

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION**

SOUTH RIVER WATERSHED  
ALLIANCE, INC., AND JACQUELINE  
ECHOLS,

Plaintiffs,

v.

DEKALB COUNTY, GEORGIA,

Defendant.

CIVIL ACTION  
NO. 1:19-cv-04299-SDG

**DEFENDANT DEKALB COUNTY, GEORGIA'S**  
**MEMORANDUM OF LAW IN SUPPORT OF ITS**  
**MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT**

**Table of Contents**

FACTUAL BACKGROUND..... 1

    I.    The 2010 U.S./GA Complaint..... 1

    II.   The Decree ..... 2

    III.  Court Approval of the Decree Over SRWA’s Objections ..... 4

    IV.  DeKalb Implementation and EPA/EPD Enforcement of the Decree..... 5

    V.   SRWA’s Post-Entry Objections to Decree and Its Current Complaint ..... 7

ARGUMENT ..... 9

    I.    SRWA’s Suit is Barred By Diligent Prosecution..... 9

        A.    Legal Standard ..... 9

        B.    Standing Alone, the Consent Decree Establishes Diligent Prosecution..... 12

        C.    The Government Has Vigorously Enforced the Decree..... 18

    II.   SRWA (Including Echols) Lacks Article III Standing. .... 20

        A.    Legal Standard ..... 20

        B.    SRWA Cannot Establish Injury Regarding Discharges into the MS4..... 21

        C.    SRWA Cannot Establish Redressability..... 22

    III.  SRWA Failed to Provide Sufficient Pre-Suit Notice..... 24

        A.    The Notice Lacks Any Specifics About DeKalb’s Alleged Deficiencies in O&M and Spills, Which Are Covered by the Decree..... 26

        B.    The Notice Fails to Properly Articulate the Requirements of DeKalb’s MS4 Permit, and the Source of Spills into and from the MS4 Are Addressed By the Consent Decree. .... 28

        C.    SRWA Has Not Given the Required Statutory Notice for Claims Based on Spills or Failure of O&M Occurring after the Notice Letter ..... 28

IV. Res Judicata Bars SRWA’s Claims to the Extent They Are Based on the Alleged Inadequacy of the Decree. ....	29
V. If SRWA Intends a Claim Based on the Hydraulic Model Deadline or the Future PASARP Deadline, That Claim Must Fail.....	31
CONCLUSION .....	32

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Cases</b>	
<i>Ainsworth v. Cmty. Bible Church</i> , No. 1:10-CV-01964-SCJ, 2012 WL 13076749 (N.D. Ga. July 19, 2012) .....	10, 11
<i>Alcocer v. Bulloch Cty. Sheriff’s Office</i> , No. CV 615-94, 2017 WL 227793 (S.D. Ga. Jan. 18, 2017) .....	23
<i>Atwell v. KW Plastics</i> , 213 F. Supp. 2d 1294 (M.D. Ala. 2002) .....	24
<i>Bertran v. Puerto Rico Aqueduct and Sewer Authority</i> , Civil 19-1412CCC, 2019 WL 6833826 (D. Pr. Dec. 12, 2019) .....	14
<i>Black Warrior Riverkeeper, Inc. v. Southeastern Cheese Corp.</i> , 2017 U.S. Dist. LEXIS 9533 (S.D. Ala. 2017) .....	14
<i>Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Engineers</i> , 781 F.3d 1271 (11th Cir. 2015) .....	20
<i>Carney v. Gordon Cty., Georgia</i> , No. CIV 4:06CV36 RLV, 2006 WL 4347048 (N.D. Ga. Sept. 12, 2006) .....	24, 25
<i>Community of Cambridge Env’tl. Health Cmty. &amp; Dev. Group v. City of Cambridge</i> , 115 F. Supp. 2d 550 (D. Md. 2000) .....	10, 13
<i>Concordia v. Bendekovic</i> , 693 F.2d 1073 (11th Cir. 1982) .....	29
<i>Connecticut Fund for the Env’t v. Contract Plating Co.</i> , 631 F. Supp. 1291 (D. Conn. 1986) .....	12, 17
<i>Culbertson v. Coats Am.</i> , 913 F. Supp. 1572 (N.D. Ga. 1995) .....	10, 13

*Duggan Family P’ship, LLP v. City of Jeffersonville, Georgia*,  
 No. CIV.A. 5:08-CV-313(HL), 2009 WL 1560045 (M.D. Ga. June  
 1, 2009) .....25

*EPA v. City of Green Forest*,  
 921 F.2d 1394 (8th Cir. 1991) .....29

*Fernandez-Montes v. Allied Pilots Ass’n*,  
 987 F.2d 278 (5th Cir. 1993) ..... 11

*Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*,  
 528 U.S. 167 (2000).....20

*Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*,  
 890 F. Supp. 470 (D.S.C. 1995) .....17

*Friends of Milwaukee’s Rivers & All. for Great Lakes v. Milwaukee  
 Metro. Sewerage Dist.*, 556 F.3d 603 (7th Cir. 2009) .....10

*Friends of Milwaukee’s Rivers v. Milwaukee Metro. Sewerage Dist.*,  
 382 F.3d 743 (7th Cir. 2004) .....12, 24, 32

*Group Against Smog & Pollution, Inc. v. Shenango Inc.*,  
 810 F.3d 116 (3d Cir. 2016) .....13

*Gryder v. Mineta*,  
 No. 1:04-CV-189-CC-ECS, 2006 WL 8431637 (N.D. Ga. Jan. 23,  
 2006) .....30

*Gwaltney v. Chesapeake Bay Found.*,  
 484 U.S. 49 (1987).....10, 25

*Hughey v. JMS Dev. Corp.*,  
 78 F.3d 1523 (11th Cir. 1996) .....24

*Humane Soc’y of United States v. Hanor Co. of Wisconsin, LLC*,  
 289 F. Supp. 3d 692 (E.D.N.C. 2018) .....13

*Jackson v. BellSouth Telecomm.*  
 372 F.3d 1250 (11th Cir. 2004) ..... 11

*Karr v. Hefner*,  
 475 F.3d 1192 (10th Cir. 2007) .....10, 14

*Knee Deep Cattle Co. v. Bindana Inv. Co.*,  
94 F.3d 514 (9th Cir. 1996) .....10

*Lockett v. E.P.A.*,  
319 F.3d 678 (5th Cir. 2003) .....14, 26

*Matthews v. JPMorgan Chase Bank, N.A.*,  
No. 1:12CV03757-RWS, 2013 WL 12106937 (N.D. Ga. Jan. 14,  
2013) .....6

*McAbee v. City of Fort Payne*,  
318 F.3d 1248 (11th Cir. 2003) .....9

*Mrosek v. City of Peachtree City*,  
539 F. App'x 938 (11th Cir. 2013) .....25

*N. & S. Rivers Watershed Ass'n, Inc. v. Town of Scituate*,  
949 F.2d 552 (1st Cir. 1991) .....12

*N.Y. Coastal Fishermen's Ass'n v. N.Y.C. Dep't of Sanitation*,  
772 F. Supp. 162 (S.D.N.Y. 1991) .....13

*Nat'l Env'tl. Found. v. ABC Rail Corp.*,  
926 F.2d 1096 (11th Cir. 1991) .....24

*Nat'l Parks & Conservation Ass'n, Inc. v. Tennessee Valley Auth.*,  
502 F.3d 1316 (11th Cir. 2007) .....25

*New Manchester Resort & Golf, LLC v. Douglasville Dev., LLC*,  
734 F. Supp. 2d 1326 (N.D. Ga. 2010) .....20

*Norfolk S. Corp. v. Chevron, U.S.A., Inc.*,  
371 F.3d 1285 (11th Cir. 2004) .....29

*Parker v. Scrap Metal Processors, Inc.*,  
386 F.3d 993 (11th Cir. 2004) .....20

*Piney Run Pres. Ass'n v. Cty. Comm'rs of Carrol Cty., Md.*,  
523 F.3d 453 (4th Cir. 2008) .....10, 12, 13, 14

*Purvis v. Douglasville Dev., LLC*,  
No. 1:06CV0415 WSD, 2006 WL 3709610 (N.D. Ga. Nov. 9,  
2006) .....24, 25

<i>SEC v. Torchia</i> , 183 F. Supp. 3d 1291 (N.D. Ga. 2016).....	10
<i>Spokeo, Inc. v. Robins</i> , 136 S. Ct. 1540 (2016).....	32
<i>St. Bernard Citizens for Envtl. Quality, Inc. v. Chalmette Ref., L.L.C.</i> , 500 F. Supp. 2d 592 (E.D. La. 2007).....	29
<i>St. Johns Riverkeeper, Inc. v. Jacksonville Elec. Auth.</i> , No. 3:07-CV-739-J-34TEM, 2010 WL 745494 (M.D. Fla. Mar. 1, 2010).....	12
<i>Stillwell v. Allstate Ins. Co.</i> , 663 F.3d 1329 (11th Cir. 2011).....	11
<i>Stalley ex rel. U.S. v. Orlando Reg’l Healthcare Sys., Inc.</i> , 524 F.3d 1229 (11th Cir. 2008).....	20
<i>United States of America and the State of Georgia v. DeKalb County</i> , <i>Georgia</i> , Civil Action No. 1:10-CV-4039-WSD (N.D. Ga.).....	1
<i>United States v. McGee</i> , 439 F. App’x 837 (11th Cir. 2011).....	6
<i>United States v. Rey</i> , 811 F.2d 1453 (11th Cir. 1987).....	11
<i>Williams Pipe Line Co. v. Bayer Corp.</i> , 964 F. Supp. 1300 (S.D. Iowa 1997).....	10
<b>Statutes</b>	
33 U.S.C.	
§1365.....	32
§1365(b)(1)(B).....	9, 14
Clean Air Act.....	25
Clean Water Act.....	<i>passim</i>
Georgia Water Quality Control Act.....	1, 2, 5

**Other Authorities**

Fed. R. Evid. 902(1).....6

Federal Rule of Civil Procedure

    12(b)(1) .....1, 10, 11, 20, 24

    12(b)(6) .....1, 11, 14, 24, 29

<https://www.dekalbcountyga.gov/watershed-management/consent-decree-cd>.....6

<https://www3.epa.gov/npdes/pubs/ssodesc.pdf> .....27

Defendant DeKalb County, Georgia (“DeKalb”) moves pursuant to Federal Rule of Civil Procedure 12(b)(1) and, alternatively, Rule 12(b)(6), for the Court to dismiss all claims in Plaintiffs South River Watershed Alliance, Inc.’s and Jacqueline Echols’ (collectively “SRWA”) Amended Complaint. SRWA alleges that DeKalb is violating the Clean Water Act (“CWA”) in how it is operating and maintaining its wastewater collection and transmission system (the “WCTS”). The U.S. Environmental Protection Agency (“EPA”) and Georgia Environmental Protection Division (“EPD”) are diligently prosecuting all alleged CWA violations involving the WCTS in accordance with a Consent Decree that this Court entered in 2011. Further, SRWA lacks standing and has not given the required notice for suit. SRWA’s claims also are barred by res judicata, and SRWA cannot bring a claim to enforce the Consent Decree. Therefore, there is no subject matter jurisdiction for SRWA’s claims, and SRWA fails to state a claim on which relief can be granted.

## **FACTUAL BACKGROUND**

### **I. The 2010 U.S./GA Complaint**

On behalf of EPA and EPD, respectively, the United States and Georgia filed a Complaint against DeKalb for violations of the CWA and the Georgia Water Quality Control Act (“GWQCA”) on December 13, 2010 (the “2010 Complaint”).<sup>1</sup>

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<sup>1</sup> See *United States of America and the State of Georgia v. DeKalb County, Georgia*, Civil Action No. 1:10-CV-4039-WSD (N.D. Ga.), Docket entry 1. (Docket entries

The 2010 Complaint broadly covered the causes of sanitary sewer overflows (“SSOs”) from the WCTS. It alleged that DeKalb violated the CWA and GWQCA by: (1) failing to adhere to the terms of applicable National Pollutant Discharge Elimination System (“NPDES”) permits; (2) allowing unpermitted SSOs throughout the WCTS; and (3) failing to efficiently operate and maintain the WCTS.<sup>2</sup> The 2010 Complaint requested judgment, an injunction for DeKalb to comply with its NPDES permits, the CWA, and the GWQCA, civil penalties, and costs.<sup>3</sup>

## **II. The Decree**

Simultaneously with the 2010 Complaint, the U.S. and Georgia lodged the Decree, which they had negotiated with DeKalb to resolve all claims alleged in the 2010 Complaint.<sup>4</sup> The “express purpose” of the Decree is for DeKalb to use its best efforts to implement the Decree programs “to achieve the goals of: (1) full compliance with the CWA, the GWQCA, and the regulations promulgated thereunder, and (2) the elimination of all SSOs.”<sup>5</sup> (As defined in the Decree, SSOs include spills, overflows, and building backups of sewage. “Spills” are the subset

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from that 2010 action will be cited as “2010 Doc. \_\_\_.” Docket entries in the current action will be cited as “Doc. \_\_\_.”)

<sup>2</sup> *Id.* at ¶¶ 1, 30, 34, 36, 37, 40-41, 47-49.

<sup>3</sup> *Id.* at ¶¶ 1, 13-14.

<sup>4</sup> 2010 Doc. 1-1.

<sup>5</sup> Decree, 2010 Doc. 39, at ¶ 6.

of SSOs that reach waters of the United States. As used here, “spills” and “SSOs” have the same meaning as in the Decree.)

The Decree required DeKalb pay a civil penalty of \$453,000 and at least \$600,000 towards an environmental project benefiting areas impacted by historical spills.<sup>6</sup> In line with its express purpose, however, the Decree is primarily a forward-looking document. Most significantly, it requires DeKalb to develop and implement an extensive suite of eleven (11) capacity, management, operation, and maintenance (or “CMOM”) programs to improve the condition and operation of the entire WCTS over time.<sup>7</sup> The Decree establishes a timeline for DeKalb to develop and submit each of these programs for EPA/EPD review and approval, and, once approved, requires DeKalb to implement the programs.<sup>8</sup> It requires comprehensive reporting of WCTS improvements and spills through submission of quarterly, semi-annual, and annual reports that must be certified as true, accurate, and complete.<sup>9</sup> The Decree contemplates that spills will continue and that DeKalb might miss CMOM program timelines. The Decree establishes escalating stipulated penalties for (i) each spill, (ii) late reports or CMOM program submittals, and (iii) late completion of all specific system assessment and rehabilitation for the highest priority areas of

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<sup>6</sup> *Id.* at ¶¶ 8, 47.

<sup>7</sup> *Id.* at ¶¶ 11-39.

<sup>8</sup> *Id.* at ¶¶ 40-46.

<sup>9</sup> *Id.* at ¶¶ 56-59.

the WCTS, based on factors such as age, known defects, and risk of causing spills (the program for these highest priority areas is called the Priority Area Sewer Assessment and Rehabilitation Program (“PASARP”) and is the most onerous of the eleven CMOM components).<sup>10</sup>

### **III. Court Approval of the Decree Over SRWA’s Objections**

Before moving for the Court to enter the Decree, EPA published notice of it in the Federal Register and received five public comments, including comments from SRWA.<sup>11</sup> SRWA also intervened in the EPA/EPD lawsuit and filed a motion objecting to entry of the Decree. SRWA argued that the Decree was not reasonable or in the public interest, because, SRWA alleged, one of the CMOM programs lacked sufficiently onerous requirements to address fats, oils, and grease (“FOG”) in the system.<sup>12</sup> One of the defects of the Decree with regard to the FOG program, SRWA, alleged, was that “there is no timetable for the elimination of FOG-related spills in the proposed Consent Decree” other than the PASARP deadline.<sup>13</sup>

The Court entered the Decree over SRWA’s objections, holding the Decree is “fair, reasonable, lawful, and in accord with the public policy and the public

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<sup>10</sup> *Id.* at ¶¶ 63–71.

<sup>11</sup> 2010 Docs. 13-1, 13-3.

<sup>12</sup> 2010 Doc. 29-1 at p. 6.

<sup>13</sup> *Id.* at p. 13.

interest.”<sup>14</sup> Moreover, the Court held that the Decree: (1) “furthers the goals of the CWA” by “establishing a PASARP and implementing procedures and controls to address future violations of the CWA and GWQCA”; (2) “is extensive and comprehensive” and “addresses and substantially resolves violations of the CWA and GWQCA by Defendant and is calculated to bring Defendant’s sewer infrastructure into compliance with the CWA”; and (3) is “technically adequate to accomplish the goal of cleaning the environment.”<sup>15</sup> The Court further held that the Decree “will remedy the issues in Defendant’s sewer infrastructure by implementing remedial actions to require it to conform with the CWA and NPDES permit requirements; by establishing procedures and oversight for EPA/EPD involvement in the implementation of those remedial actions; and by requiring Defendant to report to EPA/EPD any future spills, SSOs, and violations of the CWA that occur, ensuring that compliance continues into the future.”<sup>16</sup>

#### **IV. DeKalb Implementation and EPA/EPD Enforcement of the Decree**

DeKalb has received EPA/EPD approval for each of the eleven CMOM programs<sup>17</sup> and has submitted each of the required 56 certified quarterly, semi-

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<sup>14</sup> See *United States et al.*, Civil Action No. 1:10-CV-4039-WSD, (2010 Doc. 38) (“Approval Order”), at p. 37.

<sup>15</sup> *Id.* at pp. 30-32.

<sup>16</sup> *Id.*

<sup>17</sup> See Chart and correspondence from EPA and EPD detailing CMOM program approvals, attached hereto as Exhibit A.

annual, and annual reports.<sup>18</sup> DeKalb is implementing the CMOM programs, with EPA/EPD oversight, and has routinely met with the agencies to discuss Decree implementation. As documented in the certified reports that DeKalb is required to submit to EPA and EPD, in the last two years, DeKalb has completed over 17,000 FOG inspections, 4,759 sewer creek crossing inspections to monitor and maintain the structural integrity of sewer assets near waterways, procured a contract for root control and treatment of 478,096 feet of sewer to remove root intrusions and prevent blockages, and cleaned 120,234 feet of piping.<sup>19</sup> DeKalb inspected 466 miles of pipe in 2018 and 585 miles the year before.<sup>20</sup> DeKalb has evaluated and/or acquired almost 73,000 feet of new pipeline during the last two years as well.<sup>21</sup> In 2017 and 2018 alone, DeKalb spent \$10,077,002 on corrective and preventative sewer maintenance projects tracked under the Decree's Financial Analysis Program (note

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<sup>18</sup> See, e.g., 2017 and 2018 Annual Report excerpts, attached hereto as Exhibit B (also available at <https://www.dekalbcountyga.gov/watershed-management/consent-decree-cd>). The Court can take judicial notice of the exhibits submitted herewith, and/or they are self-authenticating. See *Matthews v. JPMorgan Chase Bank, N.A.*, No. 1:12CV03757-RWS, 2013 WL 12106937, at \*3 n.3 (N.D. Ga. Jan. 14, 2013) (judicial notice of information on agency website proper); see also *United States v. McGee*, 439 F. App'x 837, 839 (11th Cir. 2011) (citing Fed. R. Evid. 902(1)) (evidence of authenticity not required where document bears seal of any state, or agency thereof, and a signature purporting to be an attestation or execution).

<sup>19</sup> See Ex. B at pp. 7-9, 24-25.

<sup>20</sup> See *id.*

<sup>21</sup> See *id.*

that DeKalb's total costs to implement the Decree in those years were significantly higher).<sup>22</sup>

In addition to meeting with DeKalb regarding Decree implementation and system performance, EPA and EPD have reviewed, commented on, and ultimately approved each of DeKalb's submittals.<sup>23</sup> EPA and EPD have also annually imposed stipulated penalties for spills. Further, when in early 2016 DeKalb discovered that it had not properly reported some spills that occurred between 2012-2015, it was required to investigate and re-report spills for those years and pay a penalty of \$181,500.<sup>24</sup> In total, DeKalb has paid over \$1,200,000 in penalties, not including penalties that will be imposed for 2019 spills.<sup>25</sup>

#### V. **SRWA's Post-Entry Objections to Decree and Its Current Complaint**

Since entry of the Decree, SRWA has sent the Court at least two letters complaining that the Decree is deficient. On January 8, 2017, SRWA sent the Court a letter contending that "there has been no sustained progress" in reducing the volume of spills that reach creeks and rivers.<sup>26</sup> SRWA contended that the Decree did not set "milestones" for reducing spills, and, despite the escalating stipulated

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<sup>22</sup> See *id.* at pp. 9, 25.

<sup>23</sup> See Ex. A.

<sup>24</sup> See Chart and correspondence from EPA and EPD detailing amount of penalties paid or to be paid, attached hereto as Exhibit C, at p. 5.

<sup>25</sup> See *id.*

<sup>26</sup> See 2010 Doc. 41 at p. 1.

penalties, SRWA claimed the Decree did not “include penalties” for failing to reduce spills.<sup>27</sup> In an April 15, 2017 letter to the Court, SRWA concluded from the fact that spills continued that the Decree was “protecting the violator,” and asserted that the Decree did not require DeKalb to take “meaningful and timely action” to stop spills.<sup>28</sup>

On July 15, 2019, SRWA sent DeKalb a letter purporting to give required notice of its intent to file a citizen suit (the “Notice”), and on September 24, 2019, SRWA filed this action.<sup>29</sup> After DeKalb filed a Motion to Dismiss SRWA’s (original) Complaint, SRWA filed an Amended Complaint.<sup>30</sup> The Notice and Amended Complaint allege that DeKalb violated the CWA by: (1) spilling sewage from the WCTS; (2) failing to “efficiently maintain and operate” the WCTS; and (3) allowing “illicit discharges” of sewage to the municipal separate storm sewer system (“MS4”).<sup>31</sup> The Notice alleged that DeKalb failed to publish notice of spills as required under its NPDES permits, but the Amended Complaint omits any allegation or claim to that effect. The Amended Complaint requests judgment; an injunction requiring DeKalb to take all necessary action by a certain unspecified date to cease all unlawful “discharge of wastewater into waters of the United States”; an

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<sup>27</sup> *See id.* at p. 2.

<sup>28</sup> *See* 2010 Doc. 42 at p. 1.

<sup>29</sup> *See* Docs. 1, 1-1.

<sup>30</sup> *See* Doc. 18; Am. Compl., Doc. 21.

<sup>31</sup> *Id.* at ¶¶ 84–98.

injunction requiring DeKalb to take all actions necessary to cease all “illicit discharge of sewage spills” from the WCTS into the MS4; civil penalties; and costs and attorneys’ fees.<sup>32</sup>

## **ARGUMENT**

### **I. SRWA’s Suit is Barred By Diligent Prosecution.**

SRWA fails to allege a single violation of the CWA that is not being addressed by the Decree. The Decree is wide-reaching and mandates that DeKalb implement a comprehensive program for WCTS operation and maintenance (“O&M”) to address SSOs. It imposes stipulated penalties for spills and for late submittals of CMOM deliverables, and, in it, EPA and EPD retain authority to seek injunctive relief and contempt sanctions to enforce the Decree. The Decree is sufficient by itself to establish diligent prosecution, but if it alone were not enough, extrinsic evidence confirms EPA/EPD’s vigilant enforcement and the completeness of the diligent prosecution bar to SRWA’s claims.

#### **A. Legal Standard**

A citizen may not bring an action pursuant to the CWA if the EPA or a state “has commenced and is diligently prosecuting” proceedings to require compliance with the same CWA “standard or limitation” the citizen seeks to enforce.<sup>33</sup> CWA

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<sup>32</sup> *Id.* at pp. 36–37.

<sup>33</sup> *See* 33 U.S.C. § 1365(b)(1)(B); *McAbee v. City of Fort Payne*, 318 F.3d 1248, 1251 (11th Cir. 2003).

citizen suits are not intended to supplant government action and are appropriate “only when government agencies fail to exercise their enforcement responsibility.”<sup>34</sup> The government’s exercise of its enforcement responsibilities with respect to alleged CWA violations mandates dismissal pursuant to Fed. R. Civ. P. 12(b)(1) because diligent prosecution is a jurisdictional bar.<sup>35</sup> Further, the plaintiff in a citizen suit bears the burden of proving that there has not been diligent prosecution.<sup>36</sup>

A motion to dismiss under Rule 12(b)(1) can be a “facial attack,” in which the allegations of the complaint are assumed to be true and the test is whether the plaintiff has sufficiently alleged a basis of subject matter jurisdiction; and/or a

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<sup>34</sup> See *Culbertson v. Coats Am.*, 913 F. Supp. 1572, 1578 (N.D. Ga. 1995) (citing *Gwaltney v. Chesapeake Bay Found.*, 484 U.S. 49, 60 (1987)).

<sup>35</sup> See *Friends of Milwaukee's Rivers & All. for Great Lakes v. Milwaukee Metro. Sewerage Dist.*, 556 F.3d 603, 606 (7th Cir. 2009) (“The [Clean Water] Act strips the courts of subject matter jurisdiction over citizens' suits where the State has timely commenced judicial or administrative enforcement actions.”); *Piney Run Pres. Ass'n v. Cty. Comm'rs of Carrol Cty., Md.*, 523 F.3d 453, 459-61 (4th Cir. 2008) (affirming that diligent prosecution is analyzed under Rule 12(b)(1); *Knee Deep Cattle Co. v. Bindana Inv. Co.*, 94 F.3d 514, 516 (9th Cir. 1996) (same); *Ainsworth v. Cmty. Bible Church*, No. 1:10-CV-01964-SCJ, 2012 WL 13076749, at \*3 (N.D. Ga. July 19, 2012) (same).

<sup>36</sup> See *Karr v. Hefner*, 475 F.3d 1192, 1198 (10th Cir. 2007) (“Citizen-plaintiffs must meet a high standard to demonstrate that it [the government] has failed to prosecute a violation diligently.”) (citation omitted); *Community of Cambridge Env'tl. Health Cmty. & Dev. Group v. City of Cambridge*, 115 F. Supp. 2d 550, 554 (D. Md. 2000) (“Most courts considering the diligence of a state or federal prosecution have exhibited substantial deference for the agency’s process.”); *Williams Pipe Line Co. v. Bayer Corp.*, 964 F. Supp. 1300, 1324 (S.D. Iowa 1997) (“The plaintiff in a citizens suit bears the burden . . . because the enforcement agency’s diligence is presumed.”) (Citations and alterations omitted).

“factual attack,” which is a challenge to the existence of subject matter jurisdiction in fact, and matters outside the pleadings may be considered.<sup>37</sup> In this instance, the 2010 Complaint and the Decree themselves are sufficient to prove diligent prosecution.<sup>38</sup> However, if the Court deems it necessary to look beyond the face of those documents, diligent prosecution is further demonstrated by the extrinsic evidence included herewith.

The diligent prosecution bar also is grounds for immediate dismissal pursuant to Fed. R. Civ. P. 12(b)(6).<sup>39</sup> A court must dismiss a complaint pursuant to Rule 12(b)(6) if the facts alleged do not entitle the plaintiff to relief. The complaint “must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”<sup>40</sup> “[C]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss.”<sup>41</sup>

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<sup>37</sup> Cf. *SEC v. Torchia*, 183 F. Supp. 3d 1291, 1305-06 (N.D. Ga. 2016) (holding that jurisdictional defenses may be proven with or without extrinsic evidence under FRCP 12(b)(1)) (citations omitted).

<sup>38</sup> See *United States v. Rey*, 811 F.2d 1453, 1457 n. 5 (11th Cir. 1987) (“A court may take judicial notice of its own records.”).

<sup>39</sup> See *Ainsworth*, 2012 WL 13076749, at \*3 (analyzing diligent prosecution under both 12(b)(1) and 12(b)(6) standards).

<sup>40</sup> *Stillwell v. Allstate Ins. Co.*, 663 F.3d 1329, 1333 (11th Cir. 2011) (citations omitted).

<sup>41</sup> *Jackson v. BellSouth Telecomm.*, 372 F.3d 1250, 1262-63 (11th Cir. 2004) (citing *Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002)); *Fernandez-Montes v. Allied Pilots Ass’n*, 987 F.2d 278, 284 (5th Cir. 1993).

**B. Standing Alone, the Consent Decree Establishes Diligent Prosecution.**

Agency enforcement actions presumptively establish diligent prosecution. Indeed, “[t]he court must presume the diligence of the state’s prosecution of a defendant absent persuasive evidence that the state has engaged in a pattern of conduct in its prosecution of the defendant that could be considered dilatory, collusive, or otherwise in bad faith.”<sup>42</sup> “[T]his presumption is due not only to the intended role of the State as the primary enforcer of the Clean Water Act . . . but also to the fact that courts are not in the business of designing, constructing or maintaining sewage treatment systems.”<sup>43</sup>

An administrative order or court decree, on consent or otherwise, that is “capable of requiring compliance with” the CWA and that “is in good faith calculated to do so” establishes diligent prosecution.<sup>44</sup> Further, a decree that mandates significant capital outlays, periodic reporting schedules, or imposition of fines, is evidence of diligent prosecution.<sup>45</sup> The fact that a decree is enforceable by

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<sup>42</sup> *Connecticut Fund for the Env't v. Contract Plating Co.*, 631 F. Supp. 1291, 1293 (D. Conn. 1986).

<sup>43</sup> *Friends of Milwaukee’s Rivers v. Milwaukee Metro. Sewerage Dist.*, 382 F.3d 743, 760 (7th Cir. 2004) (citations omitted).

<sup>44</sup> *See Piney Run*, 523 F.3d at 459-60; *Friends of Milwaukee’s Rivers*, 382 F.3d at 760 (citations omitted).

<sup>45</sup> *See N. & S. Rivers Watershed Ass'n, Inc. v. Town of Scituate*, 949 F.2d 552, 557 (1st Cir. 1991) (finding diligent prosecution based on submission of regular written reports, stipulated penalties, and “expenditure of close to one million dollars to plan the new treatment facility”); *St. Johns Riverkeeper, Inc. v. Jacksonville Elec. Auth.*,

injunctive relief and contempt sanctions also supports a finding of diligent prosecution.<sup>46</sup> An agency's decision to modify an obligation under a consent decree or to forgo the imposition of a fine does not defeat diligent prosecution.<sup>47</sup> A consent decree does not fail for diligent prosecution for not including an ultimate deadline for full compliance with the CWA.<sup>48</sup> Courts recognize that in some instances it may take many years for a defendant to achieve compliance with environmental laws such as the CWA.<sup>49</sup> By contemplating and addressing continued CWA violations, a

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No. 3:07-CV-739-J-34TEM, 2010 WL 745494, at \*9 (M.D. Fla. Mar. 1, 2010) (“[T]he December 2006 Consent Order requires Defendant to provide ‘a written annual progress report’ . . . [and] JEA also has invested hundreds of millions of dollars in the wastewater treatment systems and has plans in place to upgrade its treatment facilities.”).

<sup>46</sup> See *Group Against Smog & Pollution, Inc. v. Shenango Inc.*, 810 F.3d 116, 129 (3d Cir. 2016) (finding diligent prosecution where “[t]he Consent Decrees provide a means to seek court intervention in the event of continuing violations.”).

<sup>47</sup> See *Cnty. of Cambridge*, 115 F. Supp. 2d at 557 (explaining that allowance of a missed deadline or deadline extension under a consent decree does not demonstrate a lack of diligent prosecution because that is not “inconsistent with standard processes for complex environmental projects”) (quotation omitted); compare with *Culbertson v. Coats Am., Inc.*, 913 F. Supp. 1572, 1579 (N.D. Ga. 1995) (holding no diligent prosecution where “EPD’s actions fundamentally consist of a series of extensions of compliance deadlines such that EPD has not yet required defendant to meet the copper and zinc standards of its NPDES permit”); also *N.Y. Coastal Fishermen’s Ass’n v. N.Y.C. Dep’t of Sanitation*, 772 F. Supp. 162, 165 (S.D.N.Y. 1991) (holding mere imposition of penalty does not necessarily preclude a citizen suit).

<sup>48</sup> See *Piney Run*, 523 F.3d at 460 (“[T]he fact that the Consent Judgment does not establish a final deadline for compliance . . . simply do[es] not establish a lack of diligence on [the Maryland Department of the Environment]’s part.”)

<sup>49</sup> See *Humane Soc’y of United States v. Hanor Co. of Wisconsin, LLC*, 289 F. Supp. 3d 692, 713 (E.D.N.C. 2018) (10-year timeline not fatal to diligent prosecution defense).

consent decree creates a bar against later suit based on the very violations that were contemplated to occur.<sup>50</sup> A plaintiff also cannot prove a lack of diligent prosecution by merely claiming a decree could be more complete or more punitive.<sup>51</sup> “Section 1365(b)(1)(B) does not require government prosecution to be far-reaching or zealous. It requires only diligence.”<sup>52</sup> Indeed, “a citizen-plaintiff cannot overcome the presumption of diligence merely by showing that the agency's prosecution strategy is less aggressive than he would like or that it did not produce a completely

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<sup>50</sup> See *Lockett v. E.P.A.*, 319 F.3d 678, 689 (5th Cir. 2003) (holding that a citizen suit cannot be filed for post consent decree violations if those violations were contemplated to occur in the consent decree: “If we were to adopt appellants’ position, a citizen could file notice the day after the compliance order was sent, give notice of any additional violations, and then sue within 120 days.”); *Black Warrior Riverkeeper, Inc. v. Southeastern Cheese Corp.*, 2017 U.S. Dist. LEXIS 9533, \*12 (S.D. Ala. 2017) (“At the time the parties entered into the Consent Decree, ADEM anticipated that there would potentially be runoffs from the site for a period of time while SCC was taking corrective action. Potential runoffs or discharges are not unusual while a company or municipality is taking corrective action. Since August of 2015, when the Consent Decree was entered in state court, ADEM has continued to pursue cessation of unpermitted discharges at SCC and compliance with the Consent Decree.”); *Bertran v. Puerto Rico Aqueduct and Sewer Auth.*, Civil 19-1412CCC, 2019 WL 6833826, at \*9-10 (D. Pr. Dec. 12, 2019) (dismissing CWA citizen suit based on diligent prosecution under Rule 12(b)(6) because 2019 CWA violations were covered by consent decree from 2016 even though violations were ongoing).

<sup>51</sup> See *Black Warrior Riverkeeper, Inc.*, 2017 U.S. Dist. LEXIS 9533, at \*22-23 (“Because of the diligent prosecution bar, SCC is entitled to judgment in its favor, as a matter of law. Riverkeeper cannot overcome the diligent prosecution bar ‘simply by criticizing the consent order as somehow inadequate, and by asking this court to assume a supervisory role over ADEM and [SCC].’”).

<sup>52</sup> *Piney Run*, 523 F.3d at 459-60 (citing *Karr*, 475 F.3d at 1197).

satisfactory result.”<sup>53</sup>

In this instance, the Decree easily satisfies the requirements for diligent prosecution. The Decree is not merely a stipulation between the government and DeKalb. It is a Decree entered by this Court on the basis that it is “fair, reasonable, lawful, and in accord with the public policy and the public interest.”<sup>54</sup> The Court expressly held that the Decree “will remedy the issues in DeKalb’s sewer infrastructure ... and violations of the CWA that occur.”<sup>55</sup> The Court further found that the Decree “addresses ... violations of the CWA by DeKalb and is calculated to bring DeKalb’s sewer infrastructure into compliance with the CWA.”<sup>56</sup> The Decree is robust and intended ultimately to achieve compliance with the CWA. Its injunctive provisions require extensive capital expenditures on the WCTS and are further enforceable through contempt sanctions.<sup>57</sup>

The fact that spills inevitably have occurred as contemplated is not counter to a finding of diligent prosecution. As noted above, the Decree acknowledges, and the Court in approving the Decree recognized, that spills from the WCTS would unavoidably continue.<sup>58</sup> The Decree does not set arbitrary limits or targets for spills

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<sup>53</sup> *Id.*

<sup>54</sup> Approval Order, 2010 Doc. 38, at p. 37.

<sup>55</sup> *Id.* at p. 30.

<sup>56</sup> *Id.*

<sup>57</sup> See Decree at ¶ 93.

<sup>58</sup> See e.g., Decree at ¶¶35(f), 38(a), 65(c), (d); Approval Order at pp. 26-36.

and instead takes the well-reasoned approach of mandating programs that will reduce spills over time. The Decree establishes deadlines, which DeKalb has met, for submittal of all CMOM components. It also establishes a deadline for completion of the upgrades to the highest-priority areas (PASARP) of the WCTS. Even if EPA and EPD exercise their enforcement discretion to extend or modify one of these deadlines, that does not foreclose diligent prosecution.<sup>59</sup> Moreover, the Decree establishes substantial and escalating penalties for spills, as well as for any failure to meet deadlines for submittals.<sup>60</sup> And, it establishes substantial stipulated penalties that become more severe with time if DeKalb fails to meet the PASARP deadline.<sup>61</sup> It does not establish a deadline for completion of upgrades in all other parts of the WCTS because, as the plan for those portions of the WCTS indicates, that work is to be “ongoing.”<sup>62</sup> EPA and EPD reserve rights to seek other relief if DeKalb is not otherwise meeting its obligations to improve the WCTS pursuant to Decree requirements.<sup>63</sup> The Court determined this approach to be “fair, reasonable, lawful, and in accord with public policy and in the public interest.”<sup>64</sup> That the Court

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<sup>59</sup> See *Sierra Club v. ICG E., LLC*, 833 F. Supp. 2d 571, 578 (N.D.W. Va. 2011) (rejecting plaintiff’s arguments that diligent prosecution was not present based on “continual series of such [deadline] extensions”).

<sup>60</sup> See Decree at ¶ 65.

<sup>61</sup> *Id.*

<sup>62</sup> Decree at ¶ 38 (“Ongoing Sewer and Rehabilitation Program”).

<sup>63</sup> *Id.* at ¶ 71.

<sup>64</sup> Approval Order at p. 30.

approved the Decree over objections of SRWA, which was permitted to participate as an intervenor and raised the same or similar objections then that it makes now, is a further reason why SRWA cannot prevail on its allegation that the government has failed to diligently prosecute.<sup>65</sup>

As to the particular matters raised in SRWA's Notice and Complaint, the Decree addresses them in the following ways:

1. Spills/O&M/MS4

DeKalb's purported deficiencies regarding spills and O&M were the basis for the 2010 Complaint. The Decree enters judgment against DeKalb with regard to spills and system O&M, and imposes a comprehensive approach to mandatory remedial actions through eleven CMOM programs to be implemented over the course of several years.<sup>66</sup> The Decree reflects the reality that spills unavoidably would continue notwithstanding implementation of the CMOM programs. It orders DeKalb to submit certified quarterly, semi-annual, and annual reports on spills and ongoing system improvements. The Decree imposes penalties for failure to timely submit any of the mandatory deliverables, for failure to meet the deadline for

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<sup>65</sup> See *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 890 F. Supp. 470, 490 (D.S.C. 1995) (explaining that the lack of an opportunity for citizen intervention triggers "heightened scrutiny" of diligent prosecution defense); *Conn. Fund for Env't*, 631 F. Supp. at 1294 ("It is also significant that the [plaintiffs] or their members could have moved to intervene in the state action . . .").

<sup>66</sup> See Decree at ¶¶ 6, 11-38.

completing the improvements in the highest priority areas under the PASARP, and for any spills from the WCTS. Thus, SRWA's allegations regarding spills and the alleged O&M deficiencies causing SSOs are all the subject of, and subject to, the Decree.

The alleged MS4 violations are equally the subject of, and subject to, the Decree. SRWA alleges that certain SSOs reach state waters via the MS4.<sup>67</sup> But all SSOs by definition originate from the WCTS, not the MS4. All SSOs, including those that enter the MS4, are what gave rise to the 2010 Complaint, and, as discussed above, the Decree comprehensively addresses them.

**C. The Government Has Vigorously Enforced the Decree.**

If the Court decides to look beyond the face of the Decree to evaluate the governments' diligence, such a review shows that EPA and EPD are continuing to monitor DeKalb's obligations and performance and punish the County with stipulated penalties. As discussed above, DeKalb's efforts and investments implementing the eleven CMOM programs to improve O&M and reduce spills have been substantial and costly. Moreover, EPA and EPD have adopted an increasingly stringent approach to the imposition of penalties for spills. Initially, EPA and EPD exercised their enforcement discretion to not assess stipulated penalties in instances where a spill was caused by vandalism, outside contractor error, or large rain events.

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<sup>67</sup> See Am. Compl., Doc. 21, at ¶¶ 91, 98, 116.

More recently, however, EPA and EPD have assessed penalties for spills arising from such causes and events.<sup>68</sup> When DeKalb determined that it had not properly reported spills, it was required to investigate the matter and re-report its spills, and EPA and EPD then assessed a \$181,000 penalty.<sup>69</sup>

Despite acknowledging that EPA and EPD have assessed these substantial penalties, SRWA contends that this is insufficient because the CWA allows EPA to charge even more.<sup>70</sup> As discussed above, the law is well-established that a plaintiff cannot meet the heavy burden of overcoming diligent prosecution by merely alleging a consent decree or agency's enforcement of it could have been stricter. SRWA's only other argument for lack of diligent prosecution is that EPA and EPD have not penalized DeKalb for implementing a static hydraulic model, instead of a dynamic model. According to SRWA, "in the absence of dynamic hydraulic models for each sewer shed, DeKalb County cannot rehabilitate its Wastewater Collection and Transmission System."<sup>71</sup> EPA and EPD clearly do not agree, as they approved DeKalb's Hydraulic Model Program document that proposed development of a static model in lieu of a dynamic model, thus, no penalty would have been appropriate.

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<sup>68</sup> Compare Ex. C at p. 1 (not enforcing stipulated penalties for "vandalism or outside contractor error" in 2012), with Ex. C. at p. 10 (enforcing stipulated penalties for every single spill in 2018).

<sup>69</sup> See Ex. C.

<sup>70</sup> See Am. Compl., Doc. 21, at ¶ 67.

<sup>71</sup> *Id.* at ¶ 49; see also *id.* at ¶ 44.

Moreover, as discussed in Section V, *infra*, the model is a requirement of the Decree, not the CWA, *per se*, and SRWA cannot bring a claim to enforce the Decree. In conclusion, the rigors of the Decree, and EPA/EPD's enforcement thereof, are quintessential acts of diligent prosecution mandating dismissal of Plaintiffs' claims.

## II. SRWA (Including Echols) Lacks Article III Standing.

### A. Legal Standard

SRWA lacks standing if its members lack standing.<sup>72</sup> SRWA must establish the following as to each claim: (1) injury in fact to its members (including specifically, Echols), (2) causal connection between the injury and DeKalb's actions, and (3) redressability.<sup>73</sup> SRWA must show that the alleged injury is (a) "concrete and particularized" and (b) "actual or imminent, not conjectural or hypothetical."<sup>74</sup> Standing is a jurisdictional requirement.<sup>75</sup> Thus, a motion to dismiss for lack of standing is treated as a 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction, and the Court may consider evidence outside the pleadings.<sup>76</sup>

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<sup>72</sup> See *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000).

<sup>73</sup> See *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Engineers*, 781 F.3d 1271, 1279 (11th Cir. 2015) (citing *Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 1328 (11th Cir. 2013)).

<sup>74</sup> *New Manchester Resort & Golf, LLC v. Douglasville Dev., LLC*, 734 F. Supp. 2d 1326 (N.D. Ga. 2010) (citing *Laidlaw*, 528 U.S. at 180-81); see also *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1003 (11th Cir. 2004) (citation omitted).

<sup>75</sup> See *Black Warrior Riverkeeper, Inc.*, 781 F.3d at 1279.

<sup>76</sup> See *Stalley ex rel. U.S. v. Orlando Reg'l Healthcare Sys., Inc.*, 524 F.3d 1229, 1232 (11th Cir. 2008).

**B. SRWA Cannot Establish Injury Regarding Discharges into the MS4.**

SRWA cannot establish injury-in-fact regarding purported spills into the MS4. SRWA alleges violations of DeKalb’s MS4 permit by: (1) illicit discharges into the MS4; (2) failure to ensure that illicit discharges are eliminated; and (3) failure to implement activities to eliminate sewage spills to the [MS4].<sup>77</sup> SRWA does not allege a cognizable violation of the MS4 permits for (1) illicit discharges or (2) failure to eliminate them, because the MS4 permit requires only the *implementation* of a program designed to eliminate discharges, not the actual elimination of illicit discharges.<sup>78</sup> Thus, there is no violation alleged from which SRWA could be injured.

With respect to the third allegation, the failure to implement activities to eliminate sewage spills, DeKalb does, as SRWA alleges, have an obligation under its recently-issued (May 2019) MS4 permit to “perform at least one activity [in DeKalb’s stormwater management plan] to detect and eliminate seepage and spillage from municipal sanitary sewers to the MS4 at least once each [annual] reporting

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<sup>77</sup> Doc. 21 at ¶¶92-98.

<sup>78</sup> See May 13, 2019 DeKalb MS4 Permit, attached hereto as Exhibit D, at pp. 9–10, (“The permittee must implement and enforce a program to detect and eliminate illicit discharges and improper disposal of pollutants into the MS4” with a “Measurable Goal” of ensuring “any identified illicit discharges are eliminated”); June 11, 2014 DeKalb MS4 Permit [replaced by 2019 MS4 permit], attached hereto as Exhibit E, at pp. 9–10 (with same provisions).

period.”<sup>79</sup> But, SRWA’s Notice and Amended Complaint do not specify what “activities” DeKalb failed to implement under the stormwater management plan that would have detected or eliminated impermissible sewage spills into the MS4. DeKalb has implemented the required activities, but even if it had not yet done so, DeKalb’s MS4 permit is less than a year old and the reporting period is May 2019 to April 2020. Therefore, DeKalb has until April 2020 to implement these stormwater management plan activities.<sup>80</sup> Thus, SRWA fails to prove any CWA violation or injury in fact with regard to the alleged MS4 permit violations.

**C. SRWA Cannot Establish Redressability.**

SRWA cannot show that any of the alleged violations of the CWA will be redressed by a favorable decision. For each of the alleged violations, SRWA seeks a judgment that DeKalb is in violation of the CWA, an injunction, and monetary penalties. But, the Decree already provides all of those forms of relief. Thus, SRWA cannot establish redressability of its claims because the remedies that it seeks are already in place by virtue of the Decree.

SRWA also makes allegations suggesting that the penalties under the Decree are not severe enough and that the static hydraulic model DeKalb developed under

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<sup>79</sup> Ex. D at p. 11, Table 3.3.2(7). Significantly, this requirement is in DeKalb’s newest MS4 from May 2019, not its previous MS4 permit. (*See* Ex. E at p. 10, Table 3.3.2(7)).

<sup>80</sup> *See* DeKalb’s MS4 Annual Report for May 2018 to April 2019, attached hereto as Exhibit F, at p. 2.

its Hydraulic Model Program EPA and EPD approved pursuant to the Decree is not good enough, and SRWA asks the Court to effectively amend the Decree by imposing a new “deadline for DeKalb County to repair its WCTS to prevent spills into surface waters.”<sup>81</sup> To the extent SRWA seeks to argue that the Decree is inadequate or insufficiently punitive in remedying the alleged violations, the Court can provide no redress. As SRWA acknowledged in its opposition to the Decree, and the Court held when it approved the Decree, the Court may approve or deny the issuance of a consent decree, but is not entitled to change the terms of the agreement the parties have reached.<sup>82</sup>

Further, the Decree requires extensive programs designed to improve O&M and thereby reduce spills (including to the MS4), and imposes substantial penalties for spills. As the Decree has been determined to address the past and ongoing violations in a fair and reasonable manner, and to be in the public interest, there is no relief that the Court can grant to redress SRWA’s claim.<sup>83</sup> It is not within the purview of the Court to substitute its judgment for EPA’s and EPD’s expertise in the

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<sup>81</sup> Am. Compl. at ¶ 13.

<sup>82</sup> 2010 Doc. 29-1 at pp. 5-6; Approval Order at p. 27.

<sup>83</sup> See *Alcocer v. Bulloch Cty. Sheriff's Office*, No. CV 615-94, 2017 WL 227793, at \*6 (S.D. Ga. Jan. 18, 2017) (“If Defendants are already violating the law, for which they face pre-existing penalties, an injunction issued by the Court ordering Defendants to obey the law, without any additional specificity, would be meaningless and futile . . . Therefore, Plaintiff’s claim for injunctive relief will not redress her injury.”).

“designing, constructing or maintaining [of] sewage treatment systems.”<sup>84</sup> As SRWA is not entitled to any relief and their claims must be dismissed, this Court cannot award SRWA attorneys’ fees.<sup>85</sup>

### **III. SRWA Failed to Provide Sufficient Pre-Suit Notice.**

Pre-suit notice is a jurisdictional prerequisite to a CWA suit.<sup>86</sup> As notice is jurisdictional, it is properly raised in a Rule 12(b)(1) motion, and the Court may consider evidence outside the pleadings.<sup>87</sup> But even if the Court elects to analyze the sufficiency of notice under Rule 12(b)(6), the Court can dismiss based solely on the Complaint and the Notice.

Notice first must be sufficiently specific to inform the alleged violator about what it is doing wrong, so that it will know what corrective actions will avert a lawsuit.<sup>88</sup> Thus, notice must articulate a specific activity alleged to constitute the

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<sup>84</sup> See *Friends of Milwaukee’s Rivers*, 382 F.3d at 760 (citations omitted).

<sup>85</sup> See *Hughey v. JMS Dev. Corp.*, 78 F.3d at 1532 (as citizen suit “has not accomplished its original objective [the plaintiff] is not a prevailing or substantially prevailing party and is thus not entitled to an award of attorney fees and costs”).

<sup>86</sup> See *Nat’l Envtl. Found. v. ABC Rail Corp.*, 926 F.2d 1096, 1097 (11th Cir. 1991).

<sup>87</sup> See *Purvis v. Douglasville Dev., LLC*, No. 1:06CV0415 WSD, 2006 WL 3709610, at \*3 (N.D. Ga. Nov. 9, 2006) (analyzing motion to dismiss for lack of notice under 12(b)(1)); *Atwell v. KW Plastics*, 213 F. Supp. 2d 1294, 1295 (M.D. Ala. 2002) (same).

<sup>88</sup> See *Carney v. Gordon Cty., Georgia*, No. CIVA 4:06CV36 RLV, 2006 WL 4347048, at \*5 (N.D. Ga. Sept. 12, 2006) (citations omitted) (“In practical terms, the notice must be sufficiently specific to inform the alleged violator about what it is doing wrong, so that it will know what corrective actions will avert a lawsuit.”); *Purvis*, 2006 WL 3709610, at \*3.

violation.<sup>89</sup> The Eleventh Circuit has emphasized that specificity of allegations with respect to a defendant's actions is especially important where, as here, there are alleged violations spanning many years.<sup>90</sup> Indeed, this Court's analysis of sufficient notice has often hinged on the identification of the defendant's specific activity—such as the failure to erect silt erosion fences—that has directly resulted in a CWA violation.<sup>91</sup> “[A]nother purpose behind the notice requirement of §1365 is to effectuate Congress's preference that the Act be enforced by government prosecution.”<sup>92</sup> The Eleventh Circuit held that “[t]he notice requirements are strictly construed.”<sup>93</sup>

Further, where the subject of an alleged violation is also the subject matter of

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<sup>89</sup> See *Duggan Family P'ship, LLP v. City of Jeffersonville, Georgia*, No. CIV.A. 5:08-CV-313(HL), 2009 WL 1560045, at \*2 (M.D. Ga. June 1, 2009) (holding notice deficient in CWA suit alleging that water treatment facility caused increased runoff that was contaminated but did not “provide a specific activity alleged to constitute the violation as explicitly required by the regulations”).

<sup>90</sup> See *National Parks & Conservation Ass'n, Inc. v. Tennessee Valley Auth.*, 502 F.3d 1316, 1321 (11th Cir. 2007) (upholding district court's holding that “plaintiffs' notice letter lacked specificity where it broadly alleged nearly 20 years' worth of daily violations” under analogous Clean Air Act notice).

<sup>91</sup> See *Carney*, 2006 WL 4347048, at \*6 (sufficient notice based on description of defendant's failure of “proper installation of erosion and sediment control structures” on construction site at farm); *Purvis*, 2006 WL 3709610, at \*5 (sufficient notice based on description of defendants who “during land development activities, discharged dredged or fill materials around the New Manchester Tributary . . . caused by [their] failure to implement appropriate sediment and erosion control structures”).

<sup>92</sup> See *Nat'l Env'tl. Found.*, 926 F.2d at 1099 (citing *Gwaltney*, 484 U.S. at 60).

<sup>93</sup> See *Mrosek v. City of Peachtree City*, 539 F. App'x 938, 940 (11th Cir. 2013) (quotation omitted).

an existing consent decree, a claimant's notice should specify whether and how such violations were not contemplated by and are not being addressed by the decree.<sup>94</sup> In *Lockett*, for example, the Fifth Circuit held that where plaintiffs' pre-suit notice under the CWA specified "ongoing violations" or "new violations," but those new violations were contemplated and covered by an existing consent decree or compliance order, that notice was insufficient as a matter of law. The court reasoned that to hold otherwise would allow a plaintiff to turn around immediately after the entry of a consent order and give "notice" of new or continuing violations, even where those exact violations were contemplated by the consent order.<sup>95</sup> That would be antithetical to the purpose of a citizen suit: "to supplement, not supplant government action."<sup>96</sup>

**A. The Notice Lacks Any Specifics About DeKalb's Alleged Deficiencies in O&M and Spills, Which Are Covered by the Decree.**

The Notice points to spills and O&M, and contends that "sanitary systems that are efficiently maintained and operated do not cause ongoing and repeated spills of untreated sewage."<sup>97</sup> That statement is unsupported and incorrect (sewer systems

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<sup>94</sup> See *Lockett*, 319 F.3d at 690.

<sup>95</sup> *Id.* at 689 ("If we were to adopt appellants' position, a citizen could file notice the day after the compliance order was sent, give notice of any additional violations, and then sue within 120 days.").

<sup>96</sup> *Id.* (citation omitted).

<sup>97</sup> Notice Letter, Doc. 21-1 at p. 3.

inevitably have at least some spills<sup>98</sup>), and, in any event, the Decree and Approval Order recognized that spills would inevitably continue to some extent for years to come.<sup>99</sup> The alleged cause of the spills, O&M, is the primary and expansive subject of the Decree, and the efforts to improve O&M likewise were contemplated to continue over many years.<sup>100</sup> The Notice does not say how O&M is deficient or specify what DeKalb should do about alleged deficiencies that it is not already required to do under the Decree. The Notice only suggests that DeKalb should operate the WCTS more “efficiently.” “More efficiently” is not the standard for compliance with the CWA, and the allegation lacks any meaningful guidance about what DeKalb could do to avert this lawsuit.

While Exhibit A to the Notice lists spills and alleged “causes” of the spills (information taken from DeKalb’s own certified reports), those “causes” all are the subject of improvements that DeKalb must make pursuant to the EPA/EPD-approved CMOM programs developed under the Decree. In particular, grease and debris buildups, contractor accidents, lift station issues, root invasion, lift station

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<sup>98</sup> See “Sanitary Sewer Overflows,” U.S. EPA Office of Wastewater Management, EPA 832-K-96-001 (Summer 1996)(“SSOs occasionally occur in almost every sewer system”), available at <https://www3.epa.gov/npdes/pubs/ssodesc.pdf>.

<sup>99</sup> See Decree at ¶¶ 6; 63-71; Approval Order at pp. 26-36.

<sup>100</sup> See Decree at ¶¶ 11-39.

failure, storm overflows, and pipe leaks all are items to be addressed under the Decree's CMOM programs.<sup>101</sup>

**B. The Notice Fails to Properly Articulate the Requirements of DeKalb's MS4 Permit, and the Source of Spills into and from the MS4 Are Addressed By the Consent Decree.**

As noted above, the discharges into the MS4 that SRWA complains of are among the kinds of SSOs addressed by the Decree. SRWA simply describes the same SSOs as a violation of the MS4 permit. Were this not the case, the Notice fails for other reasons. As discussed in Section II.B, *supra*, the Notice does not state a violation of the MS4 permit. The Notice also does not specifically describe what “activities” DeKalb failed to implement under its stormwater management plan that would have detected or eliminated SSOs into the MS4. And, DeKalb's MS4 permit is less than a year old, and DeKalb has the remainder of this reporting period to implement these stormwater management plan activities.<sup>102</sup>

**C. SRWA Has Not Given the Required Statutory Notice for Claims Based on Spills or Failure of O&M Occurring after the Notice Letter**

The Amended Complaint references a spill that occurred the week before SRWA filed the Amended Complaint.<sup>103</sup> As noted above, notice is a jurisdictional prerequisite to a citizen suit, and notice requirements are strictly construed. Here,

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<sup>101</sup> See, e.g., Decree at ¶¶ 17, 21; chart of CMOM Programs and Approvals, Ex. A.

<sup>102</sup> See *supra* at Section II.B.

<sup>103</sup> Am. Compl. at ¶ 114.

SRWA has failed to provide the required 60-day notice for any claim or relief based on that spill or any alleged failure of O&M that gave rise to that spill.<sup>104</sup> Thus, this Court cannot enter judgment or grant SRWA any relief as it pertains to that spill or any alleged O&M failure that caused or contributed to it.

**IV. Res Judicata Bars SRWA’s Claims to the Extent They Are Based on the Alleged Inadequacy of the Decree.**

A consent decree covering CWA violations operates as res judicata against a subsequent citizen suit concerning the same violations.<sup>105</sup> Res judicata covers not only claims that were brought in opposition to the Decree, but claims that could have been brought. Res Judicata is an affirmative defense.<sup>106</sup> A “party may raise a res judicata defense by [12(b)(6)] motion rather than by answer where the defense’s existence can be judged on the face of the complaint.”<sup>107</sup> “[T]he [judicial] record of

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<sup>104</sup> See *Pub. Interest Research Grp. of New Jersey, Inc. v. Hercules, Inc.*, 50 F.3d 1239, 1250 (3d Cir. 1995) (holding that a “new 60–day notice letter is necessary” for alleged violations after complaint is filed unless “post-complaint discharge violation is of the same type as a violation included in the notice letter (same parameter, same outfall)”); *Sierra Club v. City of Colorado Springs*, No. CIV 05CV01994WDMBNB, 2009 WL 1193513, at \*4 (D. Colo. Apr. 29, 2009) (holding that “new [CWA] violations occurring after the complaint,” in the form of “unlawful discharges of wastewater,” lacked sufficient similarity with pre-suit notice “in the context of Colorado Springs’s large sewer system” for the Court to consider in an amended complaint).

<sup>105</sup> See *EPA v. City of Green Forest*, 921 F.2d 1394, 1400 (8th Cir. 1991); *St. Bernard Citizens for Env’tl. Quality, Inc. v. Chalmette Ref., L.L.C.*, 500 F. Supp. 2d 592 (E.D. La. 2007).

<sup>106</sup> See *Norfolk S. Corp. v. Chevron, U.S.A., Inc.*, 371 F.3d 1285, 1289 (11th Cir. 2004).

<sup>107</sup> *Concordia v. Bendekovic*, 693 F.2d 1073, 1075 (11th Cir. 1982).

the prior case [may] be received in evidence” in ruling on a res judicata motion to dismiss.<sup>108</sup>

All of SRWA’s claims with respect to NPDES permits, spills, and O&M of the WCTS were the subject of the Decree.<sup>109</sup> Further, SRWA’s claims are premised on SRWA’s general criticism that the Decree is inadequate in addressing ongoing spills and O&M. SRWA intervened in the litigation giving rise to the Decree and raised or could have raised those challenges at that time. Although SRWA alleges that the Decree “does not limit the rights of third parties,” the Decree does limit the rights of third parties “as otherwise provided by law.”<sup>110</sup> Res Judicata is the law. The Decree also explicitly addresses res judicata: outlining that DeKalb is only limited from asserting that defense against the government, not third parties like SRWA.<sup>111</sup> SRWA participated in the 2010 Action and chose not to argue that the stipulated penalties were insufficient, that there should be an ultimate deadline for full system CWA Compliance, or that EPA and EPD’s authority to approve DeKalb’s Hydraulic Model Program should be altered. The Court approved the Decree, and SRWA’s claims are therefore barred.

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<sup>108</sup> See *Gryder v. Mineta*, No. 1:04-CV-189-CC-ECS, 2006 WL 8431637, at \*2 (N.D. Ga. Jan. 23, 2006) (quotation omitted).

<sup>109</sup> See Decree at ¶¶ 6;15; 35-39; 63-71.

<sup>110</sup> Compare Am. Compl. at ¶ 71, with Decree at ¶ 96.

<sup>111</sup> Decree at ¶ 94 (explaining that DeKalb may not raise a res judicata defense in a subsequent “judicial proceeding initiated by the United States or the State”).

**V. If SRWA Intends a Claim Based on the Hydraulic Model Deadline or the Future PASARP Deadline, That Claim Must Fail.**

Lastly, DeKalb notes that SRWA alleges that DeKalb failed to timely submit a hydraulic model under the Decree and will not timely complete assessment and rehabilitation work under the PASARP by July 20, 2020.<sup>112</sup> SRWA argues that the model that DeKalb submitted in accordance with EPA/EPD approved Hydraulic Model Program document was not sufficient because it was a “steady-state” model and should use different flow criteria.<sup>113</sup> These allegations are not included in the one and only Count of the Complaint, and SRWA does not request any relief with regard to those allegations. Therefore, it does not appear that SRWA even attempts to assert a claim based on those allegations, and DeKalb therefore should not need to seek dismissal of any such (non-existent) claim.

To the extent any response with regard to such allegations is necessary, however, any requirements for the hydraulic model and the PASARP deadline by definition derive from the Decree. Thus, even if EPA and EPD approved a “material modification” to the Decree, as SRWA claims,<sup>114</sup> SRWA cannot bring a citizen suit to enforce a purported violation of the Decree. The Decree is not an “effluent standard or limitation” or order issued by EPA or the State with regard to such a

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<sup>112</sup> See Am. Compl. at ¶¶ 27, 35-37.

<sup>113</sup> See *id.* at ¶¶ 47-48.

<sup>114</sup> See Am. Compl. at ¶¶ 45-46.

standard or limitation.<sup>115</sup> Further, as these are requirements of the Decree and DeKalb would be subject to penalties for breaching such requirements, the Decree itself establishes diligent prosecution of such requirements. Moreover, SRWA would have no standing to claim DeKalb missed a Decree deadline for the implementation of a hydraulic model, not only because DeKalb has not missed the hydraulic model deadline (EPA/EPD approved DeKalb's original and amended Hydraulic Model CMOM Programs, and such approval is entitled to deference),<sup>116</sup> but also because a mere technical or procedural violation of the Decree cannot establish the "concrete and particularized" harm required for Article III standing.<sup>117</sup> DeKalb's hydraulic model serves the intended purpose established under the Decree.<sup>118</sup> Similarly, SRWA cannot establish injury-in-fact or seek redress for a purported future deadline that has not yet been missed.

### **CONCLUSION**

For the reasons above, the Amended Complaint should be dismissed in its entirety.

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<sup>115</sup> See 33 U.S.C. §1365.

<sup>116</sup> See Exhibit B; see also *Friends of Milwaukee's Rivers*, 382 F.3d at 760 (It is not within the purview of the Court to substitute EPA's and EPD's expertise in the "designing, constructing or maintaining [of] sewage treatment systems" for its own) (citations omitted).

<sup>117</sup> See *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1550 (2016) (holding that a plaintiff "cannot satisfy the demands of Article III by alleging a bare procedural violation").

<sup>118</sup> See Exhibit B.

Dated March 9, 2020.

Respectfully submitted,

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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION**

SOUTH RIVER WATERSHED  
ALLIANCE, INC., AND JACQUELINE  
ECHOLS,

Plaintiffs,

v.

DEKALB COUNTY, GEORGIA,

Defendant.

CIVIL ACTION  
NO. 1:19-cv-04299-SDG

**CERTIFICATE OF SERVICE AND COMPLIANCE**

I certify that on March 9, 2020, I filed the foregoing **DEFENDANT DEKALB COUNTY, GEORGIA'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFFS' COMPLAINT** with the Clerk of Court using the CM/ECF system, which will automatically send e-mail notification of such filing to counsel of record. I also certify this date that the foregoing was prepared in accordance with N.D. Ga. L.R. 5.1, using Times New Roman font, 14 point.

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