ and the County entered into another administrative consent order . . . to address consistent TSS, CBOD, total phosphorus, ammonia nitrogen, and chlorine effluent violations as well as continued SSOs . . . ."); *id.* ¶ 79 ("On December 17, 2010, DEQ and Henrico entered into yet another administrative consent order [to resolve TSS and CBOD violations]."). In short, Defendant asks this Court to focus on the most recent ten months since April 2021, and ignore the past *28 years* of recurring non-compliance. It is unclear why Defendant expects Plaintiffs, or this Court, to accept that its chronic effluent violations are unlikely to recur when they themselves have acknowledged that the problem persists.

Further, the existence of a consent order with targeted enforcement measures is not prima facie evidence that violations will not recur. *See United States v. Smithfield Foods,* 191 F. 3d 516, 526 (4th Cir. 1999) (finding that the government's enforcement actions were not precluded

by *Gwaltney* because the chosen enforcement methods were not achieving compliance). Henrico has failed to comply with the terms of its permit for close to thirty years, despite repeated enforcement efforts, and these violations are likely to persist, as evidenced by the continued need for consent orders. Despite the fact that Henrico has completed the projects under each of those consent orders as required by DEQ, the consent orders have failed to address the same ongoing problems: excessive and continuous violations of effluent concentration and load limits for TSS and CBOD. *See* Compl. at ¶¶ 74–82 (detailing the terms and preceding conditions of Henrico's 2003, 2010 and 2021 consent orders). Similarly, as Plaintiffs noted previously, the current Final Administrative Consent Order will not resolve the violations identified in Plaintiffs' Complaint and is only further evidence of the likelihood of recurring violations from the WRF.

In light of Henrico's chronic violations and proven inability to maintain compliance with the terms of its VPDES permit, Defendant's violations of TSS and CBOD effluent limitations are not wholly past and are likely to recur. Accordingly, Plaintiffs ask that the Court retain Count 1 and Count 2 concerning violations of effluent load limitations and violations of effluent concentration limits, respectively, and provide such relief as is deemed appropriate.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully requests that this Court deny Defendant's Motion to Dismiss in its entirety.

Date: January 20, 2022

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CERTIFICATE OF SERVICE

I certify that on January 20, 2022, a true and correct copy of the foregoing, Plaintiffs' Brief in Opposition to Defendant's Motion to Dismiss, was filed electronically with the Clerk of Court by using the CM/ECF system, which provides notice of filing to all counsel of record by electronic means.

/s/ *Jon A. Mueller*
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