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## Environmental Law

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# Environmental Law

by Travis M. Trimble \*

In 2020,<sup>1</sup> the United States Court of Appeals for the Eleventh Circuit held that a provision of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)<sup>2</sup> that tolled statutes of limitation in state law claims did not apply to a claim brought under the Price-Anderson Act (PAA),<sup>3</sup> providing an exclusive federal cause of action for harm resulting from exposure to radioactive materials, even though the PAA “borrows” all substantive law governing liability, including a relevant statute of limitation, from the law of the state where the harm occurred.<sup>4</sup> The United States District Court for the Northern District of Georgia found that an owner of land from which an unpermitted discharge of dredged or fill material had occurred in violation of § 404 of the Clean Water Act (CWA)<sup>5</sup> could not be liable under the CWA for the discharge where the owner played no active role in the discharge.<sup>6</sup> The court also decided that the diligent prosecution provision of the CWA is a non-jurisdictional limitation on CWA citizen suits that may be raised by a defendant in a motion to dismiss for failure to state a claim.<sup>7</sup> Finally, the court granted motions for partial judgment on the pleadings to defendants in two cases challenging the Army Corps of Engineers’ updated Master Manual, which governs its operation of its reservoirs in

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<sup>1</sup> For an analysis of last year’s environmental law during the survey period, see Travis M. Trimble, *Environmental Law, 2019 Eleventh Circuit Survey*, 71 MERCER L. REV. 1005 (2020).

<sup>2</sup> 42 U.S.C. § 9601 (2018).

<sup>3</sup> 42 U.S.C. § 2210 (2005).

<sup>4</sup> *Pinares v. United Technologies Corp.*, 973 F.3d 1254, 1260–61 (11th Cir. 2020).

<sup>5</sup> 33 U.S.C. § 1344 (1987).

<sup>6</sup> *Lambeth v. Three Lakes Corp.*, No. 1:19-CV-02602-ELR, 2020 U.S. Dist. LEXIS 191347, at \*19–\*20 (N.D. Ga. Aug. 10, 2020).

<sup>7</sup> *South River Watershed Alliance Inc. v. DeKalb County*, No. 1:19-cv-04299-SDG, 2020 U.S. Dist. LEXIS 158261, at \*11–\*12 (N.D. Ga. Aug. 31, 2020).

the Apalachicola-Chattahoochee-Flint River Basin and which allocates more water from Lake Lanier in North Georgia to the water-supply needs of metro Atlanta.<sup>8</sup>

In *Pinares v. United Technologies Corp.*,<sup>9</sup> the Eleventh Circuit held that CERCLA's statute of limitations tolling provision<sup>10</sup> did not apply to claims brought under the federal PAA for injury resulting from the plaintiff's exposure to nuclear materials.<sup>11</sup> CERCLA's tolling provision applies only to claims arising under state law, and therefore, the court held, it did not toll the limitations period for an action under the PAA, even though the PAA by its terms borrows all of its substantive provisions establishing liability, including its statute of limitations, from the law of the state where the injury occurred.<sup>12</sup>

In 1996, plaintiff Cynthia Santiago moved with her parents to a residential subdivision called the Acreage in Palm Beach County, Florida, when Santiago was four months old.<sup>13</sup> The defendant owned a tract of land ten miles away from the Acreage where it conducted research and testing that over time contaminated the soil with radioactive waste.<sup>14</sup> Between 1993 and 2000, the defendant excavated thousands of tons of the contaminated soil, which was eventually sold and used as fill material for the construction of the Acreage. In 2009, Santiago was diagnosed with a type of brain cancer. Her doctors discovered the radioactive isotope thorium-230, which the plaintiffs alleged was present in the fill material and in water runoff from the defendant's property, in Santiago's spine at levels hundreds of times above a normal background amount. Santiago and her parents filed suit against the defendant in 2014, just after she turned eighteen. She testified in her deposition that she was unaware of radioactive contamination at the Acreage until 2014. She died from her cancer in 2016.<sup>15</sup>

Santiago's lawsuit asserted three claims: wrongful death resulting from negligence under Florida law, wrongful death from trespass under

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<sup>8</sup> In re ACF Basin Water Litigation, 467 F. Supp. 3d 1323, 1341 (N.D. Ga. 2020).

<sup>9</sup> 973 F.3d 1254 (11th Cir. 2020).

<sup>10</sup> 42 U.S.C. § 9658(a)(1) (1986).

<sup>11</sup> *Pinares*, 973 F.3d at 1261.

<sup>12</sup> *Id.* at 1262–63.

<sup>13</sup> *Id.* at 1257.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 1257–58.

Florida law, and damages under the PAA.<sup>16</sup> An action under the PAA is known as a “public liability action.”<sup>17</sup>

The PAA directs the district courts to “borrow” the substantive rules of decision for a public liability action from the law of the state where the injury occurred.<sup>18</sup> The court also determined that this borrowing included the relevant statute of limitation, which in this case the court said was four years from the date the action accrued,<sup>19</sup> which was the date of Santiago’s cancer diagnosis: November 27, 2009. It was undisputed that Santiago was not aware of radioactive contamination at the Acreage until 2014, and she filed her lawsuit on November 7, 2014.<sup>20</sup> However, the district court found that her causes of action accrued on November 27, 2009, the date of her cancer diagnosis, and therefore they were barred by the four-year statute of limitation.<sup>21</sup>

On appeal, the plaintiffs argued that the four-year limitation period was tolled by § 9658 of CERCLA.<sup>22</sup> For claims arising under a state’s law for injuries or damage caused by hazardous substances, pollutants, or contaminants, § 9658 mandates a commencement date for the running of the applicable state statute of limitation, that is the date Santiago

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<sup>16</sup> *Id.* at 1258.

<sup>17</sup> *Id.* at 1259. The PAA creates a “public liability action” for harm arising out of a “nuclear incident.” 42 U.S.C. § 2210(n)(2). “Public liability” is any legal liability arising out of or resulting from a “nuclear incident.” 42 U.S.C. § 2014(w). A “nuclear incident” is “any occurrence . . . causing . . . bodily injury, sickness, disease, or death . . . arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material . . .” 42 U.S.C. § 2014(q). “Source material” includes uranium and thorium. 42 U.S.C. § 2014(z). The PAA creates an “exclusive federal cause of action for radiation injury.” *Pinares*, 973 F.3d at 1259. The action is termed a “public liability action,” over which United States District Courts have original jurisdiction. In a public liability action under the PAA, “the substantive rules for decision in such action shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions [of section 2210].” 42 U.S.C. § 2014(hh).

<sup>18</sup> 42 U.S.C. § 2210(n)(2).

<sup>19</sup> FLA. STAT. § 95.11(3)(a), (g) (2018); *see Pinares*, 973 F.3d at 1259.

<sup>20</sup> *Pinares*, 973 F.3d at 1258–59.

<sup>21</sup> *Id.* at 1259.

<sup>22</sup> *Id.* This code section provides in relevant part that for any action brought under state law for personal injury or property damages caused by hazardous substances, if the date of accrual of the cause of action, or commencement of the limitations period, applicable to the state action is earlier than the “federally required commencement date” then the federally required commencement date applies rather than the state commencement date. 42 U.S.C. § 9658(a)(1). The “federally required commencement date” is the date the plaintiff knew, or reasonably should have known, that the injury or damage was caused by or contributed to by the hazardous substance, pollutant, or contaminant. 42 U.S.C. § 9658(b)(4)(A). If the plaintiff is a minor, the federally required commencement date is the date the plaintiff is deemed an adult under the state’s law. 42 U.S.C. § 9658(b)(4)(B)(i).

discovered, or should have discovered, that her injury was caused by the hazardous substance, rather than an injury-in-fact date, as was the case in the applicable Florida limitation period.<sup>23</sup> Additionally, if the plaintiff was a minor at the time of injury, CERCLA mandates a commencement date for the state-law claim when the plaintiff becomes an adult.<sup>24</sup> The plaintiffs argued that under either tolling provision, Santiago's claim was timely.<sup>25</sup>

The court held that the Santiagos' claims were barred by Florida's four-year statute of limitation.<sup>26</sup> The court explained that the CERCLA tolling provision, by its plain terms, applied only to actions brought under state law, and that a public liability action for injury done by radioactive contamination was exclusively a federal claim to which the CERCLA provision did not apply.<sup>27</sup> Furthermore, the PAA is the only cause of action available to a plaintiff alleging injury caused by radiation. Therefore, the Plaintiffs' state-law claims alleging that Santiago's cancer was caused by thorium-230 were transformed into a "public liability action" under the PAA, to which the CERCLA tolling provision did not apply.<sup>28</sup>

In *Lambeth v. Three Lakes Corp.*,<sup>29</sup> the United States District Court for the Northern District of Georgia, in a novel issue for the Eleventh Circuit,<sup>30</sup> concluded that the owner of land from which a discharge of dredged or fill material occurred could not be liable under § 404 of the Clean Water Act<sup>31</sup> for failure to obtain a permit where the owner played no active part in the work that resulted in the discharge.<sup>32</sup>

Plaintiffs own land and live adjacent to Lower Lake Forrest (LLF) in Fulton County, Georgia. Defendant Three Lakes Corporation (TLC) is a for-profit corporation that was created to hold title to and maintain three lakes for the benefit of residents, including LLF.<sup>33</sup> In that capacity, TLC

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<sup>23</sup> The plaintiffs did not point to any tolling provision that would have applied under Florida law. *Pinares*, 973 F.3d at 1259–60.

<sup>24</sup> 42 U.S.C. § 9601.

<sup>25</sup> *Pinares*, 973 F.3d at 1260.

<sup>26</sup> *Id.* at 1261.

<sup>27</sup> *Id.* at 1260.

<sup>28</sup> *See id.* at 1260–61.

<sup>29</sup> No. 1:19-CV-02602-ELR, 2020 U.S. Dist. LEXIS 191347 (N.D. Ga. Aug. 10, 2020).

<sup>30</sup> *See id.* at \*7.

<sup>31</sup> 33 U.S.C. § 1344. A permit issued by the Army Corps of Engineers is required for the discharge of dredged or fill material into a water of the United States. 33 C.F.R. § 323.3(a). "[W]aters of the United States" includes waterways and lakes, ponds and impoundments. 33 C.F.R. § 328.3(a).

<sup>32</sup> *Lambeth*, 2020 U.S. Dist. LEXIS 191347, \*7–\*8.

<sup>33</sup> *Id.* at \*2.

was also a part-owner of the LLF Dam. The City of Atlanta and the City of Sandy Springs (City Defendants)<sup>34</sup> were also part-owners of the dam because they owned Lake Forest Drive.<sup>35</sup>

In 2009, the Georgia Environmental Protection Division determined that the LLF Dam was a “high-hazard” dam because of the risks a breach of the dam posed.<sup>36</sup> In 2014, TLC learned that the City Defendants intended to drain LLF in order to repair the LLF Dam. The City Defendants provided TLC with its work plans, and in 2015 contractors working for the City Defendants began work to drain LLF.<sup>37</sup> At that point, no defendant had obtained a § 404 permit for the work. TLC “participated in the decisions about what to do” with the LLF Dam but did not have “veto power” over the plans.<sup>38</sup> On March 30, 2016, the City Defendants’ contractors, using heavy equipment, began excavating the LLF Dam and dredging LLF, breaching the dam and discharging sediment-laden water downstream.<sup>39</sup> TLC acknowledged that at this time the City Defendants did not have the right to drain LLF without obtaining a § 404 permit.<sup>40</sup>

The City Defendants obtained an after-the-fact Nationwide Permit under § 404 from the Army Corps of Engineers for the dam repairs.<sup>41</sup> The permit stated that the area around the dam was “stabilized.”<sup>42</sup> The permit did not include TLC as a permitted party, and TLC never sought to obtain a permit for itself or to become covered by the City Defendants’ permit. The dam repair project was never completed and LLF was never restored. The sediment fill produced by the work in 2016 remained in place at the time of the Court’s decision.<sup>43</sup>

In June 2019, the Plaintiffs filed suit against TLC and City Defendants under the citizen-suit provision of the CWA<sup>44</sup> for the defendants’ failure to obtain a permit under § 404 for the discharge of dredged or fill material into a water of the United States in connection with the LLF Dam work.<sup>45</sup>

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<sup>34</sup> At the time of the District Court’s decision, the City Defendants had been voluntarily dismissed by the plaintiffs. *Id.* at \*2.

<sup>35</sup> *Id.* at \*2.

<sup>36</sup> *Id.* at \*2–\*3.

<sup>37</sup> *Id.* at \*3.

<sup>38</sup> *Id.* at \*3–\*4.

<sup>39</sup> *Id.* at \*4.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at \*4–\*5.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at \*5.

<sup>44</sup> 33 U.S.C. § 1365(a) (2018).

<sup>45</sup> See *Lambeth*, 2020 U.S. Dist. LEXIS 191347 at \*5.

The court granted TLC's motion for summary judgment.<sup>46</sup> The court first concluded that the Plaintiffs' lawsuit alleged "ongoing violations" of the CWA,<sup>47</sup> rejecting TLC's argument that there were no ongoing violations because the Corps had determined in 2016 that the area was "stabilized."<sup>48</sup> The court explained that TLC did not explain what "stabilized" meant in the context of this case.<sup>49</sup> In any event, the court found that the Plaintiffs alleged an ongoing violation of the CWA because they presented evidence that, "the discharged pollutant remains and has not been removed."<sup>50</sup>

However, the court concluded second that TLC could not be liable for violating the CWA because it was not a "discharger" under the CWA.<sup>51</sup> The court noted that the CWA "imposes liability [for failure to obtain the appropriate permit] on both the party who actually performed the work" causing the discharge "and on the party with responsibility for or control over the work."<sup>52</sup> The parties agreed that the City Defendants, through their contractors, actually performed the work.<sup>53</sup> "As such, the court's sole determination is if Defendant TLC is 'responsible for' or 'controlled' the work."<sup>54</sup>

The material facts on this question were not disputed:

TLC (1) TLC owns the lake and the portion of the dam where the work and CWA violations occurred; (2) admits that it was aware of and participated in the decision making regarding the work which resulted in violations of the CWA; (3) admits that as a dam owner and property owner it is equally responsible for the dam project and the work done in furtherance of the project; and (4) never sought or obtained a CWA permit, nor did it secure coverage under any permit obtained by the City Defendants.<sup>55</sup>

But also, "TLC (1) provided recommendations concerning the work to the City Defendants which the City Defendants rejected, (2) did not have

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<sup>46</sup> *Id.* at \*20.

<sup>47</sup> The court noted that it had jurisdiction over a CWA citizen-suit action only if the action alleged "ongoing or continuous violations, not . . . those that are wholly in the past." *Id.* at \*9 (citing *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1009 (11th Cir. 2004)).

<sup>48</sup> *Lambeth*, 2020 U.S. Dist. LEXIS 191347 at \*9.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at \*10.

<sup>51</sup> *Id.* at \*11.

<sup>52</sup> *Id.* at \*12.

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

<sup>54</sup> *Id.* (citing *United States v. Lambert*, 915 F. Supp. 797, 802 (S.D.W. Va. 1996)).

<sup>55</sup> *Lambeth*, 2020 U.S. Dist. LEXIS 191347 at \*12–13.

the authority or ability to control or direct the City Defendants work, and (3) ultimately, the City Defendants unilaterally decided to lower the level of the lake.”<sup>56</sup>

The court found only one case from the Eleventh Circuit related to the issue: *Jones v. E.R. Snell Construction Inc.*<sup>57</sup> There, the Eleventh Circuit held that a county was not a discharger of pollutants under the CWA in connection with the widening of a state road where the county did not own or maintain the road, and though it “played a role in obtaining the allegedly faulty design” it also recognized problems with the design and recommended changes to the Georgia Department of Transportation (GDOT), which the GDOT rejected.<sup>58</sup> The District Court noted that while *Jones* had some similarities with the present case, the county in *Jones* did not own the road, while TLC did partly own the LLF Dam.<sup>59</sup> Ultimately, the court was persuaded by *Froebel v. Meyer*,<sup>60</sup> a Seventh Circuit case. In that case, the Seventh Circuit Court of Appeals held that a county could not be liable for a discharge under the CWA caused by the removal of a dam merely because it owned the land from which the discharge occurred.<sup>61</sup> The *Froebel* court explained that the language of § 404 and its regulations suggested that in order to be liable for a non-permitted discharge, a defendant must engage in “‘active conduct’ . . . that result[s] in the discharge of dredged or filled material.”<sup>62</sup>

The District Court explained that, similar to *Froebel*, “there is no evidence in the record that demonstrates the sort of ‘active conduct’ on the part of Defendant TLC that would make it liable under the CWA.”<sup>63</sup> “Defendant TLC did not perform the physical tasks nor did it direct, enlist, or proposition the work . . . . Defendant TLC did not pay for the work and . . . did not have the ability to control the manner in which it was performed.”<sup>64</sup> The court concluded that TLC’s partial ownership of the dam, and its awareness that the work on the dam and lake performed without a § 404 permit was a violation of the CWA, was insufficient to make TLC liable as a discharger under the CWA.<sup>65</sup>

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<sup>56</sup> *Id.* at \*13.

<sup>57</sup> 120 Fed. App’x. 786 (11th Cir. 2004).

<sup>58</sup> *Lambeth*, 2020 U.S. Dist. LEXIS 191347, \*14–\*15 (quoting *Jones*, 120 Fed. App’x. 786 at \*5–\*6).

<sup>59</sup> *Id.* at \*15.

<sup>60</sup> 217 F.3d 928 (7th Cir. 2000).

<sup>61</sup> *Lambeth*, 2020 U.S. Dist. LEXIS 191347 at \*18.

<sup>62</sup> *Id.* at \*18–19 (quoting *Froebel*, 217 F.3d at 939).

<sup>63</sup> *Id.* at \*19.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*



In another CWA issue that has not been addressed by the Eleventh Circuit, the United States District Court for the Northern District of Georgia in *South River Watershed Alliance Inc. v. DeKalb County*<sup>66</sup> concluded that the diligent prosecution bar to citizen suits<sup>67</sup> under the CWA is a non-jurisdictional limitation that can be raised via a motion to dismiss for failure to state a claim under the Federal Rules of Civil Procedure (Fed. R. Civ. P.) 12(b)(6).<sup>68</sup> The court went on to rule that the plaintiffs failed to plead facts that plausibly showed that the Environmental Protection Agency (EPA) and Georgia Environmental Protection Division (EPD) were not diligently prosecuting the violations of the CWA alleged by the plaintiffs, and thus the plaintiffs' claim was barred.<sup>69</sup>

DeKalb County owns and operates a Water Collection and Transmission System (WCTS) designed to collect and transport wastewater to three treatment facilities in the area.<sup>70</sup> The WCTS operates according to an NPDES<sup>71</sup> permit issued pursuant to the CWA by the EPD. The permit requires the County to transport wastewater to specified treatment facilities and treat the wastewater before discharging it into surface waters. In 2010, the EPA and the EPD filed an action against the County alleging that since 2006 the WCTS had experienced numerous overflows of untreated wastewater that resulted in discharges of sewage into the South River and the Chattahoochee watersheds. In 2011, the parties entered into a Consent Decree that required the County bring its WCTS into compliance with the CWA and the Georgia Water Quality Control Act and to eliminate all sanitary sewer overflows.<sup>72</sup> More specifically, the Decree required the County to rehabilitate the WCTS to eliminate overflows in "priority areas" that required more immediate improvement by June 20, 2020.<sup>73</sup> The Decree required the rehabilitation of the WCTS in non-priority areas (approximately sixty-nine percent of sewer lines in the WCTS) but without a deadline.<sup>74</sup>

Plaintiff, a clean-water advocacy organization, filed a CWA citizen suit against the County on July 15, 2019, alleging generally after the

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<sup>66</sup> No. 1:19-cv-04299-SDG, 2020 U.S. Dist. LEXIS 158261 (N.D. Ga. Aug. 31, 2020).

<sup>67</sup> 33 U.S.C. § 1365. The "diligent prosecution" provision is at 33 U.S.C. § 1365(b)(1)(B).

<sup>68</sup> *South River Watershed Alliance Inc.*, 2020 U.S. Dist. LEXIS 158261 at \*12-\*13.

<sup>69</sup> *Id.* at \*13-\*14.

<sup>70</sup> *Id.* at \*1-\*2.

<sup>71</sup> National Pollutant Discharge Elimination System, 33 U.S.C. § 1342 (2019).

<sup>72</sup> *South River Watershed Alliance Inc.*, 2020 U.S. Dist. LEXIS 158261 at \*2-\*3.

<sup>73</sup> *Id.* at \*4.

<sup>74</sup> *Id.* at \*4-\*5.

Consent Decree, the WCTS continued to discharge raw sewage into area waters at a rate equal to or greater than prior to the Consent Decree in violation of both the Consent Decree and the CWA.<sup>75</sup> The County moved to dismiss the complaint for failure to state a claim, asserting the “diligent prosecution” limitation on citizen suits.<sup>76</sup> The County claimed that the government parties to the Consent Decree, the EPA and the EPD (the “agencies”), were “diligently prosecuting” the County’s alleged violations of the CWA.<sup>77</sup> Plaintiff contended that the Consent Decree was insufficient to ensure the County’s compliance, and even if it were sufficient, the agencies were not diligently prosecuting the County for its ongoing violations.<sup>78</sup>

The court first concluded that the “diligent prosecution” provision does not act to deprive a district court of subject matter jurisdiction over a CWA citizen-suit claim, but the provision is an essential element of such a claim.<sup>79</sup> Therefore, a defendant could raise the diligent prosecution bar to the claim in a motion to dismiss the complaint under Rule 12(b)(6).<sup>80</sup> The district court followed the reasoning of the United States Court of Appeals for the Fifth Circuit in *Louisiana Environmental Action Network v. City of Baton Rouge*,<sup>81</sup> where the court held that because Congress did not provide a clear statement that the diligent prosecution bar is jurisdictional, the court would treat it as non-jurisdictional, and

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<sup>75</sup> *Id.* at \*5–\*6.

<sup>76</sup> 33 U.S.C. § 1365(b)(1)(B), providing that a citizen suit may not be brought “if the Administrator [EPA] or State has commenced and is diligently prosecuting a civil or criminal action in a court . . . to require compliance with the [CWA].” *South River Watershed Alliance Inc.*, 2020 U.S. Dist. LEXIS 158261 at \*11.

<sup>77</sup> *South River Watershed Alliance Inc.*, 2020 U.S. Dist. LEXIS 158261 at \*9.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at \*13.

<sup>80</sup> *Id.* at \*13–\*14. It is worth noting that in *South River Watershed Alliance*, the issue was not decided like a traditional 12(b)(6) motion would be. Ordinarily, the court would look only at the contents of the complaint to determine if it stated a claim. In its motion to dismiss, the County cited to documents outside the contents of the Complaint as evidence, and the court accepted that evidence without converting the motion to one for summary judgment, noting that the documents offered by the County were also the source of many of the allegations in the Plaintiff’s complaint, and that the documents were public records, of which the court could take judicial notice. *Id.* at \*16–\*17.

<sup>81</sup> 677 F.3d 737 (5th Cir. 2012). The Fifth Circuit opinion indicated the practical significance of the difference: “If the [diligent prosecution] provision is not jurisdictional, then [plaintiff] is protected by the safeguards of . . . 12(b)(6)—the district court is required to accept all well-pleaded facts in the complaint as true and view the facts in the light most favorable to [plaintiff].” *Id.* at 745.

further Rule 12(b)(6) governed the analysis of whether a CWA citizen suit was barred by the diligent prosecution provision.<sup>82</sup>

The court then concluded that the diligent prosecution provision barred the plaintiff's citizen suit.<sup>83</sup> The court found first that the Consent Decree covered the same NPDES permit violations (ongoing discharge of untreated wastewater) as the plaintiff's complaint alleged, and therefore the two actions concerned the same "standard, limitation or order" under the CWA.<sup>84</sup>

The court next found that the plaintiff had not plausibly alleged a lack of diligent prosecution by the agencies.<sup>85</sup> The court noted that a plaintiff alleging lack of diligent prosecution of a government enforcement action faced a high bar: "[p]laintiffs must instead show that the government's actions are incapable of requiring compliance with the applicable standards."<sup>86</sup> While the existence of the Consent Decree in and of itself was insufficient to prove diligent prosecution,<sup>87</sup> contrary to the County's assertion, the plaintiff's allegations, while serious, were insufficient to plausibly show that the agencies were not diligently prosecuting the Consent Decree.<sup>88</sup>

The plaintiff contended the agencies' prosecution of the Consent Decree had not been diligent for five reasons: (1) repeated raw sewage discharges from the WCTS; (2) the County's failure to meet the 2020 deadline for bringing the WCTS into compliance with the Consent Decree in priority areas; (3) the lack of a deadline for compliance in non-priority areas; (4) fines that were too low to force compliance with its NPDES permit; and (5) the County's failure, with the agencies' permission, to implement a monitoring model required by the Consent Decree.<sup>89</sup> The court acknowledged the seriousness of the allegations,<sup>90</sup> but nevertheless

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<sup>82</sup> *South River Watershed Alliance Inc.*, 2020 U.S. Dist. 158261, at \*12-\*13 (discussing *La. Envtl. Action Network*, 677 F.3d at 749).

<sup>83</sup> *Id.* at \*17. To determine whether a citizen suit is barred by the diligent prosecution provision, the court must determine first whether a prosecution by a state or the EPA to enforce the "same standard, order, or limitation" under the CWA was pending on the date the citizen suit was filed. If so, the court must then determine whether the state or EPA action was being "diligently prosecuted" at that time. *Id.*

<sup>84</sup> *Id.* at \*19-\*20.

<sup>85</sup> *Id.* at \*20.

<sup>86</sup> *Id.* at \*20-\*21.

<sup>87</sup> *Id.* at \*22.

<sup>88</sup> *Id.* at \*22-\*23.

<sup>89</sup> *Id.* at \*23-\*24.

<sup>90</sup> *Id.* at \*24. "Plaintiffs have identified serious problems with DeKalb's WCTS that have caused the ongoing discharge of raw sewage into public waterways . . . . Plaintiffs point to evidence showing that, since entry of the Consent Decree, discharges from the WCTS into watershed have not decreased in either priority or non-priority areas. Hundreds of separate

concluded that they did not state a claim that the agencies were not diligently prosecuting the Consent Decree.<sup>91</sup> The court explained that a defendant's failure to abide by the terms of a consent decree did not prove that the agency was not diligently enforcing the decree.<sup>92</sup> Further, agency choices as to the level of fines and steps they would allow the County to take to comply with the Decree were within the agencies' discretion and entitled to deference from the Court.<sup>93</sup>

This case suggests a high bar for plaintiffs to overcome in order to state a claim when pleading a claim under the CWA citizen-suit provision where government agencies are prosecuting the same alleged violations or where there is a consent order in place with respect to those violations. The court acknowledged that over the nine years the Consent Decree had been in place, discharges of raw sewage from the County's WCTS had not decreased, and yet the court did not deem this fact, even together with other facts alleged by the plaintiffs, sufficient to plausibly suggest that the agencies were not diligently enforcing the Consent Order.<sup>94</sup> The court explained that "[a] citizen-plaintiff cannot overcome the presumption of diligence merely by showing that the agency's prosecution strategy is less aggressive than [the plaintiff] would like or that it did not produce a completely satisfactory result."<sup>95</sup> But here, not only have the agencies' enforcement strategy not produced a "completely satisfactory result," it has apparently produced no result at all.<sup>96</sup> At one point in the case, the court noted from persuasive authority, but did not further apply, the principle that a citizen suit is proper where "there is a realistic prospect that the violations alleged in its complaint will continue notwithstanding the government-backed consent decree."<sup>97</sup> Here, though, the plaintiffs' allegation that the County's CWA violations continued apparently unabated over nine years, it was insufficient to state a citizen-suit claim sufficient to overcome the diligent prosecution bar.<sup>98</sup>

In *In re ACF Basin Water Litigation*,<sup>99</sup> the United States District Court for the Northern District of Georgia granted motions for partial

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discharges occurred from July 2014 through April 2019, dumping millions of gallons of untreated sewage into the watersheds." *Id.* at \*24–\*25.

<sup>91</sup> *Id.* at \*25.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at \*26.

<sup>94</sup> *Id.* at \*24–\*25.

<sup>95</sup> *Id.* at \*26.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at \*22–\*23 (quoting *Env'tl. Conservation Org. v. City of Dallas*, 529 F.3d 519, 528–29 (5th Cir. 2008)).

<sup>98</sup> *Id.* at \*24–\*25.

<sup>99</sup> 467 F. Supp. 3d 1323 (N.D. Ga. 2020).

judgment on the pleadings to defendants in two separate claims that challenge the Army Corps of Engineers' Master Manual governing the Corps' operation of five reservoirs on the Chattahoochee River.<sup>100</sup>

This litigation is related to the Tri-State Water Rights litigation that began in 1990.<sup>101</sup> In that litigation, the Eleventh Circuit held in 2011 that water supply was an authorized use of Lake Lanier.<sup>102</sup> Based on that decision, the Corps began the process of updating its Master Manual for its reservoirs in the Apalachicola-Chattahoochee-Flint (ACF) River Basin, including Lake Lanier, to accommodate Georgia's request for additional water supply from Lake Lanier for the Atlanta area. In 2017, the Corps published the final version of its updated Master Manual and a final Environmental Impact Statement (EIS) for the Master Manual.<sup>103</sup> The Master Manual included an increase in the amount of water from Lake Lanier that could be used for Atlanta's water supply.<sup>104</sup> The EIS showed potential impacts of the water supply allocation, including reduced flows downstream, substantially adverse effects on fish and aquatic resources in the Chattahoochee, and slightly to substantially adverse impacts on the phosphorous, nitrogen, and dissolved oxygen content in the Chattahoochee.<sup>105</sup>

Shortly thereafter, separate complaints were filed against the Corps by a group of environmental advocacy organizations (Environmental Groups)<sup>106</sup> and by the State of Alabama.<sup>107</sup> Relevant to the present case, the Environmental Groups' complaint alleged that the Corps violated § 2283(d)(1)<sup>108</sup> of the Water Resources Development Act of 2007 (Count II) because the Corps did not include a mitigation plan to address fish and wildlife losses and other ecological harms, which the Environmental Groups claimed the statute required.<sup>109</sup> The Environmental Groups'

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<sup>100</sup> *Id.* at 1326.

<sup>101</sup> The Atlanta Regional Commission maintains a page on its website providing an overview of the Tri-State Water Rights Litigation. See *Tri-State Water Wars Overview*, ATLANTA REGIONAL COMMISSION (last updated February 2, 2021), <https://atlantaregional.org/natural-resources/water/tri-state-water-wars-overview/>. The Atlanta Regional Commission is a defendant in the present case.

<sup>102</sup> *In re MDL-1824 Tri-State Water Rights Litigation*, 644 F.3d 1160, 1166 (11th Cir. 2011).

<sup>103</sup> *In re ACF Basin Water Litigation*, 467 F. Supp. 3d at 1329.

<sup>104</sup> *Id.* at 1328.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 1329. "The National Wildlife Federation, the Florida Wildlife Federation, and the Apalachicola Bay and Riverkeeper, Inc."

<sup>107</sup> *Id.* at 1328.

<sup>108</sup> 33 U.S.C. § 2283(d)(1) (2016).

<sup>109</sup> *In re ACF Basin Water Litigation*, 467 F. Supp. 3d at 1330.

complaint also alleged that the Corps violated the Fish and Wildlife Coordination Act of 1958<sup>110</sup> (Count III) by failing to treat fish and wildlife conservation as a “co-equal purpose” of the ACF reservoirs and by failing to give those goals equal consideration as other project purposes (navigation, hydropower, and water supply) in the Master Manual.<sup>111</sup>

Alabama’s lawsuit alleged that the Corps violated the CWA and the Corps’ regulations and the Administrative Procedure Act (Counts III and V) because the Master Manual as implemented would cause Georgia’s water quality standards to be violated in portions of the Chattahoochee River below Buford Dam on Lake Lanier.<sup>112</sup>

Several governmental parties in Georgia responsible for water supply in municipalities and counties in the upper Chattahoochee river basin intervened as defendants (the “Georgia Water Supply Providers”)<sup>113</sup> and these defendants moved for judgment on the pleadings under Fed. R. Civ. P. 12(c) as to Counts II and III of the Environmental Groups’ complaint and Counts III and V of Alabama’s complaint.<sup>114</sup>

The court granted the Georgia Water Supply Providers’ motion as to the Environmental Groups’ complaint.<sup>115</sup> As to Count II, the issue turned on language in § 2283(d)(1) of the Water Resources Development Act stating that the Corps “shall not submit any proposal for the authorization of any water resources project to Congress in any report, and *shall not select a project alternative in any report*, [emphasis added] unless such report contains” a specific plan to mitigate damages to ecological resources.<sup>116</sup> The Environmental Groups contended that the Master Manual is a report within the meaning of the italicized clause, and this language required the Corps to include a mitigation plan for ecological harms caused by the increase in the amount of Lake Lanier’s water allocated for water supply, which the Master Manual did not do.<sup>117</sup>

The court found the code section’s language to be ambiguous, but by applying principals of statutory construction the court concluded that the word “report” in the italicized clause meant “report submitted to Congress,” just as in the clause before it.<sup>118</sup> Because the Master Manual

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<sup>110</sup> 16 U.S.C. § 661 (2019).

<sup>111</sup> *In re ACF Basin Water Litigation*, 467 F. Supp. 3d at 1334.

<sup>112</sup> *Id.* at 1336.

<sup>113</sup> The Atlanta Regional Commission, the City of Atlanta, Cobb County-Marietta Water Authority, DeKalb County, Forsyth County, Fulton County, the City of Gainesville, and Gwinnett County. *Id.* at 1329.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 1334.

<sup>116</sup> *Id.* at 1330.

<sup>117</sup> *Id.* at 1331.

<sup>118</sup> *Id.* at 1331–34.

was not a report submitted to Congress, the Corps was not required to include a mitigation plan.<sup>119</sup>

As to Count III, alleging that the Master Manual failed to treat fish and wildlife conservation as a “co-equal purpose” of the reservoirs and thus violated the Fish and Wildlife Coordination Act, the court concluded that nothing in the Act placed a duty on the Corps to do so.<sup>120</sup>

The Court also granted the Georgia Water Supply Providers’ motion for judgment on the pleading as to Alabama’s allegations in Counts III and V that the Corps violated § 313(a)<sup>121</sup> of the CWA because the Master Manual as implemented would cause Georgia’s water quality standards to be violated in certain parts of the Chattahoochee.<sup>122</sup>

Section 313(a) requires federal agencies to follow all legal “requirements” for the abatement of water pollution, and to state a claim under § 313(a), a claimant must allege that such a requirement has been violated.<sup>123</sup>

The court concluded that Georgia’s water quality standards are not “requirements.”<sup>124</sup> The court noted that under Supreme Court of the United States precedent, requirements that can be enforced against federal agencies under § 313(a) “are limited to objective state standards of control, such as effluent limitations in permits, compliance schedules and other controls on pollution applicable to dischargers.”<sup>125</sup> In contrast, water quality standards “provide the legal basis for control decisions under the Act” but “the water quality standards themselves” are not enforceable.<sup>126</sup> Thus, “[because] Alabama’s claim is based on the violation of state water quality standards rather than a specific, enforceable, legal ‘requirement’ under § 313(a), Alabama has failed to state a claim under 33 U.S.C. § 1323(a).”<sup>127</sup>

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<sup>119</sup> *Id.* at 1334.

<sup>120</sup> *Id.* at 1335–36.

<sup>121</sup> 33 U.S.C. § 1323(a) (2011). This section provides in relevant part that federal agencies “shall be subject to, and comply with, all Federal, State, interstate, and local requirements, . . . respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity . . .” *Id.*

<sup>122</sup> *In re ACF Basin Water Litigation*, 467 F. Supp. 3d at 1338.

<sup>123</sup> *Id.* at 1337.

<sup>124</sup> *Id.* at 1338.

<sup>125</sup> *Id.* at 1337 (citing *EPA v. California*, 426 U.S. 200, 215 (1976)).

<sup>126</sup> *Id.* at 1338.

<sup>127</sup> *Id.* at 1339.