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

CHESAPEAKE BAY FOUNDATION, INC., and JAMES RIVER ASSOCIATION,

Plaintiffs,

v.

COUNTY OF HENRICO,

Defendant.

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

HENRICO COUNTY'S REPLY BRIEF 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

By this Clean Water Act ("CWA") citizen suit, Plaintiffs seek to supplant the role of the Commonwealth of Virginia in enforcing the CWA against a fully-cooperative local government. The Commonwealth, acting through its expert administrative agency, the Virginia Department of Environmental Quality ("DEQ"), "commenced" its enforcement action well before Plaintiffs gave their Notice of Intent to Sue. Thereafter, the agency followed through by "diligently prosecuting" its action to completion and securing as of August 2021 Henrico's execution of the Enforcement Order obligating it to perform $224 million of wastewater infrastructure upgrades. Because citizen suits are reserved for the purpose of abating pollution when the government regulators cannot or will not command compliance, this citizen suit is barred by 33 U.S.C. § 1319(g)(6). *See Gwaltney v. Chesapeake Bay Found.*, 484 U.S. 49, 62 (1987).

Notably, DEQ conducted a transparent public process in which Plaintiffs participated, at least initially. Plaintiffs made written comments and requests pertaining to the Enforcement Order, which DEQ reviewed and rejected on the merits with extensive explanation in its comprehensive

"Consolidated Response to Comments from EIP, JRA, CBF and Individual Constituents." [1] *See* Def. Memo. at Att. B. When DEQ's State Water Control Board (the "Board" or "SWCB") met for its regular quarterly meeting on December 14, 2021, Plaintiffs again shared their comments and recommendations, but the Board agreed with DEQ and voted unanimously to approve the Enforcement Order. At that point, Plaintiffs abandoned the State process, failed to exhaust their administrative remedies by not asking to present evidence in a formal hearing before the Board, and failed to seek judicial review of the Board's action in State circuit court. *See* Va. Code §§ 62.1-44.15(8f) and 62.1-44.29. Instead, they opted to pursue the federal citizen suit that they had filed on December 6, 2021, in the midst of the State process.

Plaintiffs invite the Court to second-guess DEQ and find the State enforcement action lacked diligence for not requiring Henrico to back-track and undertake new studies and plans. Pls. Opp. Br. at 2, 4 n.2, and 16. However, DEQ found that (1) the County has already undertaken "the same or similar studies," (2) Henrico (fortunately) already has the necessary "facility plans and associated capital improvement plans," and (3) Plaintiffs' request "represents a redundant effort resulting in added costs and delays in implementation of corrective action."[2] *See* Def. Memo. at Att. B (Consolidated Response to Comments on "Sewer System Plans and Measures" Issue).

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[1] "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.

[2] Plaintiffs contrast the DEQ Enforcement Order with federal consent decrees at page 2, footnote 1 of their opposition brief, but that comparison only confirms DEQ's point about delays. For example, the Baltimore County consent decree (page 31, paragraph 10.A.) allows *14.5 years* to complete repair, replacement, rehabilitation or other corrective action to the county's sewer system, whereas Henrico County must complete its last sewer system project within *seven years* (December 15, 2028). *See* Def. Memo. at Att. A, Schedule of Compliance Appendix B.

Plaintiffs also invite the Court to find a lack of diligence by DEQ in 2020-21 by discrediting DEQ's 2010 enforcement order with the benefit of hindsight and new climate change knowledge and experience. DEQ and Henrico acknowledge that the decade since the 2010 order has brought change in the form of more frequent and intense storms. DEQ documented extreme annual rainfall amounts in 2016, 2018, and 2020 as well as three separate "100 year storms" in Henrico over five years rather than 300 years. *See* Def. Memo. at Att. B (Consolidated Response to Comments on "SSO Volumes" Issue). DEQ explained that its past orders were tailored to the needs known "at the relevant point in time" and that "conditions have changed significantly" including "rainfall volume challenges." *See id.* (Consolidated Response to Comments on "Past Consent Orders" Issue).

Henrico agrees with DEQ that the effects of climate change have created new challenges and the 2021 Enforcement Order appropriately requires $224 million in new projects to meet it. That order includes $118 million for new sewer system projects to meet increased capacity needs and $106 million for upgrades to the Water Reclamation Facility to handle future flow increases even though filter rehabilitation work at the Facility had restored permit limit compliance in April 2021.

Plaintiffs do not question that Henrico County – which enjoys a national reputation for excellence in delivering government services[3] and a triple-A bond rating – will do what it has been

[3] For an extensive list of awards bestowed on Henrico County by the National Association of Counties and Virginia Association of Counties, see *Awards*, HENRICO CNTY. VA., https://henrico.us/government/awards/ (last visited Jan. 26, 2022). Additionally, the Water Environment Federation, an international non-profit dedicated to protecting public health and the environment, awarded Plant Manager James Grandstaff with the William D. Hatfield Award in 2020 for his outstanding performance and professionalism as the operator of Henrico's Water Reclamation Facility. *Department Awards: Public Utilities*, HENRICO CNTY. VA., https://henrico.us/government/awards/departmental/public-utilities/ (last visited Jan. 26, 2022).

ordered to do. Thus, because the CWA does not allow citizens to supplant the State regulator's role in comprehensive enforcement actions, the Complaint must be dismissed.

II. ARGUMENT

A. DEQ "Commenced" Its Administrative Enforcement Action Well Before Plaintiffs Made Their Required Notice of Intent to Sue.

To avoid the jurisdictional bar of 33 U.S.C. § 1319(g)(6)(A), the statute requires, among other things, that Plaintiffs establish that their August 11, 2021 Notice of Intent to Sue pursuant to 33 U.S.C. § 1365(a)(1) was given "prior to commencement" of DEQ's enforcement action. However, Plaintiffs' argument ignores the practical impossibility that in the span of two weeks — in the summer — between August 11, 2021, and August 25, 2021, when the Enforcement Order was signed by the Henrico County Manager, DEQ (1) commenced its enforcement action from ground zero, (2) drafted a complex administrative order for 10 specific Water Reclamation Facility projects and 28 specific collection system projects, and (3) negotiated all of the details of the order with County officials in final form ready for execution.

Plaintiffs misconstrue Henrico's argument regarding the commencement of DEQ's action by focusing their argument almost exclusively on DEQ's issuance of Notices of Violations ("NOVs"). Henrico does not contend that DEQ's issuance of NOVs standing alone constituted "commencement." Rather, the panoply of significant actions by DEQ prior to the County Manager's execution of the Enforcement Order on August 25, 2021, proves that DEQ "commenced" its enforcement action well before August 11, 2021. Those actions included (a) DEQ's Compliance Division referred the matter to the DEQ's Enforcement Division for enforcement by issuance of the NOVs, *see* Def. Memo. at 6; (b) DEQ conducted an Enforcement Conference with the County on June 24, 2020, in which DEQ secured Henrico's acknowledgment of needed corrective actions, *see* Def. Memo. at 6-7; (c) DEQ delivered a draft enforcement order

to the County on August 26, 2020 for review and comment to facilitate a settlement expediting the corrective actions, *see* Def. Memo. at 7; (d) DEQ negotiated with the County over the ensuing 12 months to significantly expand the order to identify the 10 specific Water Reclamation Facility projects and the 28 specific collection system projects, to triple the draft civil charge, and to add a Supplemental Environmental Project, *see* Def. Memo. at 9-10; (e) the resulting "order was combined and initiated and sent to Henrico County on August 10, 2021," *see* Pls. Opp. Br. at Att. A, p.94 (SWCB Meeting Transcript, Statement of DEQ Enforcement Director Severs); and (f) Henrico executed the expanded final Enforcement Order on August 25, 2021. Taken together, these actions satisfy the commencement requirement and justify imposition of the jurisdictional bar of 33 U.S.C. § 1319(g)(6)(A).

Moreover, another federal district court in the Fourth Circuit has ruled that "commencement" of the enforcement process began upon issuance of a Notice of Alleged Violation. *Naturaland Trust v. Dakota Fin.*, 531 F. Supp. 3d 953, 961 (D.S.C. 2021). This logical reading of the term "commencement" is consistent with the fundamental principle that the role of the citizen suit is to "supplement rather than to supplant" the role of the government as prosecutor. *See Gwaltney*, 484 U.S. at 60; *see also Sierra Club v. Colorado Refining Co.*, 852 F. Supp 1476 (D. Colo. 1994) (holding that the State regulatory agency's issuance of a Notice of Significant Noncompliance for permit violations and demand for a correction plan commenced an action within the meaning of 33 U.S.C. § 1319(g)(6)(A)(ii) sufficient to bar a citizen suit).

Plaintiffs seek to counter *Naturaland*'s ruling with decisions against West Virginia coal companies. Pls.' Opp. Brief at 12-13. However, those cases associated commencement with a later stage in the enforcement process (the publication of the order for public participation), in the context of a State regulatory agency that the district court had found "fail[ed] to require meaningful

compliance" and entered into a consent decree that "does little to address" the compliance problem after years of related litigation. *See Ohio Valley Env't Coal. v. Hobet Mining*, 723 F. Supp. 2d 886, 907 (S.D.W.V. 2010).

Therefore, the South Carolina and West Virginia cases reached different conclusions in different State enforcement contexts. Here, the timely, appropriate, and comprehensive actions by DEQ more closely resemble the facts of – and warrant the same outcome on "commencement" in – *Naturaland*.

B. DEQ Was Diligently Prosecuting Its Enforcement Action When Plaintiffs Filed Their Complaint in District Court.

Plaintiffs state the correct rule on timing – that DEQ's "diligence" must be measured at the time Plaintiffs filed their Complaint – but rely on cases from a different context to reach the wrong conclusion. Pls.' Opp. Br. at 13-14. Their cases address state *civil* enforcement under 33 U.S.C. § 1365(b)(1)(B) rather than, as here, *administrative* enforcement under 33 U.S.C. § 1319(g)(6)(A). *See id. (*citing *Chesapeake Bay Found. v. Am. Recovery Co.*, 769 F.2d 207 (4th Cir. 1985) and *Conn. Fund for Env't, Inc. v. Upjohn Co.*, 660 F. Supp. 1397 (D. Conn. 1987)).

Plaintiffs also err in claiming that courts "look to whether a final state enforcement action was filed or executed at the time of the complaint" to determine statutory "diligence." *Id.* at 14. The diligent prosecution bar of § 1319(g)(6)(A)(ii) does not require DEQ to have *completed* its administrative enforcement action; rather, the agency must simply be "diligently prosecuting" the action (*i.e.*, an ongoing diligent effort satisfies the statute).

When Plaintiffs filed their Complaint on December 6, 2021, DEQ was prosecuting its enforcement action. The public comment period had ended on October 13, 2021, *see* Def. Memo. at 11, Att. C paras. 21-22 (discussing public comment period), and Att. C-2 (*Virginia Register* notice), and DEQ had published on the Virginia Regulatory Town Hall its "Enforcement Item

Summary Form," including its "Consolidated Response to Comments from EIP, JRA, CBF and Individual Constituents for Henrico County WRF Consent Order." *See* Def. Memo. at 11, Att. B, and Att. C, para. 23. DEQ also had the matter on the agenda for its quarterly Board meeting on December 14, 2021, at which time the Board unanimously approved the final Enforcement Order. In that posture DEQ was "diligently prosecuting" the action as of December 6, 2021.

Finally, Plaintiffs attempt to discredit the final Enforcement Order by arguing the order "does not include a date, certain or estimated," by which Henrico must comply. Pls.' Opp. Br. At 15. However, paragraph C.33. of the Enforcement Order (Def. Memo. at Att. A) incorporates "Schedules of Compliance" from Appendices B, C and D of the Order. Paragraph D.1. requires Henrico to "[p]erform the actions described in Appendices B, C and D of the Order." *Id.* Paragraph E.12 provides that "plans, reports, schedules or specifications attached hereto or submitted by Henrico and approved by [DEQ] pursuant to this Order are incorporated into this Order" and "non-compliance with such approved documents shall be considered a violation of this Order." *Id.* Schedule of Compliance Appendix B specifies a date certain for each of the 28 individual sewer system projects listed. Schedule of Compliance Appendix C requires 10 Water Reclamation Facility projects that must be addressed in a Corrective Action Plan ("CAP") with an implementation schedule to be proposed by Henrico in accordance with paragraph 1 thereof. *Id.* at Appendix B. It further requires Henrico to begin the public bid process for construction within 10 days of DEQ approval of the CAP in accordance with paragraph 2, with completion of the last Water Reclamation Facility project by December 15, 2028 as provided in paragraph 4.[4] *Id.* at

[4] The Facility restored permit limit compliance as of April 2021, and it is necessary to construct the upcoming replacement and rehabilitation projects in sequence to maintain wastewater treatment operations throughout construction.

Appendix C. Finally, the Appendix D Supplemental Environmental Project must be completed by October 1, 2024 as provided in paragraph 2 of that appendix. *Id.* at Appendix D.

Plaintiffs also assert that the Enforcement Order does not address the same violations raised by Plaintiffs. Pls.' Opp. Br. at 14-17. Their argument is refuted on the face of the Enforcement Order and in DEQ's Consolidated Response to Public Comments. Section C of the Enforcement Order lays out DEQ's findings of facts regarding the extent of Henrico's violations and identifies the *same* noncompliance as Plaintiffs allege in their Complaint: TSS and CBOD permit limit exceedances, unauthorized filter bypass events, and sanitary sewer overflows ("SSOs"). *See* Def. Memo. at Att. A, Section C. Schedule of Compliance Appendix B is labeled "SSO Repair and Maintenance" and, again, consists of 28 individual sewer system projects to address SSOs. *Id.* at Appendix B. Schedule of Compliance Appendix C is the Water Reclamation Facility's "Upgrade Schedule" and among the 10 required projects are the Item h) Filter Project (Phase I) Renew Filters (avoids bypasses and controls TSS and CBOD) and Items a), b), i) and j) to rehabilitate a total of 17 clarifiers in four phases (controls TSS and CBOD). *Id.* at Appendix C.

As DEQ stated in its Consolidated Response to Comments, the Enforcement Order "will appropriately require high performance from the Henrico [sewer] system," *see* Def. Memo. at Att. B (Consolidated Response to Comments on "SSO Volumes" Issue), and "establish[es] a comprehensive scope of work for the rehabilitation and upgrade of the treatment facility, which was developed with the substantial assistance of reputable national professional engineering firms," *see id.* (Consolidated Response to Comments on "Scope and Timeline of Treatment Facility Upgrades" Issue). DEQ's response to Plaintiffs' public comments refutes the vague claims in Plaintiffs' opposition brief that "[s]pecific information or explanation substantiating any engineering deficiencies in the planned improvements is not provided by the comment." *See id.*

DEQ even provided additional responses to Plaintiffs' concerns during the December 14, 2021, Board meeting when DEQ representatives assured the Board that the Enforcement Order was designed to both address Henrico's historic areas of noncompliance and assure future compliance. Pls. Opp. Br. at Att. A, p.98-102. DEQ concluded that "the upgrades and replacements will achieve durable compliance and meet or exceed regulatory requirements." Def. Memo. at Att. B (Consolidated Response to Comments on "Scope and Timeline of Treatment Facility Upgrades" Issue).

C. The DEQ Enforcement Action with Its Substantial Civil Charge and $224 Million in Remedial Actions Bars Plaintiffs' Entire Civil Action.

Plaintiffs' fallback position is that even if DEQ timely commenced and was diligently prosecuting an administrative enforcement action that bars Plaintiffs' citizen suit under 33 U.S.C. § 1319(g)(6), the Court should limit application of the bar to civil penalties and allow their civil action for injunctive or declaratory relief to proceed. They rely on district court cases in other circuits noting that the language of § 1319(g)(6)(A) refers to barring "a civil penalty action under subsection (d) of this section or section 1321(b) of this title or section 1365 of this title." Pls.' Opp. Br. at 17-18.

The Fourth Circuit has never considered this question, and the context for its consideration here is important. With the large scale (county-wide infrastructure), technical complexity (highly-engineered facilities), and high capital costs to update a major sewer system and large wastewater treatment facility at issue, the delay and increased cost associated with changes in the capital improvement program approved by DEQ is surely relevant to injunctive and declaratory relief.

So, too, is the statute itself. This citizen suit is brought pursuant to § 1365, which provides that "any citizen may commence a *civil action* on his own behalf" for violations of the CWA. 33 U.S.C. § 1365(a) (emphasis added). The CWA's citizen suit provision does *not* authorize separate

actions for civil penalties and injunctions; it merely provides for one kind of "civil action" under which a plaintiff may proceed. This precise point was highlighted by the Supreme Court when it stated:

> § 505 [33 U.S.C. § 1365] of the Act does not authorize civil penalties separately from injunctive relief; rather, the two forms of relief are referred to in the same subsection, even in the same sentence. The citizen suit provision suggests a connection between injunctive relief and civil penalties that is noticeably absent from the provision authorizing agency enforcement.

Gwaltney of Smithfield v. Chesapeake Bay Found., 484 U.S. 49, 58-59 (1987) (citation omitted).

The Supreme Court's analysis in *Gwaltney* was a significant factor for both the First and Eighth Circuit Courts when they ruled that § 1319(g)(6) bars *any* form of citizen suit, regardless of whether a plaintiff seeks penalties or equitable relief. *N. & S. Rivers Watershed Ass'n v. Scituate*, 949 F.2d 552, 557-58 (1st Cir. 1991); *Blackstone Headwaters Coal., Inc. v. Gallo Builders, Inc.*, 995 F.3d 274, 292-93 (1st Cir.), *partially vacated and reh'g en banc granted*, 15 F.4th 1179 (1st Cir. 2021); *Ark. Wildlife Fed'n v. ICI Ams.*, 29 F.3d 376, 382-83 (8th Cir. 1994); *but see Paper, Allied-Indus., Chem. & Energy Workers Int'l Union v. Cont'l Carbon Co.*, 428 F.3d 1285 (10th Cir. 2005) (applying the bar only to penalties). The First Circuit examined *Gwaltney* and the text § 1319(g)(6) and determined that "[t]he statutory language suggesting a link between civilian penalty and injunctive actions … leads us to believe that the section 309(g) bar extends to *all citizen actions* brought under section 505 [33 U.S.C. § 1365], not merely *civil penalties*." *Scituate*, 949 F.2d at 558 (emphasis added).

Beyond the statutory text, the First and Eighth Circuits also recognized that the underlying policy goals of the CWA's citizen suit provisions were best served by this interpretation of the § 1319(g)(6) bar. The Supreme Court has recognized that the proper role of CWA citizen suits is to *supplement, not supplant* government enforcement action, and that such actions are proper only

where the government has failed to carry out its enforcement duties. *Gwaltney*, 484 U.S. at 60; *Scituate*, 949 F.2d at 558. When considering this underlying policy rationale, the Eighth Circuit reasoned that "[a]llowing suits for declaratory and injunctive relief in federal court, despite a state's diligent efforts at administrative enforcement, could result in undue interference with, or unnecessary duplication of, the legitimate efforts of the state agency." *Ark. Wildlife Fed'n*, 29 F.3d at 383. In the eyes of the Eighth Circuit, permitting these kinds of citizen suits for injunctive relief "would undermine, rather than promote, the goals of the Clean Water Act, and is not the intent of Congress." *Id.* This same interpretation of the § 1319(g)(6) bar was taken in *Naturaland*, 531 F. Supp. 3d at 964 n.12.

When considering the statutory language of the CWA along with Congress's policy goal in permitting citizen suits, "it is inconceivable … that the section 309(g) [33 U.S.C. § 1319(g)] ban is only meant to extend to civil penalty actions." *Scituate*, 949 F.2d at 558. This Court should apply this interpretation and dismiss the entire case if it finds that DEQ has satisfied the requirements of the § 1319(g)(6) diligent prosecution bar.

D. Incorrect Statements by a Board Member or Staff Were Not Adopted by the Board and Do Not Control This Court's Application of a Federal Statute.

Plaintiffs contend that incorrect comments made by one Board member and Board counsel should negate § 1319(g)(6)'s bar and enable this citizen suit to proceed. The Court should disregard the comments and Plaintiffs arguments because they are incorrect as a matter of law and are not the position of the Board.

As brief background, the Board consists of seven appointed members, Va. Code § 62.1-44.8, although only five members were present and voting at the December 14, 2021 meeting, *see* Pls. Opp. Br. at Att. A, p.5 (SWCB Meeting Transcript). The Director of DEQ and legal counsel sit with the Board at its quarterly meetings but are not voting members. The Board acts by motion

and a motion requires a majority vote to carry, as was illustrated in the conduct of the December 14, 2021 meeting for which Plaintiffs have filed the transcript. *See id.* at *passim*.

During the meeting, Board Member Hayes commented on the pending citizen suit litigation, the potential for a "negotiated settlement," and not doing "harm" to Plaintiffs' "goals." *Id.* at 121-122 (Mr. Hayes's comments). Mr. Hayes did not identify specifically what goals he was referring to, though he may have been referring to the earlier statement of Mr. Brunkow of the James River Association, who had mentioned his prior meetings with the County and continuing to engage in negotiations. *See id.* at 119 (Mr. Brunkow's comments) and 121-122 (Mr. Hayes's comments). Assistant Attorney General Grandis stated his "understanding" that the "administrative order and the litigation will proceed on parallel paths," that "it's uncertain what relief that the federal court could grant," and that "it's conceivable they [the Court] could grant additional leave to supplement what the Board does today." *Id.* at 123. Finally, Mr. Hayes (incorrectly attributed in Plaintiffs' brief to Board Member Jasinski) also commented to the effect that only a court action can bar a citizen suit and that an administrative order cannot. *Id.* at 124.

The latter comment is an incorrect statement of the law. An administrative order can bar a citizen suit as provided in 33 U.S.C. § 1319(g)(6) ("Effect of order"), subsection (A) ("Limitation on actions under other sections"). And comments of individual Board members or the Board's counsel cannot alter the provisions of a federal statute.

Moreover, these comments do not control the decision of this case because the statements of a Board member do not bind the Board or represent its official position if not expressly included in a motion that passes by a majority vote. *See, e.g., T-Mobile Ne. LLC v. Loudon Cnty. Bd. Of Supervisors*, 748 F.3d 185 (4th Cir. 2014) (ruling that the comments of one board member did not constitute an official adoption of that position by the entire board because they were not cited as a

basis for the final decision); *Bd. of Zoning Appeals v. Caselin Sys.*, 256 Va. 206, 211-13 (1998) (holding that the chairman of a governmental board did not bind the board through his actions and statements because such actions were not approved through the formal processes of the whole body); *Omps v. Bd. of Zoning Appeals of Winchester*, 8 Va. Cir. 433, 438, 441 (Va. Cir. Ct. 1987) (noting that "[t]he testimony of one member [of a governmental board] … is hardly sufficient to show a reliance by the administrative body itself" and that a governing body "may act only in a meeting of its members, [sic] informal action by any less than all of them in a regularly called meeting cannot be the action of the [body]").

The motion before the Board was as follows: "to move that we go ahead and approve the staff recommendation and approve the consent order and have it put into effect." Pls. Opp. Br. at Att. A, p.122. The staff recommendation was that "the Board approve the Henrico County SSO and wastewater treatment plant consent order, that the Board authorize the DEQ's Director to execute the consent order on the Board's behalf. And [sic] that the Board authorize the Director to refer violations of the consent order to the Office of the Attorney General." *Id.* at 120-121. Board Member Lanier seconded the Motion. *Id.* at 122. Neither Vice Chair Wallace, Board Member Seigel, or Board Member Lanier commented on the motion or Mr. Hayes's comments. Board Member Jasinski asked the question to which Mr. Grandis had responded (discussed above) but expressed no opinion herself. *Id.* at 123. Neither the motion nor the underlying staff recommendation incorporated the specific comments of Mr. Hayes and Mr. Grandis quoted in Plaintiffs' opposition brief. Because the comments in question were not part of the Board's action and do not reflect the Board's position, they should be accorded no weight in this litigation.

E. Plaintiffs' Conclusions Regarding Henrico's "Wholly Past" TSS and CBOD Violations are Baseless and Misconstrue the Effect of the Enforcement Order.

Plaintiffs argue that Henrico has not proven the effluent permit violations at the Water Reclamation Facility are "wholly past" violations. Pls. Opp. Br. at 20-24. Although Plaintiffs rely on *Gwaltney*, the citizen suit in *Gwaltney* was filed only *one month* after the industrial permittee had returned to compliance with its total Kjeldahl nitrogen ("TKN") permit limit, a fact that led the *Gwaltney* courts to find there was a reasonable likelihood the TKN permit violations could be repeated. *Id.* at 22. And the Fourth Circuit's *Gwaltney* opinion found it "absolutely clear" that there were no ongoing violations of a different permit limit (chlorine) because the industrial permittee had not violated its chlorine limit in nearly *20 months* prior to the suit. *Chesapeake Bay Found. v. Gwaltney of Smithfield*, 890 F.2d 690, 697-98 (4th Cir. 1989).

Henrico's TSS and CBOD compliance more closely resembles the *Gwaltney* defendant's chlorine compliance (20 consecutive months) than its TKN compliance (only one month). By the time Plaintiffs filed their citizen suit in December 2021, the Water Reclamation Facility had been in consistent compliance for almost *10 consecutive months* (April 2021 to December 2021) without violating the TSS or CBOD permit limits at issue. Previously, the facility had been in noncompliance most months (10 of the 14 consecutive months from February 2020 through March 2021) and had never achieved more than two consecutive months of compliance.

Contrary to Plaintiffs' assertion, the mere inclusion of past TSS and CBOD violations in Section C of the final Enforcement Order was the basis for imposing administrative penalties for *past* violations, not a finding that those violations are likely to recur. Because the facility has restored consistent compliance with its TSS and CBOD permit limits over a 10-month period, Plaintiffs cannot obtain any meaningful judicial relief for Counts 1 and 2 of their Complaint.

III. CONCLUSION

Plaintiffs ask the Court to accept overreaching interpretations of the CWA to support their late efforts to supplant the Commonwealth of Virginia's role in CWA enforcement and to second-guess DEQ's comprehensive $224 million enforcement action. Henrico County respectfully requests that the Court grant its Motion to Dismiss and enter an order dismissing Plaintiffs' Complaint with prejudice.

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Respectfully submitted,

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