IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

South River Watershed Alliance, Inc., and Jacqueline Echols, Plaintiffs, v. DeKalb County, Georgia, Defendant.	* * * * * * * * *	Case 1:19-cv-04299-SDG

Plaintiffs' Amended Response in Opposition to
Defendant's Motion to Dismiss Amended Complaint

I. Introduction

DeKalb County spills millions of gallons of untreated sewage into streams and rivers every year. In 2011, this Court approved a Consent Decree between DeKalb County, ("DeKalb"), the United States Environmental Protection Agency, ("EPA"), and Georgia Environmental Protection Division ("EPD"). The Consent Decree set a deadline to assess and rehabilitate the sewer system in "Priority Areas." The Consent Decree had no deadline for repairing the sewer system in Non-Priority Areas, which account for more than two-thirds of the sewer pipes and the majority of sewage spills.

DeKalb has acknowledged it won't meet the Consent Decree's deadline to repair the system's Priority Areas. In the meantime, sewage spills are occurring at the same rate as before the Consent Decree.

II. Statutory Background

Section 301(a) of the Clean Water Act ("CWA") prohibits the discharge of pollutants, including sewage, except as authorized by a CWA Section 402 NPDES permit.[1]

DeKalb's NPDES Permits authorize the County to collect wastewater, convey it to treatment plants where contaminants are removed, and then discharge treated wastewater to surface waters. These permits do not authorize the discharge of untreated sewage into streams and rivers.[2]

DeKalb also has a CWA Section 402 NPDES Permit for its Municipal Separate Storm Sewer System ("MS4 Permit).[3] The MS4 Permit prohibits the discharge of sewage into the separate storm sewer system (i.e., storm drains).[4]

III. Argument

A. SRWA's Notice Letter Complied With CWA Notice Requirements

In its notice letter, SRWA identified 801 sewage spills into streams and rivers from DeKalb's sewer system between July 2014 and April 2019.[5]

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[1] 33 U.S.C. §§ 1311(a), 1342, 1362(6).
[2] NPDES Permits GA0024147 and GA0026816 (Attached at Exhibits 1 and 2).
[3] MS4 Permit No. GAS000111, June 11, 2014 – June 10, 2019; MS4 Permit No. GAS000111, effective June 11, 2019) (Attached at Exhibits 3 and 4).
[4] Exhibit 3, Appendix A, p. 30; Exhibit 4, Appendix A, p. 33; Exhibits 3 and 4, p. 9 and p. 10, Table 3.3.2 (3.c.).
[5] ECF 21-2.

(Sewage "spills" into surface waters account for only a portion of DeKalb's Sanitary Sewer Overflows. There are also "surface overflows" which don't reach streams and rivers, and "back-ups" which go into buildings).

SRWA set forth that DeKalb violated the Clean Water Act by discharging sewage from point sources that were not identified in NPDES permits as authorized outfalls.[6] SRWA stated that these sewage spills were in violation of Section 301 of the CWA and in violation of NPDES Permit Nos. GA0024147, GA0026816 and GA0039012.[7]

SRWA identified the date, time, address, estimated gallons of sewage, the specific manhole or other structure from which each spill discharged, the receiving stream, and the cause and source of each spill.[8]

DeKalb asserts that SRWA's notice letter "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."[9] It is not SRWA's obligation to specify how DeKalb's Operation and Maintenance is deficient, or to identify a remedy to prevent sewage spills.[10]

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[6] ECF 21-1, at 4.
[7] *Id.* at 2.
[8] ECF 21-2.
[9] ECF 30-1, at 27.
[10] 40 C.F.R. 135.3.

A notice letter shall include "sufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to have been violated" and "the activity alleged to constitute a violation."[11]

The "regulation clearly does not require a plaintiff to identify the specific standard [alleged to constitute a violation]. Instead, it requires that the plaintiff 'include sufficient information to permit the recipient to identify' that standard."[12] Here, SRWA disclosed more information than required by the regulation. SRWA's notice letter included detailed information about each spill, about the applicable CWA effluent standards and limitations, and about how each spill violated those effluent standards and limitations, including Section 301 of the CWA and DeKalb's NPDES permits.[13]

DeKalb also asserts that "SRWA has failed to provide the required 60-day notice for any claim or relief based on" a post-Complaint sewage spill referred to in SRWA's *Amended Complaint*.[14] From Feb. 19, 2020 through Feb. 21, 2020, an estimated 9,210,192 gallons of sewage discharged into Snapfinger Creek from a manhole on Meadow Creek Path in Lithonia.[15]

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[11] *Id.*
[12] *Boring v. Pattillo Indus. Real Estate*, No. 2:19-CV-76-RWS, 2019 WL 6816931, at *3 (N.D. Ga. Dec. 11, 2019) *citing* 40 C.F.R. § 135.3(a).
[13] ECF 21-1; ECF 21-2.
[14] ECF 30-1, at 28-29 referring to ECF 21, at 35 ¶ 114).
[15] Exhibit 5, Attachment A (ECF 40-5, at 18-20).

The cause of this sewage spill was infiltration and inflow ("I/I") of storm water into the sewer system during heavy rain.[16] Another sewage spill at the same location, which was also caused by infiltration and inflow during heavy rain, was ongoing from March 5, 2020 through March 7, 2020 with an estimated 6,994,260 gallons of sewage spilled into Snapfinger Creek.[17]

Five sewage spills into Snapfinger Creek from this same manhole were identified in SRWA's notice letter, ranging from January 23, 2017 to April 19, 2019.[18] Each of these spills was caused by infiltration and inflow of storm water into the sewer during heavy rain.[19]

DeKalb cites *Pub. Interest Research Grp. of New Jersey, Inc. v. Hercules, Inc.*, to support its contention that this Court "cannot enter judgment or grant SRWA any relief as it pertains" to these post-Complaint spills.[20] But in that case, the court held "that a notice letter which includes a list of discharge violations, by parameter, provides sufficient information for the recipients of the notice to identify violations of the same type (same parameter, same outfall) occurring during and after the period covered by the notice letter."[21]

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16 Exhibit 5, Attachment A (ECF 40-5, at 18).
17 Exhibit 5, Attachment B (ECF 40-5, at 21-23).
18 ECF 21-2, at 9, 16, 17, 19, and 20.
19 *Id.*
20 ECF 30-1, at 29 *citing Pub. Interest Research Grp. of New Jersey, Inc.*, 50 F.3d 1239, 1250 (3rd Cir. 1995).
21 *Pub. Interest Research Grp. of New Jersey, Inc.*, 50 F.3d at 1250.

Here, SRWA identified the same parameter (unpermitted sewage) and same outfall (manhole 15-034-s090) for the spills at Meadow Creek Path.[22] DeKalb is subject to liability for these post-notice letter sewage spills.

DeKalb claims SRWA's "Notice does not state a violation of the MS4 permit."[23] SRWA's notice letter set forth that DeKalb's MS4 Permits prohibited illicit discharges and set forth that the MS4 Permits defined illicit discharges as including sewage discharges into the MS4 storm sewer system.[24] The notice letter included an attachment of 62 discharges of sewage into DeKalb's storm drains.[25] SRWA alleged these were illicit discharges which violated the MS4 Permits and violated Section 301 of the CWA.[26] For each illicit discharge of sewage into the MS4 system, SRWA identified the date, time, address, estimated gallons of sewage, the cause and source of the spill, and the stream which the storm drain discharged into.[27] This information complies with the CWA's notice requirements set forth at 40 C.F.R. § 135.3.

DeKalb further argues that SRWA's "Notice also does not specifically describe what 'activities' DeKalb failed to implement under its stormwater

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[22] ECF 21-2, at 9, 16, 17, 19, and 20; Exhibit 5, Attachments A and B (ECF 40-5, at 18-23).
[23] ECF 30-1, at 28.
[24] ECF 21-1, at 4.
[25] ECF 21-5.
[26] ECF 21-1, at 4.
[27] ECF 21-5.

management plan that would have detected or eliminated SSOs into the MS4."[28] SRWA doesn't need to identify "what 'activities' DeKalb failed to implement."[29] SRWA's notice letter provided the information required by 40 C.F.R. § 135.3.

B. SRWA's *Amended Complaint* Sets Forth a Claim for DeKalb County's Violation of its MS4 Permits

The Clean Water Act authorizes a citizen suit against any entity who is alleged to be in violation of an "effluent standard or limitation."[30] The term effluent standard or limitation includes "a permit or condition of a permit" issued under Section 402 of the Clean Water Act.[31] DeKalb's MS4 Permits were issued under Section 402 (National Pollutant Discharge Elimination System).[32]

According to DeKalb, "the MS4 permit requires only the *implementation* of a program designed to eliminate discharges, not the actual elimination of illicit discharges."[33]

This argument disregards the word "enforce" in the MS4 Permits: "The permittee must implement and enforce a program to detect and eliminate illicit

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[28] ECF 30-1, at 28.
[29] 40 C.F.R. § 135.3.
[30] 33 U.S.C. § 1365(a)(1).
[31] 33 U.S.C. § 1365(f)(7).
[32] 33 U.S.C. § 1342(p).
[33] ECF 30-1, at 21 (emphasis in original).

discharges and improper disposal of pollutants into the MS4."[34] It also disregards that the MS4 Permit states: "At a minimum, the program…must…[e]nsure any identified illicit discharges are eliminated."[35]

DeKalb relies on a different part of the MS4 Permit which requires the County to "perform at least one activity to detect and eliminate seepage and spillage from municipal sanitary sewers to the MS4 at least once each reporting period."[36] But the obligation to "perform at least one activity…each reporting period" does not absolve DeKalb of its additional obligations to "enforce a program to…eliminate illicit discharges,"[37] and to "[e]nsure any identified illicit discharges are eliminated."[38]

In *Citizens for Pennsylvania's Future v. Pittsburgh Water & Sewer Auth.*, the MS4 permit required the Water & Sewer Authority "to 'implement and enforce' certain programs…including: "[e]nact an ordinance prohibiting non-stormwater discharges into the MS4."[39] The plaintiffs alleged the Water & Sewer Authority violated the CWA by failing to enforce the ordinance as

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[34] Attachments 3 and 4 at p. 9.
[35] Attachments 3 and 4 at p. 10 Table 3.3.2 (3.c.).
[36] ECF 30-1, at 21-22, citing 2019 MS4 Permit p. 11, Table 3.3.2(7)).
[37] Attachments 3 and 4 at p. 9.
[38] Attachments 3 and 4 at p. 10 Table 3.3.2 (3.c.).
[39] *Citizens for Pennsylvania's Future v. Pittsburgh Water & Sewer Auth.*, No. CIV.A. 12-943, 2012 WL 6019058, at *1 (W.D. Pa. Dec. 3, 2012).

required by the MS4 permit.[40] The court held the complaint set forth "a plausible claim for relief."[41]

DeKalb's 2014 and 2019 MS4 Permits required the County to ensure that sewage discharges into the MS4 are eliminated. DeKalb's failure to ensure the elimination of sewage discharges into its storm drains, as evidenced by the 62 illicit discharges set forth in SRWA's notice letter and *Amended Complaint*, is in violation of the MS4 Permits and in violation of Section 301 of the CWA.

C. SRWA Has Standing

DeKalb raises two challenges to SRWA's standing. The first is that "there is no violation [of the MS4 Permit] from which SRWA could be injured."[42] As set forth in the preceding section, the discharge of sewage into DeKalb's storm drains violated DeKalb's MS4 Permits and violated Section 301 of the CWA.

The second argument is that "SRWA cannot show that any of the alleged violations of the CWA will be redressed by a favorable decision."[43] Redressability "means a likelihood that the requested relief will redress the

[40] *Id*. at *2.
[41] *Id*. at *3
[42] ECF 30-1, pp. 21-22.
[43] ECF 30-1, at 22.

injury."[44] A plaintiff's burden of proving redressability "is relatively modest" in a motion to dismiss."[45]

There is no deadline to stop spills in Non-Priority Areas, and no deadline to rehabilitate the sewer system in Non-Priority Areas. Setting deadlines for Non-Priority Areas is likely to redress SRWA's injury.

For the reasons set forth below in Section III.E., this Court should also grant SRWA the right to seek redress for spills in Priority Areas. *See*, *Declaration of Jacqueline Echols,* setting forth the harm to SRWA and Dr. Echols which has been caused by DeKalb's sewage spills.[46]

D. SRWA's CWA Claim is Not Barred by Res Judicata

DeKalb argues that the Consent Decree shields it from liability for the sewage spills set forth in SRWA's *Amended Complaint*. But the Consent Decree only resolved claims "through the Date of Lodging."[47] The Consent Decree further specified that the "County is responsible for achieving and maintaining compliance with" all applicable laws and permits.[48] The applicable laws and permits include the CWA and DeKalb's NPDES Permits.

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[44] *Miccosukee Tribe of Indians v. Southern Everglades Restoration Alliance*, 304 F.3d 1076, 1080 (11th Cir. 2002).
[45] *Bennett v. Spear*, 520 U.S. 154, 170-171 (1997).
[46] Exhibit 5, pp. 1-12.
[47] Exhibit 7 at p. 86, ¶ 92.
[48] *Id.* at pp. 87-88, ¶ 95.

DeKalb mistakenly argues that "SRWA's claims are premised on SRWA's general criticism that the Decree is inadequate in addressing ongoing spills."[49] SRWA's claims are premised solely on DeKalb's violation of CWA effluent standards and limitations.[50] Specifically, the sewage spills violate Section 301 of the CWA and violate the terms of DeKalb's NPDES permits.

DeKalb argues that a "consent decree covering CWA violations operates as res judicata against a subsequent citizen suit concerning the same violations."[51] But the 2011 Consent Decree only resolved claims for violations through December 13, 2010.[52] The CWA violations alleged in this case are limited to sewage spills since July 2014.

The Consent Decree stated that in any subsequent "judicial proceeding initiated by the United States or the State for injunctive relief [or] civil penalties" relating to the sewer system, the County shall not assert any defense based on res judicata except with respect to claims for violations through the date of lodging.[53]

DeKalb argues this language means the County "is only limited from asserting" the defense of res judicata "against the government, not third

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[49] ECF 30-1, at 30.
[50] ECF 21, at 31-35.
[51] ECF 30-1, at 29.
[52] Exhibit 7 at p. 86, ¶ 92.
[53] Exhibit 7 at pp. 86-87, ¶¶ 92, 94.

parties like SRWA."[54] But res judicata may be applied only if the party asserting the doctrine can meet its burden of showing that both cases "involve the same causes of action."[55]

SRWA's claims do not involve the same cause of action resolved by the 2011 Consent Decree. "It is well settled that res judicata turns primarily on the commonality of the *facts* of the prior and subsequent actions, not on the nature of the remedies sought."[56] Res judicata "does *not* apply where the facts giving rise to the second case only 'arise after the original pleading is filed in the earlier litigation.'"[57] "The scope of litigation is framed by the complaint at the time it is filed."[58] For res judicata purposes, "claims that 'could have been brought' are claims in existence at the time the original complaint is filed or claims *actually* asserted by supplemental pleadings or otherwise in the earlier action.[59]

The 2010 Complaint filed against DeKalb, and the 2011 Consent Decree, did not and could not raise the CWA violations alleged in the pending case because those claims did not accrue until 2014. A party in privity cannot face a

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[54] ECF 30-1, at 30.
[55] *In re Piper Aircraft Corp.*, 244 F.3d 1289, 1296 (11th Cir. 2001).
[56] *Id.* at 1295 (emphasis in original).
[57] *Id.* at 1298 (emphasis in original) citing *Manning v. City of Auburn*, 953 F.2d 1355, 1360 (11th Cir.1992).
[58] *Manning v. City of Auburn*, 953 F.2d at 1360.
[59] *Id.* at 1360 (emphasis in original).

res judicata bar when the original litigant itself faces no such bar. When the State settles a suit in its capacity as *parens patriae*, which grants standing to sue on behalf of its citizens, the release "must be interpreted like any other contract" and will determine the scope of any precluded claims.[60]

In *Sierra Club v. City & Cty. of Honolulu*, EPA and the State of Hawaii sued the City and County of Honolulu ("Honolulu") for violations of the CWA caused by sewage spills.[61] The court approved a Consent Decree in 1995 which included "several programmatic and capital improvement requirements designed to remedy" the sewage spills.[62] Honolulu "was ordered to develop and implement comprehensive Collection System programs, carried out under the direction of the EPA and the continuing jurisdiction" of the court through at least 2019.[63]

In 2004, Sierra Club filed a CWA citizen suit alleging sewage spills since May 1999 violated Section 301 of the CWA and violated the terms of Honolulu's NPDES permit.[64] The court held it was clear that the Decree "created a res judicata bar only for claims based on" spills through the date of lodging the

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[60] *Brown & Williamson Tobacco Corp. v. Gault*, 280 Ga. 420, 424, 627 S.E.2d 549, 553 (2006).
[61] *Sierra Club v. City & Cty. of Honolulu,* No. CV0400463DAE-BMK, 2008 WL 515963, at *1 (D. Haw. Feb. 26, 2008).
[62] *Id.*
[63] *Id.*
[64] *Id.* at *2.

Consent Decree.[65] "It would be an incongruous result … to find that EPA and [the State] may bring subsequent suit based on post–1995 spills but Plaintiffs may not."[66]

As in *Sierra Club v. City & Cty. of Honolulu*, the 2011 Consent Decree "explicitly did not relieve [DeKalb] of its ongoing responsibility to comply with the CWA and State laws, did not eviscerate [DeKalb's] liability for future spills, and did not limit the rights of third parties."[67] Res judicata does not bar SRWA's CWA claim.

DeKalb also contends the claims in this suit are barred by res judicata because: (a) SRWA intervened in the 2010 case; and (b) SRWA makes arguments that weren't raised in its objections to the 2011 Consent Decree.[68] For the reasons sets forth above, neither of DeKalb's contentions satisfy the prerequisites necessary for res judicata to bar SRWA's Clean Water Act claims.[69] Also, Judge Duffey's Order approving the Consent Decree stated, "This Consent Decree…will not affect the legal rights of any objecting parties."[70]

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[65] *Id*. at *6.
[66] *Id*. at *7.
[67] *Id*. at *6; Exhibit 7 at pp. 87-88, ¶¶ 95, 96.
[68] ECF 30-1, at 30.
[69] *In re Piper Aircraft Corp.*, 244 F.3d at 1296.
[70] *United States v. DeKalb Cty., Ga.*, No. 1:10-CV-4039-WSD, 2011 WL 6402203, *13 (N.D. Ga. Dec. 20, 2011).

E. SRWA's CWA Claim is Not Barred by Diligent Prosecution

The CWA bars a citizen suit when EPA or the State "has commenced and *is diligently prosecuting*" an action in court "to *require compliance*" with the same standard or limitation.[71] In contrast, the 2011 Consent Decree states that EPA and EPD do not "warrant or aver in any manner that the County's compliance with…this Consent Decree will result in compliance with provisions of the CWA."[72]

One reason the 2011 Consent Decree doesn't "require compliance" with the CWA is because it doesn't require DeKalb to repair its sewer system in Non-Priority Areas. The Consent Decree required DeKalb to identify Initial Priority Areas, which were set forth in the Consent Decree at Appendix B.[73] The Consent Decree also required DeKalb to identify Additional Priority Areas within one year of entry of the Consent Decree.[74] The Consent Decree set a deadline of June 20, 2020 to assess and rehabilitate the sewer system within these Priority Areas,[75] which DeKalb won't meet.[76]

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71 33 U.S.C. § 1365(b)(1)(B) (emphasis added).
72 Exhibit 7 at pp. 87-88, ¶ 95.
73 *Id*. at pp. 47-48, ¶ 35(a); pp. 107-108, Appendix B.
74 *Id*. at pp. 47-48, ¶ 35(b).
75 *Id*. at p. 53, ¶ 35(i).
76 Case No. 1:10-CV-4039, ECF 44.

DeKalb's sewer system includes approximately 838 miles of sewer lines in Priority Areas and approximately 1,762 miles in Non-Priority Areas.[77] Of more than 1,000 reported sewer spills since July 2014, 51% of spills have been from Non-Priority Areas, and 67% of the volume of sewage spilled into streams and rivers has been from Non-Priority Areas.[78]

Judge Duffey's Order approving the 2011 Consent Decree makes it clear that CWA citizen suits are not precluded for spills in the Non-Priority Areas. Scottdale Mill Village Neighborhood Association ("SMVNA") objected to the Consent Decree on the grounds that its neighborhood was not included in the list of Initial Priority Areas.[79] SMVNA also argued that the Consent Decree would bar a CWA citizen suit for violations in the Scottdale Mill Village neighborhood.[80] The Court stated that the Consent Decree "does not provide DeKalb County with a defense to any potential CWA claim by SMVNA against it regarding violations in the Scottdale Mill Village neighborhood."[81] The Court noted that "SMVNA and the parties all acknowledge [that] the Consent Decree and CWA action before this Court does not pertain to the Scottdale Mill Village

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77 Exhibit 5, Attachments C and D, (ECF 40-5, at 26, 28).
78 Exhibit 8 at pp. 5-21.
79 *United States v. DeKalb Cty., Ga.*, No. 1:10-CV-4039-WSD, 2011 WL 6402203, *4 (N.D. Ga. Dec. 20, 2011).
80 *Id.* at *8 n. 9.
81 *Id.* at *8.

sewer infrastructure."[82] The only basis for concluding that the Consent Decree "does not pertain to the Scottdale Mill Village sewer infrastructure" was because the neighborhood was left off the list of Priority Areas.

DeKalb separately argued that it didn't own the sewage infrastructure in the neighborhood.[83] But SMVNA disputed this, and ownership of the neighborhood infrastructure was not an issue about which "the parties all acknowledged."[84]

The Court stated that the "Consent Decree addresses the rights of third parties to bring claims against DeKalb County and does not prevent SMVNA from bringing its claims, including a claim under the CWA, against DeKalb County if, and when, it chooses to do so."[85]

Because the Consent Decree did "not pertain to the Scottdale Mill Village sewer infrastructure," the "CWA bar against citizen suits where the State or EPA is diligently prosecuting a civil or criminal action would not apply to a CWA citizen suit initiated by SMVNA regarding the issues in Scottdale Mill Village sewer infrastructure."[86] This applies to any third parties harmed by DeKalb's sewage spills in Non-Priority Areas, including SRWA.

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[82] *Id*. at *8 n. 9.
[83] *Id*. at *3.
[84] *Id*. at *3; *8 n. 9.
[85] *Id*. at *8. *citing* Consent Decree at ¶ 96.
[86] *Id*. at *8 n. 9.

The language in the 2011 Consent Decree which bars application of res judicata in this case is also relevant to showing that there is no diligent prosecution bar for post-Consent Decree violations of the CWA. This is true for spills in Priority and Non-Priority Areas.

By its express terms, the 2011 Consent Decree only resolved claims for violations that occurred up to the date of lodging.[87] The Consent Decree did not "limit the rights of the United States or the State to obtain penalties or injunctive relief under the CWA" except for "violations alleged in the Complaint…through the Date of Lodging."[88] The Consent Decree did not "limit the rights of third parties, not a party to this Consent Decree, against the County, except as otherwise provided by law."[89] Thus, the Consent Decree only prosecuted CWA violations through December 13, 2010 (the date of lodging).

The 2011 Consent Decree imposed stipulated penalties for future permit violations but designated those penalties as a non-exclusive remedy which "shall be in addition to any other rights, remedies, or sanctions available."[90] "Where a violation of this Consent Decree is also a violation of the Clean Water

[87] Exhibit 7 at p. 86, ¶ 92.
[88] *Id*. at pp. 86-87, ¶¶ 92, 93.
[89] *Id*. at p. 88, ¶ 96.
[90] *Id*. at p. 75, ¶ 71.

Act…the County shall be allowed a credit, for any stipulated penalties paid, against any statutory penalties imposed for such violation."[91]

Despite this language in the Consent Decree, DeKalb relies on the fact that EPA and EPD assessed stipulated penalties of $650,500 for 1,024 spills from 2012 to 2018 and assessed a penalty of $147,500 for inaccurate reporting.[92] These stipulated penalties are far lower than the CWA statutory penalties which EPA and EPD reserved the right to assess (but never did).[93]

For CWA violations occurring after November 2, 2015, the maximum statutory penalty ranges from $51,570 to $54,833 per violation, depending on the date the penalty was assessed.[94] This amount is adjusted downward based on factors set forth in 33 U.S.C. § 1319(d), but the penalty must be high enough to serve as a successful deterrent so that "potential violators believe that they will be worse off by not complying with applicable requirements."[95] As stated in one of the cases cited in DeKalb's *Memorandum*, a "lenient penalty that is far

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91 *Id.*
92 ECF 30-5, at 2.
93 *Id.* at p. 75, ¶ 71.
94 40 C.F.R. § 19.4; 84 Fed. Reg. 2059 (Feb. 6, 2019).
95 *Atlantic States Legal Foundation v. Tyson Foods*, 897 F.2d 1128, 1141 (11th Cir. 1990).

less than the maximum penalty may provide evidence of non-diligent prosecution."[96]

Stipulated penalties of $650,500 for 1,024 spills over eight years is too small to deter non-compliance. For example, in a Consent Decree Public Update, DeKalb CEO Michael Thurmond included a slide stating, "During the three year period between 2011-2014, DeKalb County failed to select a Consent Decree program manager. Therefore, several programs, maintenance, assessment and rehabilitation projects were not completed."[97] Another slide from Mr. Thurmond's Public Update acknowledged there had been: "Political interference in Watershed operations, lack of appropriate oversight…and lack of transparency."[98] This slide also acknowledged that DeKalb "[f]ailed to budget for staff and resources needed to develop and implement several Consent Decree programs."[99] The next slide acknowledged: the failure "to develop or keep in place critical maintenance contracts;" "no standard operating procedures for new sewer connections;" and "[m]isapplication of hydraulic model."[100]

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[96] *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 890 F. Supp. 470, 491 (D.S.C. 1995).
[97] Exhibit 5, Attachment E, p. 2 (ECF 40-5, at 30).
[98] *Id.* at p. 4.
[99] *Id.*
[100] *Id.* at p. 5.

The Consent Decree required DeKalb to create a "dynamic hydraulic model" for each sewer shed and to integrate these models into one model for the entire system by December 20, 2017.[101] DeKalb missed this deadline.[102]

In the absence of dynamic hydraulic models for each sewer shed, DeKalb cannot rehabilitate its sewer system.[103] According to DeKalb, "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."[104] But EPA and EPD approved a *System-Wide Hydraulic Model Program* which authorized *initial* modeling based on steady-state conditions, with later upgrades planned to include dynamic models.[105] As explained in DeKalb's 2017 Annual Report, the models were intended to be upgraded to dynamic models starting in 2018.[106]

So, the "steady-state" or "static" model was not approved "in lieu of a dynamic model," as DeKalb contends in its *Memorandum*. Rather, the steady-state model was approved as an interim phase, although one lasting beyond the

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101 Exhibit 7 at p. 37, ¶ 26.
102 Exhibit 6 at p. 7 (page 5 of Report).
103 *Id.* at p. 7 (page 5 of Report).
104 ECF 30-1, at 9.
105 Exhibit 6 at p. 6 (page 4 of Report).
106 *Id.* referring to 2017 Annual Report at p. 8, attached at Exhibit 5, Attachment C, p. 2 (ECF 40-5, at 25).

2017 deadline to integrate dynamic hydraulic models for all sewer sheds into one model for the entire system.

Dynamic hydraulic models have only been completed for 2 of the 33 sewer sheds within DeKalb's sewer system (Nancy Creek and Intrenchment Creek).[107] And the focus of these models is "on infrastructure within the CD extent," which is identified as the Priority Areas.[108]

DeKalb argues that an "agency's decision to modify an obligation under a consent decree…does not defeat diligent prosecution."[109] But the 2011 Consent Decree set forth procedures for modifying the Consent Decree, which hasn't happened here.[110] Material modifications require Court approval.[111] Non-material modifications require the signature of all parties.[112] EPA and EPD confirmed there have been no modifications of the 2011 Consent Decree.[113] A "state's failure to enforce its consent order constitutes some evidence that its prosecution was not diligent." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 890 F. Supp. 470, 490 (D.S.C. 1995).

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107 Exhibit 6 at p. 9 (page 7 of Report).
108 Exhibit 5, Attachment F (ECF 40-5, at 34-39).
109 ECF 30-1, at 13.
110 Exhibit 7 at p. 92, ¶ 105.
111 *Id.*
112 *Id.*
113 Exhibit 5, Attachment G (ECF 40-5, at 40).

DeKalb cannot know the capacity of its sewer system without dynamic hydraulic models.[114] The Consent Decree stated that once the dynamic hydraulic model is fully developed for each sewer shed, DeKalb shall not authorize new sewer service connections or increases in flow from existing connections until an engineer certifies that the receiving portions of the sewer system have adequate capacity.[115]

So, pursuant to the Consent Decree, capacity assurances to approve new or expanded connections after December 20, 2017 were to be based on dynamic hydraulic models. But DeKalb has drafted an *Interim Sanitary Sewer Capacity Evaluation Program* which states it is "to be used until the County either adopts capacity assurance program or a fully dynamic hydraulic model is developed."[116]

The *Interim Sanitary Sewer Capacity Evaluation Program* uses DeKalb's steady-state hydraulic models for capacity evaluations, which don't meet generally accepted engineering principles.[117] For example, the models use a "maximum monthly average daily flow (MMADF)" criteria for assessing

[114] Exhibit 6 at p. 8 (page 6 of Report).
[115] Exhibit 7 at p. 41 ¶28 (g).
[116] Exhibit 5, Attachment H, p. 1 (ECF 40-5, at 41).
[117] Exhibit 6 at p. 8 (page 6 of Report).

capacity in the pipes even though sewage spills normally occur during peak flows caused by heavy rain.[118]

DeKalb approved 1,344 "sewer capacity approvals" for new or expanded connections in 2018 and 2019.[119] EPA and EPD expressed concerns about DeKalb's steady-state model for approving new connections, especially the use of MMADF for capacity evaluations.[120] According to EPA, the fact that MMADF "is an average defeats the purpose of typical wet weather analysis."[121] But EPA and EPD have neither stopped DeKalb from using this flawed methodology nor used the Consent Decree's dispute resolution procedures to request this Court's oversight on this or any other matter.[122]

In *Sierra Club v. City & Cty. of Honolulu*, the court rejected Honolulu's diligent prosecution defense in part because when the citizen suit was filed in 2004, nothing had been filed in the court pertaining to the Consent Decree since 1995.[123] Similarly, the only docket entries between Judge Duffey's December 20, 2011 Order approving the Consent Decree and SRWA's citizen suit filed on September 24, 2019 were a leave of absence from the State

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[118] Exhibit 6 at p. 8 (page 6 of Report).
[119] Exhibit 5, Attachment I (ECF 40-5, at 46).
[120] Exhibit 5, Attachment H, p. 4 (ECF 40-5, at 44).
[121] *Id.*
[122] Exhibit 7, pp. 79-82 § XII; Case No. 1:10-CV-4039, ECF, Docket Sheet.
[123] *Sierra Club v. City & Cty. of Honolulu*, No. 04-00463 DAE-BMK, 2008 WL 1968317, at *8 (D. Haw. May 7, 2008).

Department of Law in 2012 and two letters from SRWA informing the Court about DeKalb's lack of progress under the Consent Decree.[124] Last month, EPA filed a *Status Report* on that docket informing this Court that DeKalb "will be unable to comply with" the June 20, 2020 deadline to assess and rehabilitate Priority Areas, and that the parties "have been engaging in negotiations with regard to a possible extension of this deadline and additional modifications to the Consent Decree."[125]

In *Sierra Club v. City & Cty. of Honolulu*, the court stated that negotiations "without other enforcement measures taken in this Court" cannot "establish diligent prosecution" of spills occurring after the Consent Decree.[126]

Also, in both DeKalb's Consent Decree and Honolulu's Consent Decree, "the United States and the State expressly reserved all remedies available to enforce" post-Consent Decree violations of the CWA, and the Decrees did not "limit the rights of third parties, not parties to" the Consent Decrees.[127]

Despite the "authority to take action related to" post-Consent Decree sewage spills," and "the allegations that other actions occurred that violated the…Consent Decree, the governments did not come back to this Court to

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[124] Case No. 1:10-CV-4039, ECF 40, 41, 42.
[125] Case No. 1:10-CV-4039, ECF 44, pp. 2-3.
[126] *Sierra Club v. City & Cty. of Honolulu*, 2008 WL 1968317, at *8.
[127] *Id.*

enforce the Consent Decree or otherwise seek remedies for these other spills."[128] This is also true with respect to EPA and EPD's failure to take enforcement actions in this Court against DeKalb.

DeKalb cites to *Black Warrior Riverkeeper, Inc. v. Se. Cheese Corp.*, to support its argument that there can be diligent prosecution even when violations continue for a period of time.[129] But in *Black Warrior Riverkeeper*, the State ordered the defendant to either comply with a plan which would prevent any unpermitted discharge of pollutants, or to obtain and comply with an NPDES permit.[130]

In contrast, DeKalb's 2011 Consent Decree does not compel the County to cease unpermitted discharges. The Consent Decree imposed a deadline to assess and rehabilitate the system within the Priority Areas but didn't impose any deadline to cease spills. As set forth in EPA's *Status Report* filed last month, "the County is required to take numerous steps…with the stated goals of eliminating Sanitary Sewer Overflows."[131] This is different than requiring the cessation of sewage spills, especially as it pertains to Non-Priority Areas.

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[128] *Id.*
[129] ECF 30-1, at 14, n. 50 *citing Black Warrior Riverkeeper, Inc. v. Se. Cheese Corp.,* No. CV 16-0083-KD-B, 2017 WL 359194 (S.D. Ala. Jan. 24, 2017).
[130] *Black Warrior Riverkeeper*, 2017 WL 359194, at *7.
[131] Case No. 1:10-CV-4039, ECF 44, p. 2.

Black Warrior Riverkeeper held that diligent prosecution should not be decided under Rule 12(b)(1) because it is a "claim processing rule" rather than a jurisdictional bar.[132] *See also*, *Louisiana Envtl. Action Network v. City of Baton Rouge* ("Absent such a clear statement from Congress, we hold that the 'diligent prosecution' bar is a nonjurisdictional limitation on citizen suits").[133]

Another case cited by DeKalb, *Cebollero Bertran v. Puerto Rico Aqueduct & Sewer Auth.*, came to this same conclusion: "Therefore, the Court proceeds [to] analyze defendant's motion pursuant to the FRCP 12(b)(6) standard of review."[134]

Unlike the 2011 DeKalb Consent Decree, the Consent Decree in *Cebollero Bertran* mandated that the Sewer Authority "prevent sewage overflows throughout its system."[135] And according to the court, the "only fact" that plaintiff alleged to support a lack of diligent prosecution was that CWA violations were ongoing at two sewers.[136]

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[132] *Black Warrior Riverkeeper*, 2017 WL 359194, at *5.
[133] *Louisiana Envtl. Action Network v. City of Baton Rouge*, 677 F.3d 737, 749 (5th Cir. 2012) citing *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 516 (2006) ("[W]hen Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.").
[134] *Cebollero Bertran v. Puerto Rico Aqueduct & Sewer Auth.*, No. CV 19-1412CCC, 2019 WL 6833826, at *3 (D.P.R. Dec. 12, 2019).
[135] *Id.* at *4.
[136] *Id.*

Other cases cited by DeKalb involved administrative Consent Orders rather than a Consent Order filed in state or federal court, as in this case.[137] The diligent prosecution standard for administrative orders is set forth at subparagraphs (ii) and (iii) of 33 U.S.C. § 1319(g)(6)(A). In contrast, the diligent prosecution standard for court orders, as applicable to DeKalb's Consent Decree, is set forth at 33 U.S.C. § 1365(b)(1)(B). The diligence requirement under § 1365(b)(1)(B) is "a more exacting standard" than the diligence requirement under § 1319(g)(6)(A).[138] This is because 33 U.S.C. § 1365(b)(1)(B) includes the phrase "to *require compliance* with the standard [or] limitation."[139]

In *St. Johns Riverkeeper*, the first of four administrative Consent Orders was filed in 2002, and the court found that the Authority's improvements "resulted in a downward trend of SSOs since 2002."[140] This is not true for DeKalb. In the three years prior to approval of the Consent Decree, (2008-2010), there was an average of 152 spills per year. In the last three years, (2017-2019), there was an average of 196 spills per year.[141]

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137 ECF 30-1, at 12-13 n. 45 *citing St. Johns Riverkeeper, Inc. v. Jacksonville Elec. Auth.*, No. 3:07-CV-739-J-34TEM, 2010 WL 745494 (M.D. Fla. Mar. 1, 2010).

138 *See*, *Id*. at *9, n. 25.

139 33 U.S.C. § 1365(b)(1)(B) (emphasis added).

140 *St. Johns Riverkeeper, Inc.*, 2010 WL 745494, *9.

141 Exhibit 5, p. 16, ¶ 41.

Another case cited by DeKalb, *N. & S. Rivers Watershed Ass'n, Inc. v. Town of Scituate*, is likewise distinguishable because the applicable diligent prosecution standard was 33 USC § 1319(g)(6)(A) rather than 33 U.S.C. § 1365(b)(1)(B).[142] Also, the court found that the town was "well into the process of diligently complying with" the Administrative Order, including enforcement of a sewer hookup moratorium.[143] In contrast, DeKalb is continuing to approve new connections even though: (a) EPA and EPD object to the criteria for evaluating capacity; and (b) the dynamic hydraulic models necessary to determine capacity of the sewer line have not been completed as required by the Consent Decree.

DeKalb also relies on *Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewerage Dist.*[144] (*Friends I*) and *Friends of Milwaukee's Rivers & All. for Great Lakes v. Milwaukee Metro*[145] (*Friends II*).

In *Friends I*, the court found that a Stipulation did not constitute diligent prosecution because it accomplishes "the eventual reduction of overflows, not

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142 *N. & S. Rivers Watershed Ass'n, Inc. v. Town of Scituate*, 949 F.2d 552, 553 (1st Cir. 1991).
143 *Id.* at 557.
144 *Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewerage Dist.*, 382 F.3d 743, 764 (7th Cir. 2004)
145 *Friends of Milwaukee's Rivers & All. for Great Lakes v. Milwaukee Metro. Sewerage Dist.*, 556 F.3d 603, 608–09 (7th Cir. 2009).

elimination of them."[146] "Compliance means an *end* to violations, not merely a reduction in the number or size of them."[147]

In *Friends II*, the court rejected "the position that post-stipulation evidence is wholly irrelevant or should generally be found to be such."[148] Relying on such post-stipulation evidence, the court found that Milwaukee "has accomplished much of the work required under the terms of the 2002 Stipulation; has maintained compliance with the terms of the 2002 Stipulation, including completion of projects in accord with the schedule; and has achieved reductions in the frequency and volume of wet weather sanitary sewer overflows ("SSOs") and combined sewer overflows ("CSOs") from its system as a result of the improvements made under the 2002 Stipulation."[149] DeKalb cannot meet these criteria.

DeKalb cites *The Piney Run Pres. Ass'n v. The Cty. Comm'rs Of Carroll Cty., MD* to argue that a "consent decree does not fail for diligent prosecution for not including an ultimate deadline for full compliance with the CWA."[150] But "the open-ended nature of the Consent Judgment" in *Piney Run* "reflects

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146 *Friends I*, 382 F.3d at 763-64.
147 *Id.* at 764 (emphasis in original).
148 *Friends II*, 556 F.3d at 612.
149 *Friends II*, 556 F.3d at 608-09.
150 ECF 30-1, at 13 citing *The Piney Run Pres. Ass'n v. The Cty. Comm'rs Of Carroll Cty., MD*, 523 F.3d 453, 460 (4th Cir. 2008).

the fact that the County is lawfully seeking an [Alternative Effluent Limitation] through the state administrative process."[151] If the Alternative Effluent Limitation is denied, the County will have a limited time period to comply with the permit limits.[152] This is not comparable to DeKalb's 2011 Consent Decree which includes no deadline for repairing two-thirds of the sewer system.

"Although a court must be deferential to a government enforcement action, the deference owed is not unlimited."[153] A "diligent prosecution analysis requires more than mere acceptance at face value of the potentially self-serving statements of a state agency and the violator with whom it settled regarding their intent with respect to the effect of the settlement."[154]

DeKalb could have entered into a Consent Decree which required compliance with CWA effluent standards and limitations. Instead, DeKalb negotiated the terms of a settlement which didn't impose any deadline for assessing and rehabilitating more than two-thirds of the sewer system and which didn't impose any express deadline to stop sewage spills. This agreement does not provide a shield from SRWA's Clean Water Act citizen suit.

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[151] *Id.* at 461.
[152] *Id.* at 458.
[153] *Ohio Valley Envtl. Coal., Inc. v. Indep. Coal Co.,* No. CIV.A. 3:10-0836, 2011 WL 1984523, at *4 (S.D.W. Va. May 20, 2011).
[154] *Friends I*, 382 F.3d at 760.

No EPA or EPD rights or interests established by the 2011 Consent Decree will be impaired by allowing SRWA to bring their claims in the present case. The injunctive relief in the 2011 Consent Decree is a start, but it is not the full solution to preventing sewage spills from DeKalb's system. SRWA seeks to supplement the Consent Decree with additional remedial measures and citizen oversight.

For these reasons, this Court should deny DeKalb's *Motion to Dismiss*. Alternatively, SRWA requests that the Court defer ruling on the motion until SRWA can conduct discovery on the diligence of the prior prosecution.

Respectfully submitted this April 14, 2020.

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Certificate of Compliance

I certify that the foregoing *Memorandum* has been prepared in Century Schoolbook 13 point in accordance with the font and point selections approved by the Court in LR 5.1(C).

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Certificate of Service

I certify that I have this April 14, 2020, served the foregoing *Memorandum* upon all counsel of record by way of the Court's electronic case filing (ECF) system.

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