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FEATURED CASE:

ENVIRONMENTAL: Citizen Suit Under CWA Barred by Diligent Prosecution

***South River Watershed Alliance. v. DeKalb County, Georgia*, No. 20-13651 (11th Cir. 2023)**

The Eleventh Circuit held that the diligent prosecution bar under the Clean Water Act is satisfied, precluding a citizen suit against DeKalb County Georgia, as the ongoing efforts of the Environmental Protection Agency and the Georgia Department of Natural Resources, coupled with the consent decree, demonstrate diligent prosecution in addressing the alleged violations.

Background: This case pertains to a lawsuit against DeKalb County ("County") for its violation of the Clean Water Act ("CWA") and failure to comply with a consent decree entered in 2011. The plaintiffs, the South River Watershed Alliance and Jacqueline Echols, allege that the County repeatedly discharged wastewater, including untreated sewage, into surface waters. The central issue is whether the 2011 consent decree and the ongoing efforts of the Environmental Protection Agency ("EPA") and the Georgia Department of Natural Resources ("GDNR") constitute "diligent prosecution" under the CWA. Section 1365 of the CWA grants individuals or citizen groups the authority to take legal action to enforce compliance with the CWA's provisions and regulations, particularly in cases where the government has not adequately addressed the violations. However, if the government has taken active and persistent legal action, either civil or criminal, to address the same violation, then a citizen suit is precluded.

Appeal: The district court granted summary judgment in favor of the County, determining that the diligent prosecution bar was applicable. The plaintiffs appealed, and the Eleventh Circuit affirmed the lower court ruling.

Lack of Standing:
The County contended that the plaintiffs lack standing due to a lack of injury and redressability. Under Article III of the Constitution, a plaintiff must demonstrate that it has suffered an injury in fact,

causation, and that such injury is likely to be remedied by a favorable action. The court concluded that the plaintiffs satisfied the requirements for associational standing. Its members would individually have standing to sue since they have been harmed by the pollution, limiting their use of the watersheds. The interests at stake, which involve restoring the water quality of the watersheds, are germane to plaintiffs purpose as a nonprofit membership organization.

Regarding the redressability claim, the County argued that the remedies sought by plaintiffs are already addressed in the consent decree and cannot be unilaterally modified by the court. However, the court finds that a favorable decision could still significantly enhance the likelihood of obtaining relief that directly addresses the injury suffered. While the court cannot modify the terms of the consent decree, it can impose additional requirements to address the CWA.

Subject Matter Jurisdiction:

Next, the court addresses the County's argument, raised on appeal, that the diligent prosecution bar under 33 U.S.C. § 1365(b)(1)(B) is jurisdictional, and therefore, the district court should have dismissed the case for lack of subject matter jurisdiction. The Eleventh Circuit considered the precedent set by *Arbaugh v. Y&H Corp*., 546 U.S. 500, 514 (2006), which established that a statutory rule should not be deemed jurisdictional unless it relates to a court's adjudicatory capacity, subject-matter jurisdiction, or personal jurisdiction. In line with the Supreme Court's caution against "drive-by jurisdictional rulings," the court thoroughly examines the language and context of the statute, as well as the Supreme Court's interpretation of comparable provisions, and ultimately determines that the diligent prosecution bar should not be considered jurisdictional.
The court briefly acknowledges the circuit split on this issue. While the First, Third, and Fifth Circuits have held that the diligent prosecution bar is not jurisdictional, the Fourth, Seventh, and Tenth Circuits have held that it is jurisdictional. However, the Eleventh Circuit aligns itself with the opinions of the First, Third, and Fifth Circuits, as they adhere to a text-based interpretation and are post-*Arbaugh* decisions.

Framework for Diligent Prosecution:

The court provides a two-part inquiry to determine whether the diligent prosecution bar applies. Firstly, the court must establish whether a government prosecution aimed at enforcing the same "standard, order, or limitation" was pending when the citizen suit was initiated. Secondly, if such a prosecution was ongoing, the court must determine whether it was being diligently pursued by the government at the time of the citizen suit's filing.

The court agrees with the district court's two-part framework and finds that the EPA and the GDNR have been prosecuting the alleged violation through a consent decree. The consent decree addresses the same "standard, order, or limitation" that the citizen suit seeks to enforce. Therefore, the first part of the inquiry is satisfied.
The court proceeds to the second part of the inquiry, which evaluates the government's diligence in its prosecution. The court initially considers the level of deference to be applied in evaluating the government's diligence. The district court applied a "heavy presumption of diligence" standard, meaning that the government's prosecution is presumed to be diligent unless persuasive evidence suggests otherwise. Based on the Supreme Court's guidance and the necessity of avoiding the undermining of ongoing executive enforcement actions, the court determined that it should defer to the judgments of the EPA and GDNR to some extent. The court emphasizes that diligence does not necessitate an extensive or zealous government prosecution, but it must demonstrate diligence.

Diligent Prosecution:

After addressing the level of deference, the court examined the claim of diligent prosecution. The court firmly refutes plaintiff's arguments by presenting four crucial points.

Firstly, the court emphasizes that the terms of the consent decree are pivotal in assessing the government's diligence. The consent decree explicitly aims to achieve "full compliance with the CWA" and eliminate sanitary sewer overflows. The court highlights that the provisions of the consent decree, including penalties and requirements for program implementation and rehabilitation, support these objectives. The court cites both *Friends II* and *Karr* to illustrate that the diligent prosecution bar does not demand an extensive or zealous government prosecution, but only diligence. *Friends of Milwaukee's Rivers & All. for Great Lakes v. Milwaukee Metro. Sewerage Dist*. ("Friends II"), 556 F.3d 603, 606 (7th Cir. 2009), *Karr v. Hefner*, 475 F.3d 1192, 1198 (10th Cir. 2007).
The court proceeds to evaluate whether the EPA and GDNR have demonstrated diligence in overseeing the consent decree and holding the defendant accountable. The court cites *Piney Run* to explain that a citizen-plaintiff cannot rebut the presumption of diligence by merely showing that the agency's prosecution strategy is less aggressive than desired or did not produce a completely satisfactory result. *Piney Run Pres. Ass'n v. Cnty. Comm'rs of Carroll Cnty*., 523 F.3d 453, 459 (4th Cir. 2008).

To substantiate the government's diligence, the court cites specific actions taken by the EPA and GDNR, noting that the government has imposed penalties amounting to nearly one million dollars against the defendant each year from 2012 to 2018.

Secondly, the court considers the provisions within the consent decree that allow the court to retain jurisdiction and modify the decree. It references *Group Against Smog*, which found diligent prosecution when a consent decree contained similar provisions, including ongoing jurisdiction and court intervention for continuing violations. *Grp. Against Smog & Pollution, Inc. v. Shenango Inc.*, 810 F.3d 116, 123 (3d Cir. 2016). Allowing a citizen suit in this case would undermine the dispute resolution process agreed upon in the decree and lead to duplicative proceedings.

Thirdly, the court addresses the plaintiff's argument that a consent decree can only preclude a citizen suit if it is stringent enough to prevent all sewage spills and CWA violations. The court disagreed, citing *Friends II* to clarify that the consent decree must be capable of requiring compliance rather than preventing all future violations. The court asserts that the consent decree in the present case satisfies this standard since its goal is full compliance with the CWA, its requirements align with that goal, and the government has diligently prosecuted it.

Lastly, the court addresses claim that the consent decree is ineffective because it is not stringent enough to prevent sewage spills and other CWA violations. The court clarifies that *Friends II* does not establish that a consent decree can only preclude a citizen suit if it prevents all future CWA violations. Instead, the court emphasizes the necessity for a substantive analysis to determine if the settlement between the state and the violator can require compliance with the CWA and was made in good faith to achieve that goal.

South River Watershed Alliance v. DeKalb County, Georgia

SHORT SUMMARIES:

1st Circuit – Takings – Ripeness

If you ever wanted to own your own private island, this case might deter you. A trust owns an island about 4 acres in size separated by between 40 and 80 feet of water from the mainland depending on the tide. The local government requires a property being developed to be within 150 feet of unpaved access to a street and is also supposed to have 150 feet of frontage on a street. The trust sought a variance. The variance application included a timber bridge to join the island with the mainland. A Tribe owns various treaty rights to clamming the channel and objected to the bridge. The variance was denied for public safety reasons and on appeal the trust sought to change the bridge design to a steel bridge having a greater span and avoiding the pilings in the channel. The board of appeals recognized that you can't change your application midstream (so to speak) and rejected the appeal. The matter went through some further appellate proceedings and in all fairness to justice, the court noted that the arguments in this federal court proceeding seemed to ignore some of the arguments the applicants made in state court. The panel concluded that the trust waived its argument as to the finality of the state proceedings and because the remainder of its arguments were meritless, upheld the lower court's dismissal without prejudice.

Haney v. Town of Mashpee

4th Circuit – Wrongful Conviction – Post Conviction Rights – Suppression of Evidence

Like most wrongful conviction cases, this case has sad facts that ought to act to motivate police and prosecutors to carefully pursue investigations with diligence. A rape murder occurred and the police focused on a young man who had some minimal relationships with the victims. Tips came in from arrestees seeking to curry favor with the authorities in their own cases. These tips focused more attention on the young man. At the same time, undercover operatives relayed information that the rape murder was a hit orchestrated by a drug gang for various reasons. Hard to believe but the detective in charge did not follow that lead. Instead, he continued to pursue the young man. DNA testing was performed and ruled the young man out. Nevertheless, he was arrested, tried and convicted and sentenced to serve 80 years. Also, troubling, a witness at the original trial was an imbedded gang informant who could have been examined about her knowledge of the gang and its relationship to the hit had the defense been informed. As time passed, new information focused more attention on the DNA tests and the lead that suggested the murder was a gang hit. The officers involved in the post-conviction proceedings identified a man whose DNA was linked to the murder and rape and taped conversations he had while in a holding cell. For some reason and despite a court order to do so, they did not turn over the recordings to the lawyers for the young man. So, the (no longer young) man sued the City, the original detective and the two officers who were involved in the post-conviction. Trial ensued and the jury awarded damages against the original officer, but the lower court dismissed the case against the City and the two officers involved in the post-conviction investigation. A panel of the 4th Circuit affirmed the results of the trial and dismissal of the suit against the City and in a 2-1 split also found the lower court improperly dismissed the case against the two officers.

Howard v. City of Durham

4th Circuit – Jails – Deliberate Indifference

Running a jail isn't easy. Jailers are subject to liability for a variety of unfortunate events that should they occur to a person outside the jail, no one would be liable. In this case, maybe that's not true, but still running a jail isn't easy. A person enters the jail in horrible physical condition. The tests reflect blood pressure at a very high level that protocol suggested required a call to a physician. The inmate's respiration rate was high suggesting under protocol that the inmate be hospitalized and the inmate's CIWA-Ar score reached 19 also suggesting hospitalization. The physician was not called and the inmate was not hospitalized. The lower court dismissed the suit because the court did not believe sufficient allegations showed deliberate indifference above mere negligence. The 4th Circuit panel reversed. Because claims against the county had been dismissed when the lower court found no constitutional violation, those claims as well as the state law claims were revived and the case remanded.

Would jails provide better care if Medicare and Medicaid and health insurers provided coverage and if a jail infirmary were incorporated into a county's hospital system? You'd think so. Many of the indigent people who seek hospital care and ER services are the same folks as reside in jails, so spreading the cost within the hospital system would likely not impact the fiscal stability of a hospital, but would lead to better medical care in the jail. Sorry for the rant. It's old age and spending too much time with doctors myself.

Stevens v. Holler

6th Circuit – Qualified Immunity – Sheriffs – Civil Conspiracy

So, the advent of legalized marijuana and its companion product legal CBD seems to have confused folks. A prosecutor and some sheriff department investigators got wind of a few stores selling CBD's and began an operation to deal with this problem. After an undercover agent bought some product and sent it off to the state lab, the lab reported that the substance contained – CBD – and categorized it as a Schedule VI drug. Because the deputies could not find CBD scheduled as such they sought direction from the local prosecutors. That office determined it should address the CBD's as an illegal drug and began "Operation Candy Crush". Behind the scenes various members of the Sheriff's department raised concerns that the operation had a shaky foundation as CBD's were likely legal drugs. The prosecutors were undeterred and when the question of civil suits was raised dismissed those concerns as likely to be defeated because the government could grind the plaintiffs lawyers into defeat over time or could throw off the claims by blaming the state lab. As the concerns from the deputies mounted, the prosecutors brought in the Sheriff, who apparently was unwilling to listen to concerns about litigation or legality raised by the deputies and continued pursuit of the operation, joining in with a town's police department. Ultimately, after raids and seizures and arrests, the whole operation fell apart due to the legality of CBD's. Suits followed and most were settled, but one Plaintiff continued the suit against the county and the Sheriff. Bringing this remarkable story to a close, the 6th Circuit concluded that there was enough in this fact pattern to hold the Sheriff in on a count of civil conspiracy and that, the Sheriff, being the policy maker for the county, the county could also be liable if all these facts proved true.

Rieves v. Town of Smyrna, TN

6th Circuit – First Amendment Retaliation – Proud Boys – Public Comment Period

Working in a political arena can offer interesting and varied political views that include those that sharply divide us. In Grand Traverse County, MI, apparently, such was the case. The board of commissioners invited members of the Proud Boys to join them at a meeting to support a resolution making the county a "2nd Amendment Sanctuary". That meeting led to an engaged group of folks who sought an opportunity at a public forum during a later meeting to complain that the board had recognized a "hate group" and sought to have the board distance itself from them and publicly state that they were not part of the group. The board chair reacted with anger asserting that the woman was spreading misinformation. Because the board members generally did not respond to public comments, one of the board members suggested that the chair should not respond to which the chair responded that the speaker was "spreading lies." The next speaker at this forum noted the troubled history of the Proud Boys that linked the group to the January 6th attack on the Capitol, an armed attempt to take over the Michigan Capitol and the protests in Charlottesville, VA that led to the death of a woman. In response, one of the board members left the meeting briefly to return with a high-powered rifle which he displayed with a smirk. The chair laughed. Finding this action intimidating the woman sued both the board member and the county. Both moved to dismiss, but without success. The board member appealed, and the 6th Circuit panel affirmed in a 2-1 decision.

From the decision:

> *Instead, the parties' dispute centers on the second element. Clous argues that his display of the rifle was not an "adverse action" that would deter a "person of ordinary firmness" from exercising her First Amendment rights, component (2). Thaddeus-X, 175 F.3d at 394. We explained in Thaddeus-X that "government actions, which standing alone do not violate the Constitution, may nonetheless be constitutional torts if motivated in substantial part by a desire to punish an individual for exercise of a constitutional right." Id. at 386. An official action is adverse only if it could "'deter a person of ordinary firmness' from the exercise of the right at stake." Id. at 396 (quoting Bart v. Telford, 677 F.2d 622, 625 (7th Cir. 1982)). Whether an action is severe enough to deter a person of ordinary firmness is a question of fact. Id. at 398-99. . . .*

Importantly, the speaker at the meeting attended virtually and while the commissioner's display of the weapon might have threatened an in-person attendee, the dissent noted that it likely had little intimidating impact on someone attending virtually. Long story short, it's not easy representing political animals.

MacIntosh v. Clous

6th Circuit – Qualified Immunity – Arrest – Escape – Reasonable Force

My initial question for you in this case is to ask why it was deemed worthy of publication. That said, I'm glad it was. The facts tell us that an officer stopped a car because it had illegal tint on its windows. The officer called for back-up and told the responding officer that the plate didn't match the car and that the car smelled like weed. (That probable cause might not be so probable into the future, BTW). The officers asked the occupants to leave the vehicle which they did. The officers conducted a search of the vehicle and prior to doing so put the driver in cuffs just to enable the search. The driver mentioned he had some weed on him, but didn't mention having any cocaine. The officer found some during the search of the driver. At or near this point in time, the driver took off running. The officer tackled him. The officer tried then to pick him up but due to the

weight lost the grasp and the driver fell. The driver began yelling that his hip was broken. The officer turned the driver on his side to alleviate the pain and shortly thereafter the driver admitted to having something else on him which after a search turned out to be a baggie of crack. Naturally, suit followed for excessive force (doesn't seem from the record that the driver's hip was fractured after all.) The panel concluded that when a detained suspect attempts to escape the officer can reasonably try to stop him and tackling him is reasonable. Nothing else the officer did reflected the use of unreasonable force. So, dismissal upheld. Suit against the City of Detroit also dismissed. For the pure of purpose, nothing in the opinion discusses whether the original detention or search were constitutional or part of the complaint. Perhaps, *Heck* foreclosed those actions, but I'm only guessing here. Anyway, tackling a person running from detention seem a reasonable use of force and body cameras are really quite good at supporting officers in these circumstances as the panel relied mainly on them for the facts.

Darrin VanPelt v. City of Detroit, Mich.