No. 20-13651-H

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

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South River Watershed Alliance, Inc. and Jacqueline Echols,
Plaintiffs-Appellants,

v.

DeKalb County, Georgia
Defendant-Appellee.

On Appeal from the United States District Court
Northern District of Georgia

# APPELLANTS' SUPPLEMENTAL BRIEF

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Court of Appeals Docket No. 20-13651-H
South River Watershed Alliance, Inc. v. DeKalb County, Georgia

## Certificate of Interested Persons

I certify that the Certificate of Interested Persons in Appellants'

Reply Brief is complete

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## I. Introduction

South River Watershed Alliance and Dr. Jacqueline Echols (collectively "the Alliance") don't allege the U.S. Environmental Protection Agency or the State of Georgia (collectively "EPA") failed to discharge their official duties by entering the Consent Decree with DeKalb County. Nor does the Alliance contend EPA otherwise acted improperly by settling with DeKalb County.

EPA has the discretion to prosecute all Clean Water Act violations, to prosecute some violations, or to forego any prosecution. EPA exercised this discretion by entering a Consent Decree without requiring DeKalb County to repair portions of its sewer system identified as "non-priority areas."

But neither a presumption of regularity nor a presumption of diligent prosecution warrants dismissal of the Alliance's citizen suit because a prosecution that won't end sewage spills in non-priority areas doesn't "require compliance" with Clean Water Act effluent limits in these non-priority areas.[1]

[1] 33 U.S.C. § 1365(b)(1)(B).

## II. Presumption of Regularity

Courts should "presume" that public officials "have properly discharged their official duties" unless there is "clear evidence to the contrary..."[2] But the "Supreme Court's cases applying the presumption to administrative agencies, prosecutors, and the President reveal that the presumption applies only to a subset of factual disputes about administrative motivations and internal processes."[3]

## III. Presumption of Diligent Prosecution

*Connecticut Fund for the Environment v. Contract Plating Co.* was the first case to find that it "must presume the diligence of the state's prosecution" when deciding whether to allow a citizen suit to proceed.[4] To overcome this presumption, the court stated that a citizen suit plaintiff must show

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[2] *United States v. Chem. Found.*, 272 U.S. 1, 15 (1926); *United States v. Armstrong*, 517 U.S. 456, 464 (1996).

[3] *The Presumption of Regularity in Judicial Review of the Executive Branch*, 131 Harv. L. Rev. 2431, 2432 (2018)

[4] *Connecticut Fund For Env't v. Cont. Plating Co.*, 631 F. Supp. 1291, 1293 (D. Conn. 1986).

"persuasive evidence that the state has engaged in a pattern of conduct in its prosecution of the defendant that could be considered dilatory, collusive or otherwise in bad faith."[5]

The court created this rule without providing any rationale or citing any authority. It seemingly did so by applying language from *Overton Park*. One issue in that case was whether a court reviewing agency action under the Administrative Procedure Act can compel agency decisionmakers to testify.[6] The Supreme Court explained that administrative officials may be required to give testimony if the record didn't provide an "adequate explanation" for the decision but held "there must be a strong showing of bad faith or improper behavior" before probing into the decisionmakers' mental processes.[7]

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[5] *Id.*

[6] *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977).

[7] *Id.* at 420.

This standard from *Overton Park* is inapplicable to the Clean Water Act's diligent prosecution clause — which precludes a citizen suit only if there is government enforcement "to require compliance" with Act's effluent limits.[8] If an agency exercises its enforcement discretion to require compliance with only a portion of a defendant's property, the Clean Water Act doesn't require evidence showing an improper motive by the agency before authorizing citizen enforcement under § 1365(a).

Even when reviewing agency action under the Administrative Procedure Act's arbitrary and capricious standard of review, the "presumption of regularity" for the decision "is not to shield [the] action from a thorough, probing, in-depth review."[9] Yet the standard created in *Connecticut Fund for the Environment*, and followed by the district court

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[8] 33 U.S.C. § 1365(b)(1)(B).

[9] *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977).

here, shields judicial review of agency prosecution unless the citizen suit plaintiff has evidence that the agency acted improperly.

DeKalb County seeks *Chevron* deference for EPA's "interpretation" of the Clean Water Act. This argument fails for several reasons. First, as Professor Miller points out, EPA and the States aren't arguing "that they should be accorded great deference in their enforcement choices or that citizen suits make it difficult for the government to enforce effectively or to reach settlements with violators. Rather, it is the violators who are seeking to wrap themselves in the flags of the enforcers."[10]

Second, *Chevron* deference applies when Congressional intent is not clear, and the agency adopts its interpretation through notice-and-comment rulemaking or formal

[10] Jeffrey G. Miller, *Theme and Variations in Statutory Preclusions Against Successive Environmental Enforcement Actions by EPA and Citizens Part One: Statutory Bars in Citizen Suit Provisions*, 28 Harv. Envtl. L. Rev. 401, 466 (2004).

adjudication where the rule has the "force of law."[11] Under this standard, Courts must accept the agency's interpretation if it is reasonable. But even if there is uncertainty in the statutory phrase "to require compliance,"[12] EPA hasn't adopted any interpretation for this Court to defer to under *Chevron*.

*Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewerage District* stated "that diligence on the part of the State is presumed"[13] — and quoted the "dilatory, collusive, or otherwise in bad faith" language from *Connecticut Fund for the Environment*[14] — but the Seventh Circuit explained that "a diligent prosecution analysis requires more than mere acceptance at face value of the potentially self-serving statements of a state agency and the violator with whom it

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[11] *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984); *United States v. Mead Corp.*, 533 U.S. 218, 221 (2001).

[12] 33 U.S.C. § 1365(b)(1)(B).

[13] *Id.*

[14] *Id.* citing *Connecticut Fund for the Env't,* 631 F. Supp. at 1293.

settled regarding their intent with respect to the effect of the settlement."[15]

The Seventh Circuit deferred to the State's judgment in determining whether the deadlines to complete certain sewer improvements were too lengthy to be diligent,[16] but held that that compliance "means an *end* to violations, not merely a reduction in the number or size of them."[17]

The court remanded so the trial court could determine, "after giving some deference" to the State, whether "there is a realistic prospect that violations" purportedly addressed by the settlement will continue after the planned improvements are completed.[18] If so, "the plaintiffs' suit may proceed."[19]

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[15] *Friends of Milwaukee's Rivers,* 382 F.3d at 760.

[16] *Id*. at 760-61.

[17] *Id*. at 764 (emphasis in original).

[18] *Id.* at 765.

[19] *Id*. at 765.

Similarly, even though the court erred in *Connecticut Fund for the Environment* by creating a bad faith standard required to overcome the presumption of diligence, the court acknowledged "there is nothing in the 'diligent prosecution' rule that would bar a future citizens' suit if the state suit failed to bring the defendant into compliance" with the Clean Water Act.[20]

For the Alliance's citizen suit against DeKalb County, the district court already found that "the Consent Decree does not establish a timeline for DeKalb to stop spills" or repair the sewer system in non-priority areas."[21] Under these facts, neither a "presumption of regularity" nor a "presumption of diligence" provide grounds for dismissing a citizen suit that seeks to enforce the Clean Water Act in non-priority areas.

[20] *Conn. Fund for the Env't*, 631 F. Supp. at 1294.

[21] Order, Doc. No. 57 at 32.

## IV. Conclusion

EPA hasn't required DeKalb County to repair the sewer system's non-priority areas. No interpretation of § 1365(b)(1)(B) — nor any presumption for agency action — can justify finding that EPA diligently prosecuted an action in court to require compliance with Clean Water Act effluent limits in non-priority areas.

Respectfully filed November 10, 2021.

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## Certificate of Compliance

This brief complies with the type-volume limitation because the brief is less than ten pages as required by this Court's Order directing the parties to file supplemental briefs, excluding the parts of the brief exempted by FRAP 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of FRAP 32(a)(5) and the type style requirements of FRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook.

November 10, 2021.

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