Civil Action No. 6:20-cv-01299-JD
United States District Court, D. South Carolina, Greenville Division.

Naturaland Trust v. Dakota Fin., LLC

531 F. Supp. 3d 953 (D.S.C. 2021)
Decided Mar 31, 2021

Civil Action No. 6:20-cv-01299-JD

2021-03-31

NATURALAND TRUST, South Carolina Trout Unlimited, and Upstate Forever, Plaintiffs, v. DAKOTA FINANCE, LLC dba Arabella Farm, Ken Smith, Sharon Smith, and Willard R. Lamneck, Jr., Defendants.

Michael G. Corley, Michael G. Martinez, SC Environmental Law Project, Greenville, SC, Lauren Megill Milton, Justin O'Toole Lucey Law Firm, Mt. Pleasant, SC, for Plaintiffs. Elizabeth Bartlett Partlow, Law Offices of Elizabeth B. Partlow LLC, Cayce, SC, Adam B. Lambert, Acker Lambert Hinton PA, Pickens, SC, for Defendants.

Joseph Dawson, III, United States District Judge

956 *956

Michael G. Corley, Michael G. Martinez, SC Environmental Law Project, Greenville, SC, Lauren Megill Milton, Justin O'Toole Lucey Law Firm, Mt. Pleasant, SC, for Plaintiffs.

Elizabeth Bartlett Partlow, Law Offices of Elizabeth B. Partlow LLC, Cayce, SC, Adam B. Lambert, Acker Lambert Hinton PA, Pickens, SC, for Defendants.

ORDER

Joseph Dawson, III, United States District Judge

This matter is before the Court on Dakota Finance, LLC dba Arabella Farm[1] ("Dakota"), Ken Smith, Sharon Smith, and Willard R. Lamneck, Jr.'s 957 ("Lamneck") *957 collectively ("Defendants") motion to dismiss Naturaland Trust ("Naturaland"), South Carolina Trout Unlimited ("SCTU"), and Upstate Forever's ("Upstate") (collectively the "Plaintiffs")[2] complaint for lack of subject-matter jurisdiction pursuant to Rule 12(b)(1), Fed. R. Civ. P. (DE 9.) Defendants contend this Court lacks subject matter jurisdiction because (1) Plaintiffs' citizen-suit claim brought pursuant to the Clean Water Act ("CWA") fails to state a claim under the Act, (2) when a permit has been issued, section 505 of the CWA does not authorize citizens' suits to challenge violations of the 404 permit, and (3) Upstate and SCTU's claims are barred because they failed to comply with the CWA's notice requirements.[3] (DE 9, p. 1.) The parties have filed responses and replies to the motion to dismiss. (DE 13, 14.)

[1] Although Plaintiff's complaint refers to Dakota as "doing business as" Arabella Farm, the Defendants assert in their Response that Arabella Farm is a separate and distinct legal entity known as Arabella Farm Event Center, LLC ("Arabella"). (DE 9-1, p. 6, n. 2.) Ken Smith and Sharon Smith are members of Dakota and Arabella. (DE 9, p. 2, n. 2.)

[2] Naturaland and Upstate are non-profit organizations focused on the protection of South Carolina's land and waters. (DE 1, ¶ 6-18.) Naturaland also owns property adjacent to the subject property. (DE 1, ¶ 38.) SCTU is South Carolina's affiliate of Trout Unlimited, a national non-profit

group whose mission is to conserve, protect and restore South Carolina's cold-water fisheries and watersheds. (DE 1, ¶ 6.)

[3] Defendants also contend that without a basis for federal jurisdiction, Plaintiffs' remaining common-law claims in their complaint should be dismissed. (DE 9, p. 1.)

For the reasons set forth herein, the Court grants the Defendants' motion to dismiss for lack of subject matter jurisdiction, pursuant to Rules 12(b)(1), Fed. R. Civ. P.

BACKGROUND

Dakota is a limited liability company that holds land and operates a farm/event center in Pickens County, South Carolina. (DE 9, p. 3.) In 2015, Dakota purchased a 72-acre parcel of land located at 125 Buck Ridge Road, Pickens County, South Carolina ("Arabella Farm"). Defendants Ken Smith and Sharon Smith are members of Dakota. (DE 1, ¶ 18.) Defendant Lamneck owns a 5-acre parcel of land located near Arabella Farm.[4] (DE 1, ¶ 17.) (DE 9, p. 3.) Arabella Farm is bounded by three bodies of water: Clearwater Branch, Peach Orchard Branch, and an unnamed tributary of the Eastatoe River (the "Unnamed Tributary"). (DE 1, ¶ 38.) Plaintiffs contend each of these waterbodies receives stormwater discharges from Arabella Farm during rain events, but the bulk of those discharges have been into the Unnamed Tributary. (DE 1, ¶ 38.) The Unnamed Tributary crosses from Arabella Farm onto Naturaland's property, then to property owned by the South Carolina Department of Natural Resources, and eventually into the Eastatoe River. (DE 1, ¶ 38.) These water bodies are continuously flowing and navigable waters of the United States, pursuant to the CWA. (DE 1, ¶ 38.)

[4] Plaintiffs contend the construction project underlying this CWA action consists of property owned by Dakota and Lamneck. (DE 9-10, p. 1, n. 1.) Plaintiffs contend the Smiths and Lamnecks are related and have jointly undertaken the activities alleged in the complaint. (DE 9-10, p. 1, n. 1.)

In 2017, Ken Smith and Sharon Smith formed Arabella to operate the Event Barn and grounds on Arabella Farm. (DE 9, p. 3.) During that time, Ken Smith approached Pickens County with his proposal to construct an event barn and to develop fruit orchards and vineyards. (DE 9, p. 4.) As negotiations with Pickens County progressed, the county informed Dakota that it should have had a land disturbance (stormwater) permit from the county. (DE 9, p. 4.) Dakota hired a registered professional engineer and applied for the permit; however, the county rejected several iterations of the permit application. (DE 9, p. 4.) In April 2019, Dakota and the county entered a Consent
958 Agreement. (DE *958 9-1, p. 4.) The Consent Agreement required stabilization of disturbed areas of Arabella Farm but did not require Dakota to obtain a stormwater permit. (DE 9-1, p. 4.)

On September 13, 2019, South Carolina Department of Health and Environmental Control ("DHEC") issued Dakota a Notice of Alleged Violation/Notice of Enforcement Conference.[5] (DE 9-2, p. 5.) Following a period of negotiation, DHEC and Dakota finalized on May 6, 2020, a Consent Order requiring Dakota to take several actions. (DE 9, p. 5.) The Consent Order required Dakota to *inter alia* : (1) Complete the process of obtaining coverage under the National Pollutant Discharge Elimination System ("NPDES") General Permit for Stormwater Discharges from Construction Activities with the Pickens County Office of Stormwater Management and (2) Pay to the Department a civil penalty. (DE 9, p. 5-6.) As required by the Consent Order, Dakota obtained coverage under the NPDES General Permit for Stormwater Discharges from Construction Activities on May 22, 2020. (DE 9-6, p. 6.)

[5] The Notice of Alleged Violation/Notice of Enforcement Conference is the first step in DHEC's enforcement process for violations in all the environmental programs DHEC

> administers. (DE 9, p. 5.) DHEC alleged Defendants violated various sections of the Pollution Control Act pursuant to S.C. Code Ann § 48-1-90(A). (DE 9-2, p. 4.)

Plaintiffs bring this action based on alleged violations of the CWA pursuant to the Act's citizen suit provision, as well as several common-law claims for damage to property interests. (DE 13, p. 1.) Plaintiffs seek damages and injunctive relief as a result of actions taken by Defendants. Plaintiffs contend "even with the intervention of these [sic] agencies, major unresolved damage persists in the waterbodies surrounding the Defendants' properties." (DE 13, p. 4.) On the other hand, Defendants argue Plaintiffs are barred from bringing a citizens' action due to statutory limitations of the CWA and because Defendants have already entered into consent agreements with Pickens County and DHEC. (DE 9, p. 6, 10.)

LEGAL STANDARD

Federal district courts are courts of limited subject matter jurisdiction. "They possess only the jurisdiction authorized them by the United States Constitution and by federal statute." United States v. ex rel. Vuyyuru v. Jadhav, 555 F.3d 337, 347 (4th Cir. 2009). As such, "there is no presumption that the court has jurisdiction." Pinkley, Inc. v. City of Frederick, 191 F.3d 394, 399 (4th Cir. 1999) (citing Lehigh Mining & Mfg. Co. v. Kelly, 160 U.S. 327, 327, 16 S. Ct. 307, 40 L. Ed. 444 (1895)). Indeed, when the existence of subject matter jurisdiction over a claim is challenged under Fed. R. Civ. P. 12(b)(1), "[t]he plaintiff has the burden of proving that subject matter jurisdiction exists." Evans v. B.F. Perkins Co., 166 F.3d 642, 647 (4th Cir. 1999) ; see also Richmond, Fredericksburg & Potomac R.R. Co. v. United States, 945 F.2d 765, 768 (4th Cir. 1991). If subject matter jurisdiction is lacking, the claim must be dismissed. See Arbaugh v. Y & H Corp., 546 U.S. 500, 506, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006).

To determine whether jurisdiction exists, the district court is to regard the pleadings' allegations as mere evidence on the issue and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment. Richmond, Fredericksburg & Potomac R. Co. v. U.S., 945 F.2d 765, 768 (4th Cir.1991). The court may dismiss a case for lack of subject matter jurisdiction for any of the following bases: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; *959 or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. Cosby v. S.C. Prob. Parole & Pardon Servs., 2020 WL 1878193, 2020 U.S. Dist. LEXIS 67026 (D.S.C. 2020) (citations omitted).

959

DISCUSSION

In this action, Plaintiffs present claims *inter alia* under Section 402 of the CWA, 33 USC § 1342 alleging unpermitted discharges from a construction site and claims under Section 404 of the CWA, 33 U.S.C. § 1344(c) alleging placement of fill material without a valid permit and in violation of a permit.[6] (DE 1, p. 16-19.) The CWA "prohibits 'the discharge of any pollutant by any person' unless done in compliance with some provision of the Act." S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 102, 124 S. Ct. 1537, 158 L. Ed. 2d 264 (2004) (quoting 33 U.S.C. § 1311(a)). One such provision, codified at 33 U.S.C. § 1342, "established a National Pollution Discharge Elimination System ... that is designed to prevent harmful discharges into the Nation's waters." Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 127 S. Ct. 2518, 2525, 168 L. Ed. 2d 467 (2007). "Generally speaking, the NPDES requires dischargers to obtain permits that place limits on the type and quantity of pollutants that can be released into the Nation's waters." The Piney Run Pres. Ass'n v. The Cty. Comm'rs Of Carroll Cty., MD, 523 F.3d 453, 455-456 (4th Cir. 2008). "[A] NPDES permit 'defines, and facilitates compliance with, and enforcement of, a

preponderance of a discharger's obligations under the [Act]." Id. Initially, "[t]he Environmental Protection Agency (EPA) ... administers the NPDES permitting system for each State, but a State may apply for a transfer of permitting authority to state officials. If authority is transferred, then state officials ... have the primary responsibility for reviewing and approving NPDES discharge permits, albeit with continuing EPA oversight." Id. The EPA has delegated CWA enforcement to South Carolina. 40 Fed. Reg. 28130 (July 3, 1975) (NPDES program); 57 Fed. Reg. 43733 (Sept. 22, 1992) (general permits program).[7]

[6] Section 402 of the CWA regulates pollutant discharges from a "point source" into "waters of the United States" pursuant to a NPDES permit issued by the EPA, or by a state that has received approval to issue such a permit pursuant to CWA. Section 404 of the CWA regulates the discharge of dredged or fill material into waters of the United States, including wetlands.

[7] "In order for the EPA to delegate enforcement authority under the CWA to a state, the state must meet certain public participation requirements, pursuant to 40 C.F.R. 123.27(d)" Paper, Allied-Industrial, Chem. & Energy Workers Int'l Union v. Cont'l Carbon Co., 428 F.3d 1285, 1296 (11th Cir. 2005).

"Although the primary responsibility for enforcement rests with the state and federal governments, private citizens provide a second level of enforcement and can serve as a check to ensure the state and federal governments are diligent in prosecuting Clean Water Act violations." Sierra Club v. Hamilton Cty. Bd. of Cty. Comm'rs, 504 F.3d 634, 637 (6th Cir. 2007). Specifically, § 505(a) of the CWA, 33 U.S.C. § 1365(a), authorizes citizens "to bring suit against any NPDES permit holder who has allegedly violated its permit." Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149, 152 (4th Cir. 2000) (en banc). The Fourth Circuit has recognized that citizen suits are critical to the enforcement of the CWA, as it allows citizens "to abate pollution when the government cannot or will not command compliance .... However, citizen suits are meant 'to supplement rather than 960 *960 to supplant governmental action,' ...." Piney Run Pres. Ass'n, 523 F.3d at 456. Conversely, the CWA, specifically § 1365(b)(1)(B), "bars a citizen from suing if the EPA or the State has already commenced, and is 'diligently prosecuting,' an enforcement action. This statutory bar is an exception to the jurisdiction granted in subsection (a) of § 1365, and jurisdiction is normally determined as of the time of the filing of a complaint." Id. (internal citations omitted).

1. Enforcement action

Defendants contend that the CWA bars citizen suits in cases in which 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). (DE 9-1, p. 1.) The Defendants allege that "[a]t the time Plaintiffs sent the 60-day notice letter required by the Act, both Pickens County ... and DHEC itself had commenced enforcement actions against Defendants for failure to obtain a stormwater permit and were diligently pursuing them." (DE 9-1, p. 3-4.)

In determining if a citizen's suit is barred under this section, courts will conduct a two-step inquiry. The first inquiry is whether the agency suit seeks to enforce the same standard, limitation, or order as the citizen suit. See Connecticut Fund For Env't v. Cont. Plating Co., 631 F. Supp. 1291, 1293 (D. Conn. 1986). The second inquiry is whether the government action is being diligently prosecuted in court. See id. Plaintiff bears the burden of proving an action is not diligently being prosecuted. See Piney Run Pres. Ass'n, 523 F.3d at 459. An enforcement prosecution will ordinarily be considered "diligent" if the judicial action "is capable of requiring compliance with the Act and

is in good faith calculated to do so." Id. Courts have held that in order to comply with this inquiry, an action must proceed in court. See Kendall v. Thaxton Rd. LLC, No. 1:09-CV-3520-TWT, 2013 WL 210892, at *6 (N.D. Ga. Jan. 18, 2013) (holding "[a]s no civil or criminal action has been filed by the EPD against any Defendant in a court, section 1365(b)(1)(B) does not preclude the citizen suit here"). Since no civil action was pending, Defendants' motion to dismiss for lack of subject matter jurisdiction must fail.

However, Congress has adopted an administrative enforcement exception to the "in-court prosecution" requirement of the CWA, which provides in pertinent part:

> Action taken by the Administrator or the Secretary, as the case may be, under this subsection shall not affect or limit the Administrator's or Secretary's authority to enforce any provision of this chapter; except that any violation ... with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection ....

33 U.S.C. § 1319(g)(6)(ii).

In other words, a citizens' suit may also be pursued through an administrative enforcement action. "Courts that have addressed § 1319(g)(6)(A)(ii) —the diligent-prosecution bar—have interpreted the statute to bar citizen suits when three requirements are satisfied." McAbee v. City of Fort Payne, 318 F.3d 1248, 1251 (11th Cir. 2003) (internal quotations and citations omitted). "First, the state must have commenced an enforcement procedure against the polluter. Second, the state must be "diligently prosecuting the enforcement proceedings. Finally, the state's statutory enforcement scheme must be comparable to the federal scheme promulgated in 33 U.S.C. § 1319(g)." Id. *961 In this case, the county's Consent Agreement was issued in April 2019, the DHEC administrative enforcement action commenced with the Notice of Alleged Violation issued on September 13, 2019, and the complaint was filed on April 6, 2020. Thus, this Court holds the state had commenced an enforcement procedure and was diligently prosecuting the enforcement proceeding. Therefore, the only remaining consideration is the comparability analysis.

"The text of the CWA and Supreme Court precedent suggest a broad interpretation of the phrase comparable State law." McAbee, 318 F.3d at 1252. "In the declaration of goals and policy under the CWA, Congress expressly states that " [i]t is the policy of the Congress to recognize, preserve, and protect *the primary responsibility and rights of the States* to prevent, reduce, and eliminate pollution...." Id. (citing 33 U.S.C. § 1251(b)) (emphasis added). Thus, "the term comparable means that the state law need only be sufficiently similar to the federal law, *not identical.* " Id. (emphasis added).

The Federal Circuits have differed in how they apply the comparability prong. Courts have either followed the rough comparability standard or the overall comparability standard.[8] The McAbee Court noted that requiring "rough comparability between each class of provisions ... reduces uncertainty not only for courts but also for potential litigants, state administrative agencies, and state legislatures." Id. Finally, while admitting that the most reliable indicator of congressional intent is the language of the statute, the court found the legislative history of the 1987 amendments to the CWA to be supportive of "requiring rough comparability between each class of provisions." Id. at 1255-56. Thus, the court held "that for state law to be 'comparable,' each class of state law provisions must be roughly comparable to the corresponding class of federal provisions." Id. at 1256 ; see also Paper, Allied-Industrial, Chem. & Energy Workers Int'l Union v. Cont'l Carbon Co., 428 F.3d 1285, 1294 (10th Cir. 2005) ("Therefore, we hold that for state law to be "comparable," under 33 U.S.C. 1319(g)(6)(A)(ii), each category of state-law provisions--penalty

assessment, public participation, and judicial review--must be roughly comparable to the corresponding class of federal provisions.").

> [8] "As a rationale for applying an overall comparability test, the First Circuit suggested that the correct legal standard should be concerned primarily with whether corrective action already taken and diligently pursued by the [state] government seeks to remedy the same violations as duplicative civilian action. The First and Eighth Circuits also highlighted the secondary nature of citizens suits and the deference that should be afforded state agencies." McAbee, 318 F.3d at 1255 (internal citations and quotations omitted). However, this is a less vigorous standard than the rough comparability standard." Id.

Although the Fourth Circuit has not addressed the appropriate standard, the rough comparability standard imposes a more rigorous comparability requirement, and therefore affords states less deference. Accordingly, this Court will apply the rough comparability standard, and thus, "must compare each class of state-law provisions to its federal analogue, at least until one class of provisions fails the comparability test." McAbee, 318 F.3d at 1256.

First, the penalty assessment provision of § 1319(g) is roughly comparable to South Carolina's civil penalties provision. See S.C. Code Ann. § 48-1-330 ("Any person violating any of the provisions of this chapter, or any rule or regulation, permit or permit condition, final determination or order of the Department, shall be subject to a civil penalty not to exceed ten
962 thousand dollars per day of such violation.") *962 Under 33 U.S.C. § 1319(g)(2), the administrator or the EPA may assess penalties for Class I violations of $10,000 per violation up to an aggregate penalty of $25,000. The EPA may also assess penalties for Class II violations of $10,000 per day up to an aggregate penalty of $125,000. Therefore, South Carolina's civil penalty of $10,000 per day for violations with no cap is roughly comparable to the CWA.[9]

> [9] See McAbee, 318 F.3d at 1255 (holding the Alabama "penalty-assessment provisions are comparable" when it allows for a civil penalty not more than $25,000 for each violation with the total capped at $250,000).

Next, the Rights of Interested Persons provision of the Federal statute is roughly comparable to analogous South Carolina laws. The CWA "provides for public participation in three ways: (1) a reasonable notice and opportunity to comment before the issuance of the proposed order assessing a civil penalty; (2) the right to present evidence if a hearing is held; and (3) the right to petition for a hearing if one is not held." Paper, Allied-Industrial, Chem. & Energy Workers Int'l Union v. Cont'l Carbon Co., 428 F.3d 1285, 1295. The public notice provision of § 1319(g) requires the Administrator or Secretary to provide public notice and a reasonable opportunity to comment on a proposed order before issuing that order. See 33 U.S.C. § 1319(g)(4)(a). In applying this statute, the EPA has mandated that public notice must be provided within thirty days after a complaint is issued but forty days before a penalty is assessed. See 40 C.F.R. § 22.45(b)(1). Similarly, South Carolina law provides:

> The Department may conduct public hearings prior to action in the following cases, either of its own volition or upon the request of affected persons, (a) an order of determination of the Department requiring the discontinuance of discharge of sewage, industrial waste or other wastes into the waters of the State or air contaminant into the ambient air, (b) an order issuing, denying, revoking, suspending or modifying a permit, (c) a determination that a discharge constitutes pollution of waters of a marine district and (d) any other proceeding resulting in a finding of fact or determination that a discharge of air contaminants into the ambient air or sewage, industrial waste or other wastes into the waters of the State contravenes the standards established for such air and waters.

S.C. Code Ann. § 48-1-150.

Moreover, with regards to stormwater management and sediment reduction, like the CWA's public participation provision, South Carolina law provides for an administrative hearing "following a timely request, to determine the propriety of [*inter alia*]: ... [a] citizen complaint concerning program operation; [t]he requirements imposed by the implementing agency for approval of the stormwater management and sediment reduction plan; [t]he issuance of a notice of violation or non-compliance with the approved stormwater management and sediment reduction plan; [and t]he issuance of fines by an implementing agency ...." S.C. Code Ann. Regs. 72-313(a). Additionally, hearings "may be requested by any person", and "the Commission [sic] shall give notice to all parties." S.C. Code Ann. Regs. 72-313(d). The notice will be given at least thirty days in advance and will include the time, place, and nature of the hearing. S.C. Code Ann. Regs. 72-313(d). Further, any party has twenty days to file an exception to a hearing officer's proposal once it has been mailed, to commence an appeal before the commission. See S.C. Code Ann. Regs. 72-313.

Equally regarding NPDES permits, South
963 Carolina law provides that "[p]ublic *963 notice of a public hearing shall be given at least 30 days before the hearing." S.C. Code Ann. Regs. 61-9.124.10. Further, any person can request to be placed on a mailing list whereby the department must provide a copy of the notice by mail. See id. at 124.10(c). In addition, "... any interested person may submit written comments on the draft permit and may request a public hearing, if no hearing has already been scheduled. A request for a public hearing shall be in writing and shall state the nature of the issues proposed to be raised in the hearing." S.C. Code Ann. Regs. 61-9.124.11. Finally, South Carolina law provides that:

> A hearing shall be scheduled not less than four (4) nor more than eight (8) weeks after the Department determines the necessity of the hearing in the geographical location of the applicant or, at the discretion of the Department, at another appropriate location, and shall be noticed at least thirty (30) days before the hearing. The notice of public hearing shall be transmitted to the applicant and shall be published in at least one (1) newspaper of general circulation in the geographical area of the existing or proposed discharge identified on the permit application and shall be mailed to any person or group upon request therefor.

S.C. Code Ann. Regs. 61-9.124.12.

Therefore, the Rights of Interested Persons provision of the CWA is roughly comparable to analogous South Carolina public notice laws.[10]

[10] See McAbee, 318 F.3d at 1256 (holding that Alabama law was not comparable to § 1319(g) because "[u]nlike the federal provisions that ensure public notice before

issuance of penalty orders, the AEMA requires only ex post facto notice of enforcement action").

Lastly, South Carolina also has a comparable judicial review provision. The CWA provides a judicial review to "[a]ny person against whom a civil penalty is assessed under this subsection or who commented on the proposed assessment of such penalty ...." 33 USCS § 1319. On the other hand, South Carolina provides "[a]ny person may appeal from any order of the Department within thirty days after the filing of the order, to the court of common pleas of any county in which the pollution occurs." S.C. Code Ann. § 48-1-200 ; see also S.C. Code Ann. § 1-23-380 ("A party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review pursuant to this article and Article 1.... A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.") Therefore, the judicial review provisions of the CWA and South Carolina law are roughly comparable.[11]

11 The Paper, Allied-Indus., Chem. And Energy Workers Int'l Union Court, in construing the difference between the CWA and Oklahoma law, found that "[t]he only apparent difference is the fact that under the federal system, a commenter can seek judicial review, while Oklahoma limits the right of review to those who have been harmed. Such a difference does not preclude a determination of comparability between Oklahoma law and 33 U.S.C. § 1319 with respect to judicial review." Paper, Allied-Indus., Chem. And Energy Workers Int'l Union, 428 F.3d at 1295. The difference in the South Carolina judicial review provision and the CWA is less distinguishable.

Notwithstanding this Court's analysis, other courts have relied on the fact that "the EPA's delegation of enforcement authority to [the state] under the Clean Water Act through the National Pollutant Discharge Elimination System ("NPDES") 964 significantly mitigates any concerns that *964 [state] law is not comparable to subsection 1319(g)." Paper, Allied-Indus., Chem. And Energy Workers Int'l Union, 428 F.3d at 1296. In concluding that § 1365 is roughly comparable to analogous South Carolina provisions, this Court holds that although DHEC and Pickens County did not initiate an action in court, an administrative action occurred comparable to provisions outlined under § 1319(g). Thus, because Defendants were already being prosecuted, § 1319 acts as a bar against Plaintiffs' suit.[12] Therefore, Plaintiffs first claim must be dismissed.

12 Courts have differed in holding § 1319(g) acts as a bar to both monetary and injunctive relief. The Tenth Circuit has held that 1319 does not apply to injunctive relief. Paper, Allied-Indus., Chem. And Energy Workers Int'l Union, 428 F.3d at 1297. The court reasoned that because the text of § 1319(g) provides that violators "shall not be the subject of a *civil penalty action* under section 1365," while the text of 1365 provides "any citizen may *commence a civil action* ," 1319 "operated only to bar civil-penalty relief." Id. (emphasis added) The court specifically noted that "Congress chose to use the words "civil action" in § 1365 authorizing citizen suits but chose the narrower term "civil penalty action" in the § 1319 exclusion from the § 1365 grant." Id. at 1298. Conversely, the First Circuit held that 1319 bared both injunctive and monetary relief. N. & S. Rivers Watershed Ass'n, Inc. v. Town of Scituate, 949 F.2d 552, 557 (1st Cir. 1991). The court reasoned that "[b]oth the Congress and the Supreme Court have recognized: (1) that the primary responsibility for enforcement of Clean Water Acts rests with the government; (2) that citizen suits are intended to supplement rather than

> supplant this primary responsibility; and (3) that citizen suits are only proper if the government fails to exercise its enforcement responsibility." Id. at 558. Thus, if the "state is already acting with diligence to remedy the violations," 1319 must cover all civil actions. Id. This Court agrees with the First circuit and concludes 1319 applies to all civil actions.

2. 404 Permit

Plaintiffs' second cause of action claims "Defendants' discharge of fill material does not qualify for NWP #18, and Defendants therefore have violated the CWA by undertaking such discharge without a permit." (DE 1 ¶ 79.) Specifically, Plaintiffs contend "while the Defendants did receive authorization under Section 404 to construct an impoundment, Plaintiffs' claims are based on allegations that the Defendants have undertaken regulated fill activities beyond that authorization or, in other words, have violated the terms of their permit." (DE 13, p. 17.) Plaintiffs' second cause of action claims "[t]o the extent Defendants possess a permit under Section 404 of the CWA, Defendants' discharge of fill material into the Unnamed Tributary is in violation of the terms of that permit." (DE 1 ¶ 84.)

Section 404 of the CWA requires a person to obtain a permit for the discharge of dredged or fill material into waters of the United States. See 33 U.S.C. § 1344. Citizens suits are permitted under the CWA pursuant to 33 U.S.C. § 1365. Specifically, § 1365 (a), extends to civil action against any person "who is alleged to be in violation of ... an effluent standard or limitation under this Act." 33 U.S.C. § 1365(a)(1). Effluent standard or limitation under this act is further defined under section (f) of the statute. Notably missing from the list of effluent standards enforceable in a citizen suit is a standard or limitation in a 404 permit issued under § 1344 of the CWA. This list, however, does provide for a citizen's action for a permit issued under section 1342. 33 U.S.C. § 1365(f). The Fifth Circuit determined that because the CWA does not list 404 permits, "the Act does not allow citizen suits to enforce the conditions of a § 1344 permit." Atchafalaya Basinkeeper v. Chustz, 682 F.3d 356, 357 (5th Cir. 2012). The court reasoned that if congress had intended to authorize a citizens suit for *965 § 1344 permit "it could have simply added another subsection to § 1365(f), providing the same right to sue for § 1344 permit condition violations that it provided for § 1342 permit condition violations in § 1365(f)(6)." Id. at 359. "The Corps can enforce § 1344 itself as well as the conditions of the permits it issues under § 1344(s)." Id. at 358. This Court agrees. Enforcement of a 404 permit is solely within the discretion of the Army Corp of Engineers. The CWA does not provide for a citizens' suit. Therefore, Plaintiffs' second and third claims must also be dismissed.

3. Notice

Citizens must comply with certain notice requirements before initiating a claim under the CWA. See 33 U.S.C. § 1365(b)(1)(a). Specifically, § 1365 provides that no person may sue a person alleged to be in violation of the Clean Water Act "prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order." 33 U.S.C. § 1365(b)(1)(a). Citizen suit notice requirements are "mandatory conditions precedent to commencing suit" and may not be avoided by employing a "flexible or pragmatic" construction. See Monongahela Power Co. v. Reilly, 980 F.2d 272, 275 n.2 (4th Cir. 1992) (citing Hallstrom v. Tillamook County, 493 U.S. 20, 26, 110 S.Ct. 304, 107 L.Ed.2d 237 (1989)). Courts have dismissed plaintiffs who were not named in the Notice of Intent to Sue even when they purport to raise the same issues raised by other properly noticed plaintiffs. Assateague Coastkeeper v. Alan & Kristin Hudson Farm, 727 F. Supp. 2d 433 (D.

Md. 2010). Similarly, a notice letter stating "other interested parties may join in as plaintiffs" was insufficient to comply with statutory notice requirements for individuals not specifically named in the notice letter. Washington Trout v. McCain Foods, Inc., 45 F.3d 1351 (9th Cir. 1995).

The Notice of Intent to Sue was filed on behalf of Naturaland and Trout Unlimited. However, this action is being brought by Naturaland Trust, SCTU and Upstate. Upstate was not named at all in Plaintiffs' notice letter. (DE 9-11.) Upstate has failed to comply with the statutory notice requirements of § 1365(b)(1)(a). Thus, Upstate is not a proper party to this action. Additionally, the party identified as "SCTU" was also not named in the Notice Letter. (DE 9-11.) Trout Unlimited appeared in place of SCTU. (DE 9-11.) The notice letter indicates "Trout Unlimited is a national non-profit organization with 300,000 members ... [and] two local chapters in the Upstate of South Carolina." However, there is no mention of SCTU. Thus, Trout Unlimited is not a proper party to this action, and none of the claims initiated by SCTU comply with the CWA and are dismissed.

4. Related Common-law Claims

In addition to claims under the CWA, the complaint includes closely related common-law claims arising out of the same alleged conduct by the Defendants. (DE 1 ¶ 4.) Plaintiffs contend this Court, therefore, has supplemental subject matter jurisdiction over these common-law claims pursuant to 28 U.S.C. § 1367. (DE 1 ¶ 4.) 28 U.S.C. § 1367(a) provides that if the district court has jurisdiction over a civil action, then it has supplemental jurisdiction over all other claims so related to the federal claims that they form part of the same case or controversy. A district court, however, may decline to exercise supplemental jurisdiction if the district court dismisses all the federal claims. See 28 U.S.C. 1367 (c)(2)(3). In light of this Court's dismissal of Plaintiffs' federal
966 claims, this *966 Court declines to exercise supplemental jurisdiction here.

CONCLUSION

For the foregoing reasons, it is Ordered that the Defendants' motion to dismiss for lack of subject-matter jurisdiction pursuant to Rule 12(b)(1), Fed. R. Civ. P., is granted.

AND IT IS SO ORDERED.