Case No. No. 11-30549

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

LOUISIANA ENVIRONMENTAL ACTION NETWORK,
Plaintiff – Appellant,
v.
CITY OF BATON ROUGE, et al.,
Defendants – Appellees

On Appeal from the U.S. District Court for the Middle District of Louisiana,
No. 3:10-cv-187
(Hon. Brian A. Jackson)

BRIEF OF APPELLANT
LOUISIANA ENVIRONMENTAL ACTION NETWORK

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate the possibility of disqualification or recusal.

1. Louisiana Environmental Action Network, Plaintiff-Appellant
2. City of Baton Rouge, Defendant-Appellee
3. Parish of East Baton Rouge, Defendant-Appellee
4. Louisiana Department of Environmental Quality
5. Peggy Hatch, Secretary of Louisiana Department of Environmental Quality
6. U.S. Environmental Protection Agency
7. U.S. Department of Justice
8. Adam Babich, Attorney for Plaintiff-Appellant
9. Corinne Van Dalen, Attorney for Plaintiff-Appellant
10. Robert H. Abbott III, Attorney for Defendants-Appellees
11. Mary E. Roper, Attorney for Defendants-Appellees

THIS CASE WARRANTS ORAL ARGUMENT

Pursuant to 5th Cir. R. 28.2.3, Plaintiff-Appellant Louisiana Environmental Action Network ("LEAN") respectfully requests oral argument for this case which involves an issue central to enforcement of the Clean Water Act. Oral argument will clarify the issues before this court.

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STATEMENT OF JURISDICTION

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1291 because it is an appeal from a final decision of the United States District Court for the Middle District of Louisiana. Plaintiff-Appellant Louisiana Environmental Action Network ("LEAN") filed a timely notice of appeal on June 10, 2011, which is within the 30 days allowed for appeal. Fed. R. App. P. 3(a)(1) and 4(a)(1)(A).

ISSUES PRESENTED

1. When ruling on a Motion to Dismiss under Fed. R. Civ. P. 12(b)(6), courts accept a complaint's well-pleaded facts as true, view those facts in the light most favorable to the plaintiff, and dismiss claims only when a plaintiff can prove no set of facts that would merit relief. Under the Clean Water Act, a plaintiff's claims may be barred if, at the time of filing, EPA or a state is already "diligently" prosecuting an action in court to require compliance with the standards at issue. 33 U.S.C. § 1365(b)(1)(B). Here, the Plaintiff's Amended Complaint pleads violations of the Clean Water Act and alleges that a) "[n]either EPA nor [Louisiana] has commenced or is diligently prosecuting a civil or criminal action in court to redress the violations," b) the Defendants "will continue their violations until enjoined," and c) the Defendants "are in violation of [a 2002 EPA] consent decree." Amended Complaint ¶¶ 1, 6, 12, 35 (ECF 4) [R. 36-37, 39, 42]. Did the District Court err in granting a Rule 12(b)(6) Motion to Dismiss based on an

implicit conclusion that EPA was prosecuting the violations at issue diligently? Or, alternatively, was the Plaintiff entitled to an opportunity to prove its well-pled allegations that there is no diligent prosecution and that violations "will continue"?

2. An EPA consent decree does not moot a plaintiff's Clean Water Act claims if there is "a realistic prospect" that a violation will continue. *Envtl. Conservation Org. v. City of Dallas*, 529 F.3d 519, 528-29 (5th Cir. 2008). Here, the plaintiff's Amended Complaint pleads violations of the Clean Water Act and alleges that a) the Defendants "will continue their violations until enjoined," and b) the Defendants "are in violation of [a 2002 EPA] consent decree." Amended Complaint at ¶¶ 1, 6, 12, 35 (ECF 4) [R. 36-37, 39, 42]. Did the District Court err in granting a Rule 12(b)(6) Motion to Dismiss based on findings that Defendants "asserted that they are in full compliance with the 2002 consent decree" and that Defendants "allege that . . . improvements address and resolve Plaintiffs' grievances"? Or, alternatively, was the Plaintiff entitled to an opportunity to prove its well-pled allegations that Defendants "are in violation of the consent decree" and that violations "will continue"?

3. This Court has acknowledged that an EPA consent decree does not moot a plaintiff's Clean Water Act claims when there is "a realistic prospect" that a violation will continue. *City of Dallas*, 529 F.3d at 528-29. Similarly, the Clean Water Act provides that government enforcement only blocks citizen suits when

the government enforcement is "diligently" prosecuted in a court. 33 U.S.C. § 1365(b)(1)(B). Did the District Court err in ruling that — if the Defendants are violating the Clean Water Act and "not complying with the 2002 consent decree"— the Plaintiff's only option is to "take up the matter with the EPA.?" Or, alternatively, in the absence of diligent prosecution or a consent decree that leaves no realistic prospect for future violations, does the Plaintiff enjoy the rights that Congress afforded it in the Clean Water Act's citizen-suit provision?

STATEMENT OF THE CASE

Plaintiff-Appellant LEAN filed this case in the U.S. District Court for the Middle District of Louisiana on March 22, 2010 under the citizen suit provision of the Clean Water Act, 33 U.S.C. § 1365, against Defendants-Appellees City of Baton Rouge and Parish of East Baton Rouge. Plaintiff's Amended Complaint alleges that Defendants are liable for the continued discharge of wastewater from three treatment plants with pollutant concentrations that violate limits defined in permits issued to Defendants pursuant to the Clean Water Act § 402(b), 33 U.S.C. § 1342(b). (ECF 4) [R. 36-46]. The Amended Complaint also alleges that Defendants "will continue their violations until enjoined," that "[n]either EPA nor [Louisiana] has commenced or is diligently prosecuting a civil or criminal action in court to redress the violations," and that the Defendants "are in violation of [a 2002 EPA] consent decree." Amended Complaint ¶¶ 1, 6, 12, 35 (ECF 4) [R. 36-37, 39,

42].

On June 3, 2010, Defendants filed a motion to dismiss the suit pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. (ECF 7) [R. 63]. Plaintiff filed its opposition to this motion on June 24, 2010, (ECF 10) [R. 85-90], and Defendants replied on July 29, 1010. (ECF 15) [R. 96-101]. Plaintiff filed a Sur-Reply on August 3, 2010. (ECF 18) [R. 141-43]. The court held oral argument on the Defendant's Motion to Dismiss on March 16, 2011. (ECF 26) [R. 158].

The court granted Defendants' Motion to Dismiss on May 17, 2011 and dismissed Plaintiff's complaint with prejudice, ruling that Plaintiff failed to state a claim which entitled it to relief. (ECF 28) [R. 161-71]. The District Court held that "Prior to the January 2015 compliance deadline set by the 2002 consent decree, no remedy is available to the Plaintiff absent a finding of non-compliance by the Court having proper jurisdiction to enforce the decree." (ECF 28) [R. 169-71]. The Court acknowledged Plaintiff's well-pled allegations that Defendants were in violation of the consent decree, stating: "If Plaintiff is correct in its assertion that Defendants are not complying with the 2002 consent decree, the Court encourages Plaintiff to take up the matter with the EPA, as the EPA has the power to enforce the consent decree." *Id.* at n.11.

On June 10, 2011, Plaintiff filed its notice of this appeal. (ECF 29) [R. 172-73].

STATEMENT OF FACTS

Since this is an appeal from a Fed. R. Civ. P. 12(b)(6) dismissal, Plaintiff provides the following facts directly from its Plaintiff's Amended Complaint, Mar. 30, 2010, ("Amended Complaint") (ECF 4) [R. 36-46], Plaintiff's Notice of Intent to Sue attached and incorporated by reference as Exhibit A to the Amended Complaint ("Notice of Intent to Sue") (ECF 4-1) [R. 47-57], and the federal consent decree entered in *United States v. City of Baton Rouge*, No. 01-978-B-M3 (M.D. La. Mar. 15, 2002) ("2002 Consent Decree"), which Plaintiff references in its Amended Complaint and which is part of the public record.

Defendants own and operate three wastewater treatment plants, known as the North Wastewater Treatment Plant, the South Wastewater Treatment Plant, and the Central Wastewater Treatment Plant. Amended Complaint ¶ 15 (ECF 4) [R. 39]. Defendants discharge treated sanitary wastewater from point sources at these plants. *Id.* ¶ 27 [R. 41].

The Louisiana Department of Environmental Quality ("LDEQ") "administers the Clean Water Act permit program in Louisiana pursuant to Clean Water Act § 402(b), 33 U.S.C. § 1342(b), under a program called the Louisiana Pollution Discharge Elimination System ('LPDES')." *Id.* ¶ 18 [R. 39]. LDEQ issued LPDES Permits Nos. LA0036439, LA0036421, and LA0036412 ("permits") to the City and Parish for discharges from the North, Central, and

South Wastewater Treatment Plants. *Id.* ¶ 19 [R. 40]. These permits require Defendants to reduce the amount of biochemical oxygen demand and total suspended solids at its wastewater treatment plants such that the 30-day average amount of these pollutants in the wastewater discharged from plants is at least 85% less than the amount of the pollutants in the sewage entering the plants ("85% reduction"). *Id.* ¶ 33 [R. 42].

In 1988, the United States filed *United States v. Baton Rouge*, No. 88-191A (M.D. La.), alleging violations of the Clean Water Act at the North, Central, and South Wastewater Treatment Plants. Amended Complaint ¶ 28 (ECF 4) [R. 41]. The Middle District of Louisiana entered a Consent Decree ("1988 Consent Decree") to resolve the claims alleged in *United States v. Baton Rouge*. *Id.* ¶ 29 [R. 41]. The Middle District of Louisiana entered a subsequent Consent Decree ("2002 Consent Decree") in *United States v. City of Baton Rouge*, No. 01-978-B-M3 (M.D. La. Mar. 15, 2002), which superseded and terminated the 1988 consent decree. Amended Complaint ¶ 30 [R. 41]. The 2002 Consent Decree requires only a 75% reduction in biological oxygen demand and total suspended solids, rather than the 85% reduction required by the LPDES permits. *Id.* ¶¶ 31-32 [R. 41]; 2002 Consent Decree ¶ 39.

Plaintiff filed this Clean Water Act citizen enforcement suit against Defendants because of Defendants' "ongoing" violations of LPDES Permits Nos.

LA0036439, LA0036421, and LA0036412 at its three sewage treatment plants. Amended Complaint ¶ 1[R. 36]. Defendants "continue" to violate its permits and is also "in violation" of the 2002 Consent Decree. *Id.* More than sixty days have passed since Plaintiff sent its Notice of Intent to Sue to Defendants, EPA and LDEQ. Neither EPA nor LDEQ has commenced or is diligently prosecuting a civil or criminal action in court to redress the violations at issue in this suit. *Id.* ¶ 6 [R. 37].

Defendants submit Discharge Monitoring Reports to LDEQ detailing its permit violation. The Discharge Monitoring Reports show that since at least January 2007, Defendants have violated the 30-day average 85% reduction requirement for biological oxygen demand and total suspended solids 60 times as follows:

- 12 violations of the 30-day average 85% reduction requirement for biological oxygen demand in Permit LA0036439 at the North Plant

- 16 violations of the 30-day average 85% reduction requirement for biological oxygen demand in Permit LA0036421 at the Central Plant

- 23 violations of the 30-day average 85% reduction requirement for biological oxygen demand in Permit LA0036412 for the South Plant

- 2 violations of the 30-day average 85% reduction requirement for total suspended solids in Permit LA0036421 at the Central Plant

- 6 violations of the 30-day average 85% reduction requirement for total suspended solids in Permit LA0036412 for the South Plant

Id. ¶¶ 35-40 [R. 42-43]; Notice of Intent to Sue at 2-6 (ECF 4-1) [R. 48-52].

Moreover, since at least 2007, the Discharge Monitoring Reports also show that Defendants have violated the Consent Decree's interim 30-day average of 75% reduction requirement for biological oxygen demand and total suspended solids as set forth in the 2002 Consent Decree 14 times as follows:

- 3 violations of the 30-day average 75% reduction requirement for biological oxygen demand in Permit LA0036421 at the Central Plant

- 11 violations of the 30-day average 75% reduction requirement for biological oxygen demand in Permit LA0036412 for the South Plant

Id. ¶¶ 35, 41-42 [R. 42-43]; Notice of Intent to Sue at 6-7 (ECF 4-1) [R. 52-53].

Plaintiff's Amended Complaint pleads causes of action based on violations of the Clean Water Act. Allegations about Defendants' violations of the EPA Consent Decree are included to show that Defendants' violations will continue until enjoined—in other words, that the consent decree has not solved the problem.

SUMMARY OF ARGUMENT

It is undisputed that governmental action may bar citizen enforcement of Clean Water Act permits if that government action is either: 1) diligent prosecution in court that began prior to filing of the citizen suit, or 2) a government consent decree that leaves no "realistic" prospect that a violation will continue after a "reasonable" timetable. *Envtl. Conservation Org. v. City of Dallas*, 529 F.3d 519, 528-29, 530 (5th Cir. 2008). All of these key tests are fact-based and depend on

the circumstances of the violations, the specifics of any government enforcement, and the harm experienced by the surrounding community. For example, can an eight-year old government consent decree qualify as "diligent" prosecution when the government fails to require compliance with the standards of that decree? Do ongoing violations of a consent decree's interim standards support an inference that there is a "realistic" prospect of future Clean Water Act violations? Is a 13-year compliance schedule "reasonable" in the face of impacts on the surrounding community?[1] These all are intensely fact-based questions that depend on a factual record—a record that has yet to be developed in this case.

Here, Plaintiff squarely and plausibly alleged there is no diligent prosecution and that—notwithstanding the 2002 Consent Decree— violations "will continue," and that Defendants are violating that Consent Decree. The District Court was obligated to accept these facts as true when ruling on a Rule 12(b)(6) Motion to Dismiss. Instead, however, the District Court relied on Defendants' unproven

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[1] Even the 2015 deadline is subject to modification upon agreement of the parties, Consent Decree 58 ¶ 118, and there is a long history of slipped deadlines in this case. *See* Ruling on Mot. Dismiss at 1-2 (ECF 28) [R. 161-162] (initial suit brought in 1988, resulting in judicially-enforceable consent decree "requir[ing]" POTW upgrades by 1996); *id*. at 2 (deadline extended by mutual consent of parties in 1997); *id*. (second suit brought in 2002, after upgrades required by first suit failed to secure compliance, resulting in second consent decree); *id*. at 3 (second consent decree modified in 2009, pushing deadline back to 2015).

allegations of compliance and dismissed the case. In addition—contrary to the Clean Water Act's express direction that prior government action only bars citizen suits when it is "diligently prosecuted"—the District Court suggested that Plaintiff's only remedy for ongoing violations of the Clean Water Act in the face of a consent decree (which is not being complied with) is to "take up the matter with the EPA." In other words, the District Court sidestepped the factual inquiry required by the Act and by this Court's ruling and analysis in *Envtl. Conservation Org. v. City of Dallas*, 529 F.3d 519 (5th Cir. 2008).

Accordingly, resolution of this case requires only enforcement of the basic "standard of review" for Rule 12(b)(6) motions. *See United States ex rel. Riley v. St. Luke's Episcopal Hosp.*, 355 F.3d 370, 376 (5th Cir. 2004). If the parties are not able to settle this case, resolution of the merits—including whether government prosecution has been diligent and whether the 2002 Consent Decree leaves a "realistic prospect" for future violations—should await development of a factual record.

STATUTORY BACKGROUND

The goal of the Clean Water Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To achieve this goal, the Clean Water Act prohibits the "discharge of any pollutant by any person" into the waters of the United States with limited exceptions. 33

U.S.C. § 1311. The primary exception to this prohibition is under the National Pollutant Discharge Elimination System established in 33 U.S.C. § 1342, which allows the EPA or an authorized state agency to issue a permit for the discharge of pollutants, provided that such discharge complies with the conditions of the Clean Water Act and the terms of the permit. *See* 33 U.S.C. § 1342(a)(1).

Congress empowered private citizens to bring suit in federal court against alleged violators of the Act. 33 U.S.C. § 1365. Specifically, the Clean Water Act citizen suit provision authorizes federal courts to enter injunctions and assess civil penalties, payable to the United States Treasury, against any person found to be in violation of "an effluent standard or limitation" under the Act. 33 U.S.C. § 1365(a*); Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000). And the Act defines "effluent standard or limitation," as a permit or condition thereof issued under §1342. 33 U.S.C. § 1365(f). Therefore, citizens may enforce violations of permits issued pursuant to section 1342 of the Act.

This Court has explained that the "citizen-suit provision is a critical component of the CWA's enforcement scheme, as it 'permit[s] citizens to abate pollution when the government cannot or will not command compliance.'" *Envtl. Conservation Org. v. City of Dallas*, 529 F.3d 519, 526 (5th Cir. 2008) (quoting *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 62 (1987)). *See also Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S 240,

263 (1975) (noting that with citizen suits, "Congress has opted to rely heavily on private enforcement to implement public policy"); *Natural Resources Defense Council, Inc. v. EPA*, 484 F.2d 1331, 1337 (1st Cir. 1973) ("The [Senate] committee realized that federal or state enforcement resources might be insufficient, and that federal agencies themselves might sometimes be polluters; the citizen suit provision created 'private attorneys general' to aid in enforcement.").

Congress set forth circumstances under which prior government action could bar commencement of a citizen suit. Specifically, a citizen may not bring such a suit if the EPA or State "has commenced and is diligently prosecuting a civil or criminal action" against the alleged violator. 33 U.S.C. § 1365(b)(1)(B). These restrictions are intended "to strike a balance between encouraging citizen enforcement of environmental regulations and avoiding burdening the federal courts with excessive numbers of citizens suits." *Hallstrom v. Tillamook County*, 493 U.S. 20, 29 (1989); *see also La. Envtl. Action Network v. Sun Drilling Products Corp.,* 716 F. Supp. 2d 476 (E.D. La. 2010).

ARGUMENT

I. The Standard of Review is *De Novo* and Plaintiff's Well-Pled Allegations Must be Taken as True.

The proper standard of review of the District Court's dismissal under

Federal Rule of Civil Procedure 12(b)(6) is *de novo*. *EPCO Carbon Dioxide Products, Inc. v. JP Morgan Chase Bank, NA*, 467 F.3d 466, 469 (5th Cir. 2006). The appellate court "accept[s] all well-pleaded facts as true and view[s] those facts in the light most favorable to the plaintiff." *Doe ex rel. Magee v. Covington County School Dist. ex rel. Bd. of Educ*., --- F.3d ----, 2011 WL 3375531 at *4 (5th Cir. Aug. 5, 2011).

This Court has explained that "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Gonzalez v. Kay*, 577 F.3d 600, 603 (5th Cir. 2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). And that "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Id.* (quoting *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009); *Harold H. Huggins Realty, Inc. v. FNC, Inc.*, 634 F.3d 787, 796 (5th Cir. 2011) (quoting same). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the Defendant is liable for the misconduct alleged." *Id.*

II. Plaintiff States a Cause of Action Under the Clean Water Act.

Accepting as true all well-pleaded facts in Plaintiff's Amended Complaint, and viewing them in the light most favorable to the Plaintiff, the District Court

should have found that Plaintiff stated a valid claim under the Clean Water Act, 33 U.S.C. 1365(a), against Defendants for violations of "an effluent standard or limitation" under the Act. Specifically, the Clean Water Act provides that "any citizen may commence a civil action on his own behalf … against any person . . . who is alleged to be in violation of (A) an effluent standard or limitation under [the Clean Water Act] …." Plaintiff alleged that it is a citizen, Amended Complaint ¶ 8 (ECF 4) [R. 37-38], and that Defendants are persons, *id.* at ¶ 13-14 [R. 39], who is in violation of an effluent standard under the Act. *See id.* at ¶¶ 35-40, 52 [R. 42-44] (alleging violations of the 85% reduction requirement in LPDES permits LA0036439, LA0036421, and LA0036412 for biological oxygen demand and/or total suspended solids); *id*. at ¶¶ 45-46, 54-58 [R. 44-45] (alleging permit and regulatory violations that cause and contribute to sanitary sewer overflows). Furthermore, Plaintiff satisfied the rule in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, *Inc.*, 484 U.S. 49 (1987) that the violations at issue must be ongoing by alleging that Defendants' permit violations are ongoing and continuing since at least January 2007. *See* Amended Complaint ¶¶ 1, 35-40 [R. 36, 42-43], Notice of Intent to Sue at 2-7 (ECF 4-1) [R. 48-53]; 484 U.S. at 64-65 (finding "most natural reading of 'to be in violation' is a requirement that citizen-plaintiffs allege a state of either continuous or intermittent violation").

In addition, Plaintiff alleged facts sufficient to meet the statutory prerequisites for a Clean Water Act citizen suit. The Act requires Plaintiff to provide proper notice at least 60 days before filing suit. 33 U.S.C. 1365(b)(A). Plaintiff alleged that it provided proper notice more than 60 days prior to its suit, and attached a copy of the notice to the complaint. *See* Amended Complaint ¶ 4 (ECF 4) [R. 37], Notice of Intent to Sue at 1-2 (ECF 4-1) [R. 47-48]. The Clean Water Act also prohibits citizen suits where "the [EPA] or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order." 33 U.S.C 1365(b)(1)(B). This "statutory bar is an exception to the jurisdiction granted [by the statutes], and jurisdiction is normally determined as of the time of the filing of a complaint." *Chesapeake Bay Found. v. American Recovery Co.*, 769 F.2d 207, 208 (4th Cir.1985). Here, Plaintiff alleges that "[n]either EPA nor LDEQ has commenced or is diligently prosecuting a civil or criminal action in court to redress the violations specified in the Notice." Amended Complaint ¶ 6 (ECF 4) [R. 37].

Plaintiff substantiates its allegation of no diligent prosecution by alleging that Defendants continue to violate its permits despite the 2002 Consent Decree entered by a federal court that resolved the EPA and the state's suit against Defendants for the same type of permit violations. *See id.* at ¶¶ 1, 28-30 [R. 37, 41]. Plaintiff further alleged that Defendants are in violation of interim limits set

in the 2002 Consent Decree that reduces the biological oxygen demand and total suspended solids reduction requirement to 75%. *Id.* at ¶¶ 1, 41-42 [R. 37, 43, Notice of Intent to Sue at 6-7 (ECF 4-1) [R. 51-52].

To prove a defense of diligent prosecution, Defendants must do more than point to the 2002 Consent Decree – especially in the face of plausible allegations that it is in violation of that decree. It must show ongoing, present tense, diligent enforcement. The statute says that "no action may be commenced . . . if the [EPA] or the State has commenced and *is* diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order." 33 U.S.C. 1365(b)(1)(B) (emphasis added). *See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 59–60 (1987) (discussing "the pervasive use of the present tense throughout [33 U.S.C. 1365]"). As the Fourth Circuit has observed, "the verb tenses used in [the commencement bar to citizen suits in the Clean Water Act] and the scheme of the statute demonstrate that the bar was not intended to apply unless the government files suit first (and is diligently prosecuting such suit)." *Chesapeake Bay Found. v. Am. Recovery Co., Inc.*, 769 F.2d 207, 208 (4th Cir.1985); *see also Adkins v. VIM Recycling, Inc.*, 644

F.3d 483, at 493–94, 2011 WL 1642860, at *8 (7th Cir. May 3, 2011) (analyzing verb tenses of similarly worded commencement bar in the Resource Conservation and Recovery Act).[2]

Furthermore, Defendants have failed to make any allegations of efforts taken by EPA or the state to presently prosecute the violations at issue here. Defendants have not even alleged that EPA or the state has tried to enforce the ongoing violations of the 2002 Consent Decree's requirement that Defendants meet the relaxed interim effluent limits.

III. The District Court Erred in Determining that the Consent Decree Moots Plaintiff's Case.

A. The District Court Relied Improperly on Defendants' Allegations and Assertions, Rather than Plaintiff's Well-Pled Allegations.

The District Court held that Plaintiff's claims are moot based on its finding that the "Defendants asserted that they are in full compliance with the 2002 consent decree." *Id.* at 10 [R. 169]; *see also id.* at 3 [R. 192]. But Defendants

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[2] Indeed, the Ninth Circuit upheld a district court decision that "because of the entry of the settlement agreement . . . the enforcement action is no longer being 'prosecuted' within the meaning of § 1319(g)(6)(A)(ii)," which is a similar citizen suit preclusion rule under the Clean Water Act. *Citizens for a Better Env't v. Union Oil Co.*, 83 F. 3d 1111, 1118 (9th Cir. 1996) ("*UNOCAL*").

never made this assertion and certainly never proved it. The District Court also based its decision on Defendants' claim that it is "on schedule" to come into compliance by the 2002 Consent Decree deadline—a claim that Defendants failed to support with facts. *Id.* at 10 [R. 169]. As a matter of law, Defendants' unproven allegations cannot defeat Plaintiff's well-pleaded claims. The District Court, therefore, had no basis for finding the 2002 Consent Decree moots Plaintiff's claims on review of a Fed. R. Civ. P. 12(b)(6) motion. Instead, the District Court should have made its mootness determination after reviewing the specific facts and circumstances of the 2002 Consent Decree and the government's enforcement of its terms, something the court cannot properly accomplish in the review of a 12(b)(6) motion.

B. Plaintiff Alleges Facts that Show a "Realistic Prospect" of Continued Violations.

In *City of Dallas*, this Court addressed the impact of a consent decree entered into by the EPA and the defendant on a pending citizen suit. 529 F.3d at 523. There, this Court adopted the "realistic prospect" test for situations where the defendant had been forced to comply with a government enforcement action. *Id.* at 528. In such situation, the citizen-plaintiff must prove "that there is a realistic prospect that the violations alleged in its complaint will continue notwithstanding the consent decree." *Id.* This Court also noted that "the 'realistic prospect'

mootness standard . . . comports with Congress's policy that only 'diligent prosecutions' preempt citizen suits." *Id.* (citing § 1365(b)(1)(B). "If a citizen-suit plaintiff demonstrates that there is a realistic prospect that the violations alleged in its complaint will continue notwithstanding the government-backed consent decree, then a less-than-diligent prosecution might have been shown." *Id.* at 528-29 (citing 33 U.S.C. § 1365(b)(1)(B)).[3]

Here, Plaintiff has alleged that Defendants continue to violate Clean Water Act and also violate the consent decree. In its Amended Complaint, Plaintiff alleged that Defendants have violated their permits at least 60 times since January 2007, and have violated the interim limits in the consent decree at least 14 times within the same period. Amended Complaint ¶¶ 35-42 (ECF 4) [R. 42-44]. Defendants have committed these violations despite the existence of the first consent decree entered in 1988. The defense has not refuted these violations in any

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[3] Any argument that the mere existence of a government consent decree bars citizen enforcement is clearly wrong, since the U.S. Supreme Court overturned the dismissal of a citizen suit while acknowledging the existence of a government settlement of a lawsuit. *Friends of the Earth, Inc. v. Laidlaw Envt. Servs. (TOC), Inc.*, 528 U.S. 167, 177 (2000) ("On June 9, 1992, the last day before FOE's 60-day notice period expired, DHEC and *Laidlaw* reached a settlement requiring *Laidlaw* to pay $100,000 in civil penalties and make 'every effort' to comply with its permit obligations."). Further, a 2002 judgment "cannot be given the effect of extinguishing claims which did not even then exist …" *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 328 (1955). Otherwise, the U.S. Supreme Court has explained, old judgments would "in effect confer … a partial immunity from civil liability for future violations." *Id.* at 329.

of their pleadings. The Defendants do not allege that, nor do they present any evidence that the violations have discontinued. The 2002 Consent Decree itself notes that, even if complied with, "[t]he United States does not, by its consent to the entry of this Consent Decree, warrant or aver in any manner that the City/Parish's complete compliance with this Consent Decree will result in compliance with the provisions of the Clean Water Act, 33 U.S.C. §§ 1251 et seq., or with the City/Parish's NPDES permits." 2002 Consent Decree at 52 ¶ 101. Moreover, Plaintiff's detailed allegations of ongoing violations of the consent decree support an inference that there is a "realistic" prospect of future Clean Water Act violations. R. 6. Plaintiff specifically alleged that the violations "will continue." R. 9.

IV. The District Court Erred in Ruling that the Plaintiff's Only Remedy for Clean Water Act Violations Was With EPA.

This District Court ruled that "If Plaintiff is correct in its assertion that Defendants are not complying with the 2002 Consent Decree, the Court encourages Plaintiff to take up the matter with the EPA, as the EPA has the power to enforce the consent decree." But the Clean Water Act unambiguously empowers plaintiffs to bring citizen enforcement cases when government enforcement is not diligent. 33 U.S.C. § 1365(b)(1)(B). At this stage of litigation, Plaintiff's allegation that there is no "diligent" prosecution must be accepted as

true. As authorized by the Clean Water Act, Plaintiff seeks to enforce the Act itself—and Defendants' permits (issued in 2007)—not the 2002 Consent Decree. But Plaintiff's allegation that those violations "will continue . . . until enjoined," and Defendants are "in violation of [a 2002 EPA] consent decree," [R. __ at ¶¶ 1, 6, 12, 35], plausibly allege that the consent decree has not cured the underlying violations. Accordingly, the District Court erred in dismissing the Plaintiff's complaint.

CONCLUSION

For these reasons, the judgment of this Court should reverse the District Court's order dismissing the Plaintiff's Complaint and remand this case for further proceedings on the merits.

Respectfully submitted this 23rd day of September 2011,

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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32.3 FOR CASE NUMBER 11-30549

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Fifth Circuit Rule 32.3, the attached Appellant's brief in case number 11-30549 is proportionately spaced, has a typeface of 14 points, and contains 5038 words.

Dated this 26th day of September, 2011,

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CERTIFICATE OF SERVICE

In accordance with Fed. R. App. Pro. 25(d), I hereby certify that I have, this 23rd day of September 2011, electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/EDCF system. I certify that to the best of my knowledge all participants in the case are registered CM/EDCF users and that service will be accomplished by the CM/EDCF system.

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Case No. No. 11-30549

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

LOUISIANA ENVIRONMENTAL ACTION NETWORK,
Plaintiff – Appellant,
v.
CITY OF BATON ROUGE, et al.,
Defendants – Appellees.

On Appeal from the U.S. District Court for the Middle District of Louisiana,
No. 3:10-cv-187
(Hon. Brian A. Jackson)

REPLY BRIEF OF APPELLANT
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INTRODUCTION

The Defendants argue that the Plaintiff is up against a "presumption" of diligence and that the Plaintiff's burden "is a heavy one." Defs.' Br. at 9, 15 (Oct. 24, 2011). But Defendants fail to explain why the Plaintiff should be given *no* opportunity to meet that burden. Court rules clearly contemplate that the party against whom a presumption is directed has an opportunity to "go[ ] forward with evidence." Fed. R. Evid. 301. Here, the Plaintiff specifically alleges a lack of diligence and provides *detailed* allegations of Defendants' ongoing violations of the consent decree that the Defendants rely on. *See* Appellant's Opening Br. at 3, 8 (Sept. 23, 2011) (citing R. 36-37, 39, 42-43). Accordingly—under the U.S. system of justice—the Plaintiff should have a chance to prove its allegations. *Doe ex rel. Magee v. Covington Cnty. School Dist. ex rel. Bd. of Educ*., 649 F.3d 335, 341 (5th Cir. 2011) ("We review a District Court's grant of a motion to dismiss for failure to state a claim de novo, accepting all well-pleaded facts as true and viewing those facts in the light most favorable to the plaintiff." (internal quotation marks omitted) (citation omitted)). Clearly a consent decree that is not being enforced or complied with does not qualify as "diligent" and should not bar the Plaintiff's lawsuit.

The Defendants also assert that the Clean Water Act's "diligent prosecution" bar is jurisdictional and that the District Court therefore lacked "subject matter

jurisdiction." Defs.' Br. at 7. But this Court has explained that such requirements are not jurisdictional and in fact require "factfinding" to administer:

> The standard of "diligently" is not the kind of bright-line criteria normally associated with truly jurisdictional requirements; and the "diligently" formulation likewise suggests that factfinding, generally a trial court function, may be necessary to determine whether or not the condition is met.

Sierra Club v. Yeutter, 926 F.2d 429, 437 (5th Cir. 1991); *see also Lockett v. EPA*, 319 F.3d 678, 682-83 (5th Cir. 2003) (holding that 33 U.S.C. § 1365(b)'s related notice requirement "although mandatory, is not jurisdictional . . . , and hence may not be availed of for the first time on appeal by an appellant seeking reversal of an adverse trial court judgment on that basis").

Here, the District Court made no finding of "diligence." Instead that Court based its dismissal on a mootness theory. The District Court's mootness theory, however, also depends on factfinding. Here, the Plaintiff has alleged facts showing that a nine-year-old consent decree has not solved the problem and, in fact, that the Defendants are not complying with the decree.

ARGUMENT

I. The "Diligent Prosecution" Bar Does Not Restrict Subject Matter Jurisdiction.

This Court has found that the procedural requirements for bringing federal statute-based citizen suits, although mandatory, are *not* jurisdictional. For

example, in *Lockett v. EPA.,* 319 F.3d 678 (5th Cir. 2003), the Court ruled that a related Clean Water Act requirement that Plaintiff provides notice before filing citizen suits, "although mandatory, is not jurisdictional . . . , and hence may not be availed of for the first time on appeal by an appellant seeking reversal of an adverse trial court judgment on that basis." *Id.* at 682-83 (citing *Yeutter*, 926 F.2d at 437). In *Yeutter*, this Court held that a similar notice requirement is not a subject matter jurisdiction issue.

And in *Yeutter,* the Court further ruled that a "diligent prosecution" bar was not jurisdictional, explaining that "[t]he standard of 'diligently' is not the kind of bright-line criteria normally associated with truly jurisdictional requirements . . . ." *Id.* at 437. Instead, "the 'diligently' formulation . . . suggests that factfinding, generally a trial court function, may be necessary to determine whether or not the condition is met." *Id.*

This Court's analysis is consistent with United States Supreme Court precedent. In *Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1202-03 (2011), the Supreme Court determined that courts are best served by restricting "jurisdictional issues" to those that actually govern a court's *adjudicatory capacity*. There, the Court said: "We have urged that a rule should not be referred to as jurisdictional unless it governs a court's adjudicatory capacity, that is, its subject-matter or personal jurisdiction . . . ." *Id.* at 1202. The Clean Water Act provision

at issue, 33 U.S.C. § 1365(b) (2006), is addressed to litigants, not courts. That is, the Act provides that "no action may be commenced" without proper notice or if the government is already diligently prosecuting a case about the violations in court. 33 U.S.C. § 1365(b). Congress would not have used such "litigant-centric language" to deprive the courts of jurisdiction. *See Dawson Farms, LLC v. Farm Serv. Agency*, 504 F.3d 592, 604-05, 605 n.12 (5th Cir. 2007).

II. Taking Plaintiff's Allegations as True, Defendants Fail to Show That EPA's Enforcement Action Bars Plaintiff's Suit on a 12(b)(6) Motion to Dismiss.

As this Court said in *Sierra Club v. Yeutter*, 926 F.2d 429, 437 (5th Cir. 1991), "the 'diligently' formulation . . . suggests that factfinding, generally a trial court function, may be necessary to determine whether or not the condition is met." For that reason, this Court should deny Defendants' 12(b)(6) motion because the Plaintiff has pled facts sufficient to state a claim upon which relief can be granted. Whether the Plaintiff ultimately prevails, of course, should depend on admissible evidence, properly presented to the trial court.

A. The Trial Court Must Base its Merits Ruling on Evidence and Facts, Even If a Presumption of Diligence Applies.

Defendants cite *Citizens Legal Environmental Action Network, Inc. v. Premium Standard Farms, Inc. (CLEAN)*, No. 97-6073-CV-SJ-6, 2000 WL 220464 (W.D. Mo. Feb. 23, 2000) for the proposition that "prosecutions under the CWA are heavily presumed 'diligent.'" Defs.' Br. at 8. But that court also pointed

out that "neither are prosecutions *ipso facto* 'diligent' . . . ." *CLEAN*, 2000 WL 220464, at *12. Indeed, the *CLEAN* court recognized that "the same courts that profess deference toward state and federal enforcement decisions have nevertheless decided for themselves whether the claims at issue were diligently prosecuted." *Id*. (citing *Ark. Wildlife Fed'n v. ICI Americas, Inc.*, 29 F.3d 376, 380-81 (8th Cir. 1994); *Jones v. City of Lakeland,* 175 F.3d 410, 413-14 (6th Cir. 1999)).

Defendants rely improperly on *Jones*, 175 F.3d at 413-14. Defs.' Br. at 9. The Sixth Circuit vacated that decision, *Jones v. City of Lakeland*, 204 F.3d 680 (6th Cir. 1999), but on rehearing found, by "crediting as true the pleaded assertions in the complaint," that the state's ten-year administrative enforcement effort and multiple consent orders did not amount to diligent prosecution. *Jones v. City of Lakeland*, 224 F.3d 518 (6th Cir. 2000) (en banc).

Moreover, in *Williams Pipe Line Co. v. Bayer Corp*., 964 F. Supp. 1300, 1324 (S.D. Iowa 1997), also relied on by Defendants, *see* Defs.' Br. at 8, the court conducted a full analysis of the agencies' enforcement efforts before determining diligence. *Williams*, 964 F. Supp. at 1322-25 (finding diligent prosecution bar applied only after considering witness testimony and determining defendant complied with agency directives and remedial measures). And in *Glazer v. Am. Ecology Envtl. Servs. Corp*., 894 F. Supp. 1029, 1036 (E.D. Tex. 1995), again relied on by Defendants, *see* Defs.' Br. at 8, the court declined to resolve the issue

of diligent prosecution under a comparable citizen suit preclusion provision in RCRA, 42 U.S.C. § 6972(b)(1)(B), because it found "plaintiffs have not had an adequate opportunity to develop their evidence in response to the motion for summary judgment." *Glazer*, 894 F. Supp. at 1037.

Whatever deference a court should pay agencies in securing compliance, the Sixth Circuit and other courts have recognized that an agency does not necessarily "diligently prosecute" violations by allowing them to continue. *Jones*, 224 F.3d at 522-23 (finding enforcement efforts were not diligent "especially in light of the City's ongoing impermissible pollution of the Oliver Creek"); *Student PIRG of N.J. v. Fritzsche, Dodge & Olcott, Inc.*, 579 F. Supp. 1528, 1536-37 (D.N.J. 1984) (no diligent prosecution under § 505(b)(1)(B) where agency extended compliance deadlines); *Culbertson v. Coats American, Inc.*, 913 F. Supp. 1572, 1579 (N.D. Ga. 1995) (concluding state action had no preclusive effect because it did not require compliance, but merely extended the compliance deadline); *Frilling*, 924 F. Supp. 821, 837-38 (S.D. Ohio 1996) (finding state action was not commenced to "require compliance" where the state substituted interim limitations for the final limitations); *Ohio Envtl. Coal., Inc. v. Hobet Mining, LLC*, 723 F.Supp.2d 886, 907-08 (S.D. W.Va. 2010) (finding lack of diligence where, among other things, consent order failed to provide "meaningful schedule or remedial plan for compliance").

B. Neither *Lockett* nor *Karr* Supports Dismissal of Plaintiff's Well-Pled Citizen Suit.

Relying on *Lockett v. EPA*, 319 F.3d 678 (5th Cir. 2003) and *Karr v. Hefner*, 475 F.3d 1192 (10th Cir. 2007), Defendants assert it is proper to dismiss Plaintiff's suit on a Rule 12(b)(6) motion "without initiating a labor-intensive fact inquiry." Defs.' Br. at 7, 12. But neither case is applicable to the situation before this Court.

In *Lockett*, which involved application of a similar diligent prosecution bar under § 1319(g)(6) of the Act, the issue of "diligence" was not before the Fifth Circuit because the appellants did not raise this issue on appeal.[1] *Lockett*, 319 F.3d at 683-84. Moreover, the district court opinion in *Lockett*, which Defendants also rely on, dismissed the suit on a Rule 12(b)(1) motion to dismiss for lack of jurisdiction—not a 12(b)(6) failure to state a claim. *Lockett v. EPA*, 176 F. Supp. 2d 628 (E.D. La. 2001). The district court, therefore, could consider evidence, which it did, to determine whether the prosecution was diligent. *Id*. at 634 (considering deposition testimony of state official to determine diligence of enforcement proceeding). *See also Williamson v. Tucker*, 645 F.2d 404, 412-13 (5th Cir. 1981) (district court may weigh evidence when reviewing 12(b)(1) motion that attacks factual basis for subject matter jurisdiction). Therefore, neither

[1] Rather the court considered whether the state statute was comparable with § 1319(g) of the Act.

the appellate nor the District Court decisions in *Lockett* are examples of cases where the court granted a 12(b)(6) motion to dismiss based on a finding that the government action was diligent.

In *Karr*, the Tenth Circuit determined EPA's actions were diligent based on apparently undisputed facts. *Karr*, 475 F.3d at 1198 (relying on the defendants' "uncontested assertions … in District Court"). Here, the facts are in dispute, since the Plaintiff has alleged that prosecution is not diligent, that the Defendant is in violation of the consent decree, and that the Defendant will not comply with its permit until enjoined by the District Court. *See* Appellant's Opening Br. at 3, 8 (Sept. 23, 2011) (citing R. 36-37, 39, 42-43).

CONCLUSION

For all of the foregoing reasons, the District Court's judgment and opinion below must be REVERSED.

Respectfully submitted this 10th day of November 2011,

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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32.3 FOR CASE NUMBER 11-30549

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Fifth Circuit Rule 32.3, the attached Appellant's reply brief in case number 11-30549 is proportionately spaced, has a typeface of 14 points, and contains 1,827 words.

Dated this 10th day of November, 2011,

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In accordance with Fed. R. App. Pro. 25(d), I hereby certify that I have, this10th day of November 2011, electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/EDCF system. I certify that to the best of my knowledge all participants in the case are registered CM/EDCF users and that service will be accomplished by the CM/EDCF system.

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