

Looking for Protection from Future Environmental Citizen Suits? The Eleventh Circuit Provides Guidance

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On May 31, 2023, the Eleventh Circuit in *South River Watershed Alliance, Inc. et al. v. DeKalb County, Georgia* affirmed dismissal of an environmental group's citizen suit challenging a Clean Water Act (CWA) consent decree between DeKalb County and government regulators on "diligent prosecution" grounds. The CWA precludes citizen suits if the government is "diligently prosecuting" an action to require compliance with the same standard, limitation, or order for which the citizen suit alleges a violation. The Eleventh Circuit's opinion may provide guidance to defendants seeking to resolve government enforcement actions and obtain protection from future citizen suits.

Goals of the consent decree. As a threshold, to be considered diligent prosecution, the Eleventh Circuit found that the goal of the consent decree should be to achieve full compliance with the statute. According to the Eleventh Circuit, the consent decree complied with this requirement because the decree's "express goal [was] for DeKalb County to achieve 'full compliance with the CWA' and eliminate" all alleged violations, i.e., its sanitary sewer overflows.

Capable of requiring compliance. Of course, the consent decree should be capable of achieving that compliance. The Eleventh Circuit found that the consent decree complied with this requirement: "[t]he provisions of the consent decree—from the penalties imposed on DeKalb County to the requirements that it implement various programs to stop future overflows and rehabilitate affected areas—support th[e] goals" of achieving full compliance.

Diligent prosecution. Even though the consent decree was designed to ensure compliance with the CWA, the citizen group argued that its lawsuit should still proceed because the government was not "diligently prosecuting" that decree. The Eleventh Circuit disagreed, finding that the consent decree's inclusion of stipulated penalties and the government's enforcement of those penalties demonstrated diligent prosecution. In particular, the Eleventh Circuit found that the government agencies' diligent prosecution was "evidenced by their continued penalization—according to the terms of the consent decree—of [the defendant] for noncompliance."

The court disagreed with the citizen group's argument that the stipulated penalty was not evidence of diligence because the defendant had an "economic incentive" to avoid remedying its violations:

“Whether South River agrees with the amount of the [stipulated penalties] levied against DeKalb County is inconsequential because it is clear that [the government agencies] have been diligent in monitoring DeKalb County and imposing penalties for noncompliance.”

Jurisdiction. Like many consent decrees, the consent decree between the government and DeKalb County included a provision stating that the district court retained jurisdiction until the decree is terminated. In *South River*, the government moved to reopen the case after several years, and the parties agreed to modify the consent decree. The Eleventh Circuit determined that this was “further evidence of diligent prosecution.”

Timeline. Finally, the Eleventh Circuit rejected the citizen group’s argument that the consent decree was not “diligent prosecution” because it imposed no timeline or deadline for DeKalb County to stop violations or repair the sewer system in certain areas. According to the Eleventh Circuit, that was not dispositive because “the consent decree contains other ongoing compliance requirements,” namely that the defendant “must report all spills ... and pay hefty fines” for further noncompliance.

While every case is different, the Eleventh Circuit’s decision could provide helpful guidance to defendants seeking to resolve government enforcement actions and obtain protection from future citizen suits, particularly for defendants in the Eleventh Circuit.

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