IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

APPALACHIAN VOICES, NORTH CAROLINA STATE CONFERENCE OF THE NAACP, and STOKES COUNTY BRANCH OF THE NAACP,	)	
Plaintiffs,	)	
v.	)	1:17CV1097
DUKE ENERGY CAROLINAS, LLC,	)	
Defendant.	)	

ORDER

Plaintiffs, Appalachian Voices, the North Carolina State Conference of the NAACP, and the Stokes County Branch of the NAACP initiated this citizen-enforcement action against Defendant Duke Energy Carolinas, LLC ("Duke Energy") on December 5, 2017, alleging violations of the Clean Water Act at the Belews Creek Steam Station ("Belews Creek") in Stokes County, North Carolina. (ECF No. 1.) The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331. (*Id.*) Before the Court is Duke Energy's Motion to Dismiss, brought pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). (ECF No. 9.) For the reasons stated below, this motion to dismiss will be denied.

I. CLEAN WATER ACT OVERVIEW

In 1972, Congress enacted the Clean Water Act ("CWA" or "Act") "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The Act prohibits "the discharge of any pollutant by any person" into the waters

of the United States, except as in compliance with certain provisions of the Act. *Id.* § 1311(a).[1] To comply, pollutant dischargers can obtain a permit through the National Pollutant Discharge Elimination System ("NPDES") permit program, administered by the Environmental Protection Agency ("EPA") and authorized states. *See id.* § 1342(a)–(b). The agency responsible for issuing NPDES permits in North Carolina is the North Carolina Department of Environmental Quality ("DEQ"). *See* N.C. Gen. Stat. § 143B-282(a)(1)(a). "NPDES permits impose limitations on the discharge of pollutants, and establish related monitoring and reporting requirements, in order to improve the cleanliness and safety of the Nation's waters." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 174 (2000). "Noncompliance with a permit constitutes a violation of the Act." *Id.*; *see* 40 C.F.R. § 122.41(a).

"[P]rimary responsibility for enforcement rests with the state and federal governments . . . ." *Piney Run Pres. Ass'n v. Cty. Comm'rs* (*Piney Run II*), 523 F.3d 453, 456 (4th Cir. 2008) (quoting *Sierra Club v. Hamilton Cty. Bd. of Cty. Comm'rs*, 504 F.3d 634, 637 (6th Cir. 2007)). To ensure "a second level of enforcement," the Act's citizen suit provision, 33 U.S.C. § 1365, authorizes citizens "to bring suit against any NPDES permit holder who has allegedly violated its permit." *Piney Run*, 523 F.3d at 456 (quoting *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 152 (4th Cir. 2000) (en banc)). Citizen suits are meant "to supplement rather than to supplant governmental action," allowing citizens "to abate pollution when the government cannot or will not command compliance." *Id.* (quoting *Gwaltney of*

[1] The CWA prohibits the discharge of pollutants to "navigable waters," *see* 33 U.S.C. §§ 1311(a), 1362(12)(A), which are defined as "the waters of the United States," *id.* § 1362(7).

Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 60, 62 (1987)). To that end, citizen suits are subject to two statutory limitations. First, a would-be plaintiff must give sixty days' notice to the EPA, the state, and the alleged violator of its intent to sue. 33 U.S.C. § 1365(b)(1)(A). The notice requirement provides the opportunity for the government to initiate its own enforcement action against the alleged violator and for the alleged violator "to bring itself into complete compliance with the Act," both obviating the need for a citizen suit. *See Gwaltney*, 484 U.S. at 59–60. Second, citizen suits are barred if the EPA or state is "diligently prosecuting" a civil or criminal enforcement action against the alleged violator in a federal or state court. 33 U.S.C. § 1365(b)(1)(B). In addition to these statutory limitations on citizen suits, "a permit shields 'its holder from liability . . . as long as . . . the permit holder complies with the express terms of the permit and with the Clean Water Act's disclosure requirements.'" *Ohio Valley Envtl. Coal. v. Fola Coal Co.*, 845 F.3d 133, 142 (4th Cir. 2017) (emphasis omitted) (quoting *Piney Run Pres. Ass'n v. Cty. Comm'rs* (*Piney Run I*), 268 F.3d 255, 259 (4th Cir. 2001)).

II. BACKGROUND

The Complaint alleges that Duke Energy owns and operates the Belews Creek Steam Station, which is a coal-fired electricity generating facility located in Stokes County, North Carolina. (ECF No. 1 ¶ 32.) Plaintiffs allege that Duke Energy created a coal ash settling basin at Belews Creek "in 1972 by damming Little Belews Creek and sluicing wet coal ash and other substances into the impounded stream valley." (*Id.* ¶ 37.) According to the Complaint, Duke Energy operates the Belews Creek coal ash basin under NPDES permit #NC0024406,

issued by the agency that preceded DEQ.[2] (*Id.* ¶ 38.) "The coal ash settling basin at Belews Creek is a wastewater treatment system; its purpose is to treat and remove solids, sludges, and pollutants and keep them out of public waters." (*Id.* ¶ 42.) Plaintiffs allege that: "These waste streams are treated by sedimentation in the ash basin," and "[p]ollutants that have been removed in the course of treatment are disposed of in the Belews Creek coal ash basin." (*Id.* ¶ 118.) According to the Complaint, "Duke Energy has dumped approximately 12 million tons of coal ash and other wastes into the unlined coal ash basin at Belews Creek." (*Id.* ¶ 37.)

On August 16, 2013, DEQ's predecessor filed an action against Duke Energy in the General Court of Justice, Superior Court Division, in Mecklenburg County, (the "state action" or "state proceeding"), alleging unpermitted seeps and exceedances of groundwater standards by Duke Energy at the Belews Creek Steam Station and other sites, which constituted violations of the NPDES permit and state law. (ECF No. 1-2.)

On December 5, 2017, Plaintiffs filed suit in this Court "to challenge ongoing, unlawful leaks of toxic metals and other pollutants by . . . Duke Energy . . . at its Belews Creek Steam Station." (ECF No. 1 ¶ 1.) The Complaint alleges three causes of action arising from (1) Duke Energy's alleged violation of the NPDES Permit's Removed Substances provision; (2) Duke Energy's alleged failure to properly operate and maintain its wastewater treatment facility; and (3) Duke Energy's alleged impermissible use of Little Belews Creek as a wastewater discharge channel. (*Id.* ¶¶ 113–140.)

[2] DEQ's predecessor was the Department of Environment and Natural Resources ("DENR"). *Roanoke River Basin Ass'n v. Duke Energy Progress, LLC*, No. 1:16cv607, 2017 WL 5654757, at *2 n.3 (M.D.N.C. Apr. 26, 2017).

Duke Energy moves to dismiss only the first claim in the Complaint: the removed substances claim. (ECF No. 9.) Duke brings its motion pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). (*Id.*)

III. LEGAL STANDARD

A motion brought pursuant to Rule 12(b)(1), which governs dismissals for lack of subject-matter jurisdiction, raises the question of "whether [the plaintiff] has a right to be in the district court at all and whether the court has the power to hear and dispose of [the] claim." *Holloway v. Pagan River Dockside Seafood, Inc.*, 669 F.3d 448, 452 (4th Cir. 2012). The burden of establishing subject-matter jurisdiction is on the plaintiff. *Evans v. B.F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999). When evaluating a Rule 12(b)(1) motion, the court may consider evidence outside the pleadings and should grant the motion "only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." *Id.* (quoting *Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991)). Once a court determines it lacks subject-matter jurisdiction over a claim, the claim must be dismissed. *See Jones v. Calvert Grp., Ltd.*, 551 F.3d 297, 301 (4th Cir. 2009).

A motion made under Rule 12(b)(6) challenges the legal sufficiency of the facts in the complaint, specifically whether the complaint satisfies the pleading standard set forth in Rule 8 of the Federal Rules of Civil Procedure. *Francis v. Giacomelli*, 588 F.3d 186, 192 (4th Cir. 2009). Rule 8(a)(2) requires a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). While a complaint need not contain detailed factual allegations, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of

a cause of action." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (alteration in original). Rather, the "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Id.* In other words, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). A claim is plausible when the complaint alleges facts that suffice to allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Johnson v. Am. Towers, LLC*, 781 F.3d 693, 709 (4th Cir. 2015) (quoting *Iqbal*, 556 U.S. at 678).

When considering a Rule 12(b)(6) motion to dismiss, "a court evaluates the complaint in its entirety, as well as documents attached [to] or incorporated into the complaint." *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 448 (4th Cir. 2011). A district court evaluating a motion brought under Rule 12(b)(6) can also "consider a document submitted by the movant that was not attached to or expressly incorporated in a complaint, so long as the document was integral to the complaint and there is no dispute about the document's authenticity." *Goines v. Valley Cmty. Servs. Bd.*, 822 F.3d 159, 166 (4th Cir. 2016). Going "beyond these documents on a Rule 12(b)(6) motion . . . converts the motion into one for summary judgment," and "[s]uch conversion is not appropriate where the parties have not had an opportunity for reasonable discovery." *E.I. du Pont de Nemours & Co.*, 637 F.3d at 448–49.

IV. DISCUSSION

Duke Energy moves to dismiss the first claim in Plaintiffs' Complaint, the removed substances claim, on three grounds. (ECF No. 10 at 12–25.) First, Duke Energy argues that

to the extent the removed substances claim arises from allegedly unpermitted discharges to surface water, the claim is barred by DEQ's diligent prosecution because "[l]ike DEQ, Plaintiffs have alleged violations of the permit based upon unpermitted discharges from the wastewater treatment system to surface water." (*Id.* at 12–15.) Second, Duke Energy contends that to the extent the removed substances claim arises from allegedly unauthorized discharges to groundwater, this claim is barred by the "permit shield." (*Id.* at 16–21.) Finally, Duke Energy argues that the factual allegations supporting the removed substances claim are insufficient to state a claim to relief. (*Id.* at 21–25.) Plaintiffs respond by contending that (1) the diligent prosecution bar cannot apply in this case because DEQ is not prosecuting the removed substances claim in the state action, (ECF No. 14 at 10–13); Duke Energy cannot invoke the permit shield defense because the permit shield only applies when the party seeking to invoke it is in compliance with the permit, (*id.* at 13–18); and the allegations in the Complaint are sufficient to support the removed substances claim, (*id.* at 18–21). This Court agrees with Plaintiffs.

A. Whether DEQ's Diligent Prosecution of the State Enforcement Action Bars Plaintiffs' Removed Substances Claim

The CWA's citizen suit provision authorizes any citizen to commence a civil action against any person alleged to be in violation of "an effluent standard or limitation" under the CWA or "an order . . . with respect to such a standard or limitation." 33 U.S.C. § 1365(a)(1). The same provision prohibits citizens from filing suit when the EPA or state "has commenced and is diligently prosecuting" a judicial action "to require compliance with the standard, limitation, or order." *Id.* § 1365(b)(1)(B). Whether the diligent prosecution bar is a jurisdictional issue remains an open question. The Fifth Circuit has concluded that the bar is

not jurisdictional. *La. Envtl. Action Network v. City of Baton Rouge*, 677 F.3d 737, 749 (5th Cir. 2012). The Fourth Circuit has not directly addressed the issue, though it has affirmed a district court's evaluation of the diligent prosecution bar under Rule 12(b)(1). *See Piney Run II*, 523 F.3d at 459–61. It has also described the bar as "an exception to the jurisdiction granted" in § 1365(a). *Id.* at 456 (quoting *Chesapeake Bay Found. v. Am. Recovery Co.*, 769 F.2d 207, 208 (4th Cir. 1985) (per curiam)). The Court will therefore evaluate Duke Energy's diligent prosecution argument under Rule 12(b)(1) for lack of subject-matter jurisdiction.

For an agency lawsuit to bar a citizen suit based on diligent prosecution, the agency suit must seek to enforce the same standard, limitation, or order as the citizen suit. *Cal. Sportfishing Prot. All. v. Chico Scrap Metal, Inc.*, 728 F.3d 868, 874 (9th Cir. 2013) ("Subsection (b)'s reference to 'the' clean-water standard makes clear that it must be the same standard, limitation, or order that is the subject of the citizen suit under subsection (a)."). Accordingly, the first question in a diligent prosecution inquiry is whether, at the time the citizen suit was filed, the EPA or state had commenced a judicial action to enforce the same standard, limitation, or order as the citizen suit. *Conn. Fund for the Env't v. Contract Plating Co.*, 631 F. Supp. 1291, 1293 (D. Conn. 1986). If so, the next question is whether the EPA or state was "diligently prosecuting" its enforcement action at the time the citizen suit was filed. *Id.*

1. Comparison of State and Federal Enforcement Actions

To determine whether an agency enforcement action and citizen suit seek to enforce the same standards, limitations, or orders, "the court may rely primarily on a comparison of the pleadings filed in the two actions." *Id.*; *see Sierra Club v. City & Cty. of Honolulu*, No. 04-00463 DAE-BMK, 2008 WL 1968317, at *5 (D. Haw. May 7, 2008) (comparing the complaints

filed in the agency suit and the citizen suit). The comparison need not reveal identical claims for the actions to cover the same standards and limitations. Citizen suits seeking to enforce the same standards and limitations as an agency suit have been barred even when they alleged violations occurring at more locations and at different times than those alleged in the agency suit. *See, e.g.*, *Karr v. Hefner*, 475 F.3d 1192, 1199 (10th Cir. 2007) (rejecting the plaintiffs' argument that an EPA enforcement action was not diligent because it addressed violations at only 19 to 21 of the 37 locations listed in the plaintiffs' complaint); *Sierra Club*, 2008 WL 1968317, at *1, *2, *5 (concluding two suits covered the same standard or limitation even though the citizen suit alleged violations occurring seven years after those covered in the agency suit). Citizen suits have also been barred when seeking to enforce specific permit conditions that fall within the scope of a broader agency enforcement action. *See, e.g.*, *Cmty. of Cambridge Envtl. Health & Cmty. Dev. Grp. v. City of Cambridge*, 115 F. Supp. 2d 550, 556 (D. Md. 2000) (finding that an agency suit addressing all sewage overflows covered the same issues as a citizen suit alleging sewage overflows during dry weather, in violation of a NPDES permit provision specifically prohibiting "discharges during dry weather"). The diligent prosecution bar does not apply, however, if the agency suit and citizen suit seek to enforce different standards and limitations of the same NPDES permit. *See Frilling v. Vill. of Anna*, 924 F. Supp. 821, 837–38 (S.D. Ohio 1996) (concluding that an agency enforcement of two NPDES permit parameters "does not prevent Plaintiffs from seeking to enforce [four different parameters] through a citizen suit" (emphasis omitted)); *cf. Md. Waste Coal. v. SCM Corp.*, 616 F. Supp. 1474, 1483 (D. Md. 1985) (explaining, in the Clean Air Act context, that "[i]n a situation where a single emission source violates multiple standards, limitations or orders, it would defeat the

purpose of the citizen suit provision to hold that EPA's enforcement of a single standard against the emission source would bar private enforcement of other standards, limitations or orders applicable to the same emission source").

Here, a comparison of DEQ's complaint in the state action and the Plaintiffs' Complaint in the present action reveals that DEQ and Plaintiffs are not enforcing the same standard or limitation. DEQ's unpermitted seep claim is enforcing a prohibition on the discharge of wastewater and stormwater at outfalls other than those allowed by the NPDES permit. (*See* ECF No. 1-2 ¶¶ 130–33.) Plaintiffs' removed substances claim alleges a violation of the permit's Removed Substances provision, which provides that "[s]olids, sludges, . . . or other pollutants removed in the course of treatment or control of wastewaters shall be utilized/disposed of . . . in a manner such as to prevent any pollutant from such materials from entering waters of the State or navigable waters of the United States except as permitted." (ECF Nos. 1 ¶¶ 113–31; 1-4 at 18.) Prohibiting the discharge of wastewater and stormwater at unpermitted outfalls, which is the aim of DEQ's unpermitted seep claim, is not the same as "ensur[ing] the integrity of [a] wastewater treatment and control system[ ]," which is the aim of Plaintiffs' removed substances claim, *see Roanoke River Basin Ass'n v. Duke Energy Progress, LLC*, No. 1:16cv607, 2017 WL 5654757, at *4 (M.D.N.C. Apr. 26, 2017) (quoting *Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC*, 141 F. Supp. 3d 428, 446 (M.D.N.C. 2015)). This Court is once again "unpersuaded by Duke Energy's attempt to characterize the [Plaintiffs'] removed substances claim as another unpermitted seep claim." *Id.*

Because Plaintiffs are not seeking to enforce the same standard or limitation as DEQ, Duke Energy's argument fails at the first step of the diligent prosecution inquiry, *see Yadkin*, 141 F. Supp. 3d at 446, and this Court has no need to proceed further on this issue.

B. Whether the Permit Shield Bars the Removed Substances Claim

The Court will next consider Duke Energy's contention that the Clean Water Act's permit shield bars Plaintiffs' removed substances claim. The Fourth Circuit has held that an NPDES permit "shields 'its holder from liability . . . *as long as* . . . *the permit holder complies with the express terms of the permit* and with the Clean Water Act's disclosure requirements.'" *Fola Coal Co.*, 845 F.3d at 142 (quoting *Piney Run I*, 268 F.3d at 259). Plaintiffs' removed substances claim explicitly alleges that Duke Energy is not complying with the express terms of the permit. (ECF No. 1 ¶¶ 113–31.) As an example, Plaintiffs allege that:

> The Removed Substances provision requires the permittee to prevent coal ash contaminants, solids, sediments, and sludge from entering the waters of North Carolina and waters of the United States. . . . Far from preventing the entrance of these pollutants into state and United States waters, for years Duke Energy has knowingly discharged pollutants, solids, and sludges from its Belews Creek coal ash basin into these waters.

(*Id.* ¶¶ 119–20.) Taking Plaintiffs' well-plead allegations as true, as the Court must at this stage of the litigation, the Court concludes that Duke Energy has not complied with the express terms of its permit; and the permit shield cannot, therefore, bar Plaintiffs' removed substances claim. Duke Energy's arguments to the contrary are misplaced.

C. Whether Plaintiffs Have Stated a Plausible Claim for Relief

The Court will now turn to Duke Energy's contention that the factual allegations supporting Plaintiffs' removed substances claim are insufficient to state a plausible claim to relief. Duke raises three arguments in support of this contention: (1) "Plaintiffs fail to

specifically identify the pollutants allegedly released to surface waters that have been removed during the course of treatment"; (2) Plaintiffs "fail to identify when, where or how" releases of coal ash to surface water "are occurring at Belews Creek"; and (3) "To the extent Plaintiff[s] claim[ ] that Duke Energy has allowed dissolved pollutants like iron to 'enter the groundwater,' Plaintiffs' allegations do not explain how these dissolved pollutants are 'removed during the course of treatment.'" (ECF No. 10 at 23–24.) The Court rejects these arguments.

The Removed Substances provision of the permit provides: "Solids, sludges, . . . or other pollutants removed in the course of treatment or control of wastewaters shall be utilized/disposed of . . . in a manner such as to prevent any pollutant from such materials from entering waters of the State or navigable waters of the United States except as permitted." (ECF No. 1-4 at 18.) In the Complaint, Plaintiffs allege that "[t]he ash basin at Belews Creek receives and treats various waste streams, including coal ash, coal ash sluice water, and other substances from the burning of coal, as well as waste streams from the chemical holding pond, power house and yard holding sumps, coal yard sumps, stormwater and remediated groundwater, and treated scrubber wastewater." (ECF No. 1 ¶¶ 118.) The Complaint further alleges that "[t]hese waste streams are treated by sedimentation in the ash basin," and that "[p]ollutants that have been removed in the course of treatment are disposed of in the Belews Creek coal ash basin." (*Id.*) According to Plaintiffs, "Duke Energy is allowing removed substances from its Belews Creek coal ash basin to travel through numerous leaking streams of polluted wastewater into the Dan River, Belews Lake, Little Belews Creek, and downstream drinking water supplies." (*Id.* ¶ 128.) Also according to Plaintiffs, "[t]hese surface flows convey removed substances into waters of the United States and of North Carolina, in

violation of Duke Energy's permit and the Clean Water Act. (*Id.*) This Court finds that the above allegations are sufficient to render Plaintiffs' removed substances claim plausible.

The Court is unpersuaded by Duke Energy's arguments as to why the removed substances claim is implausible. Duke Energy contends that "Plaintiffs fail to specifically identify the pollutants allegedly released to surface waters that have been removed during the course of treatment." (ECF No. 10 at 23.) However, Plaintiffs could allege a violation of the Removed Substances provision without specifically identifying any particular pollutants, as the provision regulates the manner in which the permitee utilizes and disposes solids and sludges, as well as "other pollutants." (ECF No. 1-4 at 18.) Therefore, Duke Energy's argument that Plaintiffs' claim is not plausible because Plaintiffs do not identify a specific pollutant in the Complaint is inapposite.

Duke Energy also contends that Plaintiffs "fail to identify when, where or how" releases of coal ash to surface water "are occurring at Belews Creek." (ECF No. 10 at 23.) This contention is simply incorrect. Plaintiffs' Complaint alleges that: "Duke Energy is allowing removed substances from its Belews Creek coal ash basin to travel through numerous leaking streams of polluted wastewater into the Dan River, Belews Lake, Little Belews Creek, and downstream drinking water supplies." (ECF No. 1 ¶ 128.) Duke Energy also argues that: "To the extent Plaintiff[s] claim[ ] that Duke Energy has allowed dissolved pollutants like iron to 'enter the groundwater,' Plaintiffs' allegations do not explain how these dissolved pollutants are 'removed during the course of treatment.'" (ECF No. 10 at 24.) This argument simply misses the mark. Plaintiffs may allege a violation of the Removed Substances provision without addressing how pollutants are removed during the course of treatment because the

provision regulates "[s]olids, sludges, . . . or other pollutants removed in the course of treatment ***or*** control of wastewaters." (ECF No. 1-4 at 18 (emphasis added).)

V. CONCLUSION

The Court concludes that Plaintiffs' removed substances claim is not barred by DEQ's diligent prosecution, is not barred by the permit shield, and is supported by factual allegations that are sufficient to render the claim plausible. The Court will, therefore, deny Duke Energy's Motion to Dismiss, (ECF No. 9).[3]

For the reasons stated herein, it is hereby ordered that:

ORDER

IT IS THEREFORE ORDERED that Duke Energy's Motion to Dismiss, (ECF No. 9), is DENIED.

This, the 13th day of August, 2018.

/s/ Loretta C. Biggs
United States District Judge

[3] To the extent Duke Energy has raised an argument for the first time in its reply brief, this Court will not address such argument. *See Clawson v. FedEx Ground Package Sys., Inc.*, 451 F. Supp. 2d 731, 734 (D. Md. 2006) ("The ordinary rule in federal courts is that an argument raised for the first time in a reply brief or memorandum will not be considered.").