

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

4	CALIFORNIA SPORTFISHING)	
5	PROTECTION ALLIANCE, a non-)	2:10-cv-01207-GEB-GGH
	profit corporation,)	
6)	
	Plaintiff,)	<u>ORDER DISMISSING ACTION FOR</u>
7)	<u>LACK OF JURISDICTION</u>
	v.)	
8)	
	CHICO SCRAP METAL, INC., a)	
9	California corporation; GEORGE)	
	W. SCOTT, SR. REVOCABLE INTER)	
10	VIVOS TRUST; GEORGE SCOTT, SR.,)	
	an individual; and GEORGE SCOTT,)	
11	JR., an individual,)	
)	
12	Defendants.)	
	_____)	

14 Defendants move for an order dismissing this citizen water
15 pollution enforcement action. Plaintiff alleges in this action twelve
16 claims under the Federal Water Pollution Control Act ("Clean Water Act"
17 or "CWA"), and three claims under California Health & Safety Code
18 section 25249.5 et seq. Plaintiff alleges in its CWA claims that
19 Defendants' discharges of pollutants from scrap metal facilities they
20 operate violates Defendants' permits issued under the National Pollutant
21 Discharge Elimination System ("NPDES"). Defendants argue in their
22 dismissal motion: 1) Plaintiff lacks standing to bring its claims; 2)
23 Plaintiff's claims are moot; and 3) the CWA "civil penalty" bar in 33
24 U.S.C. 1319(g)(6)(a)(ii) deprives this Court of jurisdiction over
25 Plaintiffs' claims.

26 Defendants' dismissal motion includes a request that judicial
27 notice be taken of the following documents which are part of California
28 state court criminal cases involving three of the named Defendants in

1 the instant federal lawsuit: 1) "Imminent and Substantial Endangerment
2 Determination and Remedial Action Consent Order[s]" dated October 1,
3 2008; 2) a "Terms of Plea" filed in Butte County Superior Court in
4 California on October 17, 2008; and 3) a "Conditions of
5 Probation/Conditional & Revocable Release" dated October 20, 2008.
6 Further, following oral argument on the dismissal motion, Defendants
7 requested that judicial notice be taken of the following document which
8 is part of the same state court criminal cases: "Petition for Violation
9 of Probation" dated June 6, 2011. These judicial notice requests are
10 granted since referenced documents "have a direct relation to matters at
11 issue" in this federal court action. U.S. ex rel. Robinson Rancheria
12 Citizens Council v. Borneo, Inc., 971 F.2d 244, 248 (9th Cir. 1992).

13 Defendants' dismissal motion was heard on February 7, 2011.
14 Following oral argument on the motion, the Court realized the parties
15 did not brief whether 33 U.S.C. § 1365(b)(1)(B) has a bearing on the
16 Court's jurisdiction over this federal lawsuit, and therefore ordered
17 briefing on this issue. § 1365(b)(1)(B) deprives a court of jurisdiction
18 over a CWA citizen enforcement action "if the . . . State has commenced
19 and is diligently prosecuting a civil or criminal action in a court of
20 . . . a State to require compliance with [an effluent] standard [or]
21 limitation[.]" 33 U.S.C. § 1365(b)(1)(B).

22 Defendants operate scrap metal facilities in Butte County,
23 California ("scrap metal facilities"), under NPDES permits issued by the
24 state of California. (Decl. of Kim Scott in Supp. of Defs.' Mot to
25 Dismiss ("Scott Decl.") ¶¶ 1, 5.) NPDES permits "make the generally
26 applicable effluent limitations and other water quality standards
27 [promulgated under the CWA] the individual obligation of the
28 discharger." Sierra Club v. Chevron, 834 F.2d 1517, 1519 (9th Cir.

1 1987). “[C]ertain states are authorized to issue NPDES permits to
2 discharging entities within the state.” Id. (citing 33 U.S.C. §§
3 1251(b), 1342(b)). “California maintains an NPDES permit program that
4 has been approved by the EPA Administrator.” Id. (citing CAL. WATER CODE
5 § 13370 et seq.).

6 In 2007, the state of California commenced individual criminal
7 actions against three of the named Defendants in this federal court
8 lawsuit (“criminal Defendants”). (Defs.’ Req. for Judicial Notice
9 (“Defs.’ RJN”) Ex. B, at 1:17-24.) The state of California alleged these
10 criminal Defendants were responsible for violating various state
11 environmental laws when operating the scrap metal facilities. Id.

12 In October of 2008, these state criminal Defendants entered
13 into a “global” plea agreement that resolved each state criminal case.
14 Id. Ex. B, at 2:1, 13:20-21. Part of this plea agreement “placed [each
15 Defendant] on five years informal court probation” commencing in October
16 of 2008. Id. Ex. B, at 4:2, 15:8. These criminal Defendants also entered
17 into consent orders with the California Department of Toxic Substances
18 Control (“DTSC”) concerning each scrap metal facility. Id. Ex. A, at
19 194, 359, 542. Terms in the criminal Defendants criminal probation
20 obligated each criminal Defendant to comply with the referenced DTSC
21 consent orders. Id. Ex C, at 1-2. Each consent order contains the
22 following provision: “Maintain Drainage Control: [Defendants] agree to
23 maintain drainage control that meets, at a minimum, . . . the Waste
24 Discharge Requirements for Discharges of Storm Water Associated with
25 Industrial Activities as adopted by the California State Water Quality
26 Control Board.” Id. Ex. A, at 202, 368, 550. Further, pursuant to the
27 plea agreement, the state of California imposed a fine of \$700,000 on
28 the criminal Defendants, \$500,000 of which “is suspended pending

1 satisfactory completion of the terms of probation including the
2 certification by the [DTSC] that [the criminal Defendants have]
3 successfully complied with the requirements of the [consent orders]."
4 Id. Ex. B, at 2:22, 2:25-3:2, 13:27-28, 14:3-7.

5 In December of 2009, the California Regional Water Quality
6 Control Board, Central Valley Region ("CWQCB") sent letters to Defendant
7 Chico Scrap Metals, Inc., a named defendant in this federal lawsuit, in
8 which it states: storm water runoff from the scrap metal facilities
9 exceed the Environmental Protection Agency ("EPA") benchmarks. (Scott
10 Decl. ¶ 8; Ex. A.) Each letter also states: "failure to respond to the
11 exceedances . . . is a violation of the [NPDES] Permit[s]." Id. Ex. A.

12 On March 17, 2010, Plaintiff provided notices to the
13 Defendants in this federal civil water pollution action which informs
14 them of CWA violations occurring at the scrap metal facilities. (Id. ¶
15 11; Second Am. Compl. ("SAC") ¶ 2.) Plaintiff filed its initial
16 Complaint in this federal lawsuit on May 17, 2010. In June of 2010, the
17 CWQCB "issued a Notice of Violation [of Defendants' NPDES permits] for
18 . . . the [scrap metal] facilities." (Scott Decl. ¶ 9.) On June 6,
19 2011, the state of California filed a "Petition for Violation of
20 Probation" in each above referenced state court criminal case, in which
21 it alleges that the criminal Defendants violated probation by, inter
22 alia, violating the NPDES permits at the scrap metal facilities. (Defs.'
23 Supplemental Request for Judicial Notice, Addendum A, ¶¶ 8, 14, 15, 24,
24 June 29, 2011.)

25 "Congress enacted the CWA 'to restore and maintain the
26 chemical, physical, and biological integrity of the Nation's waters.'" The Piney Run Pres. Ass'n v. The Cnty. Comm'rs of Carroll Cnty., MD, 523
27 F.3d 453, 455 (4th Cir. 2008) (quoting 33 U.S.C. § 1251).
28

1 To serve those ends, the Act prohibits the
2 discharge of any pollutant by any person unless
3 done in compliance with some provision of the Act.
4 One such provision, codified at 33 U.S.C. § 1342,
5 established a National Pollution Discharge
6 Elimination System that is designed to prevent
7 harmful discharges into the Nation's waters.
8 Generally speaking, the NPDES requires dischargers
9 to obtain permits that place limits on the type and
10 quantity of pollutants that can be released into
11 the Nation's waters. An NPDES permit defines, and
12 facilitates compliance with, and enforcement of, a
13 preponderance of a discharger's obligations under
14 the Act. The [EPA] initially administers the NPDES
15 permitting system for each State, but a State may
16 apply for a transfer of permitting authority to
17 state officials. If authority is transferred, then
18 state officials have the primary responsibility for
19 reviewing and approving NPDES discharge permits,
20 albeit with continuing EPA oversight. . . .

11 Although the primary responsibility for
12 enforcement rests with the state and federal
13 governments, private citizens provide a second
14 level of enforcement and can serve as a check to
15 ensure the state and federal governments are
16 diligent in prosecuting Clean Water Act violations.
17 Specifically, § 505(a) of the CWA, 33 U.S.C. §
18 1365(a), authorizes citizens to bring suit against
19 any NPDES permit holder who has allegedly violated
20 its permit. We have recognized that this citizen
21 suit provision is critical to the enforcement of
22 the CWA, as it allows citizens to abate pollution
23 when the government cannot or will not command
24 compliance. However, citizen suits are meant to
25 supplement rather than to supplant governmental
26 action, and the CWA - specifically § 1365(b)(1)(B) -
27 bars a citizen from suing if the EPA or the State
28 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.

24 Id. at 455-456 (internal quotation marks and citations omitted).

25 Here, the existence of jurisdiction is decided by determining
26 whether 33 U.S.C. § 1365(b)(1)(B) bars Plaintiff's federal CWA citizen
27 enforcement action based on the commencement of criminal state
28 prosecutions against the criminal Defendants in California state court,

1 and the prosecution of those cases. § 1365(b)(1)(B) prescribes a federal
2 court is without jurisdiction over a CWA citizen enforcement action if
3 the "State has commenced and is diligently prosecuting a . . . criminal
4 action in [state court] to require compliance with [an effluent]
5 standard [or] limitation[.]" 33 U.S.C. § 1365(b)(1)(B). "An effluent
6 standard or limitation includes a 'permit or condition thereof.'" Sierra
7 Club v. City and Cnty. of Honolulu, No. 04-00463 DAE-BMK, 2008 WL
8 1968317, at *4 (D. Hawaii May 7, 2008) (quoting 33 U.S.C. § 1365(f)).
9 Plaintiff "bears the burden of proving that [the state of California]
10 has not diligently prosecuted [its state criminal cases against the
11 criminal Defendants based their violations of their NPDES permits]."
12 Piney Run, 523 F.3d at 459. "A CWA enforcement prosecution will
13 ordinarily be considered 'diligent' if the judicial action 'is capable
14 of requiring compliance with the [CWA] and is in good faith calculated
15 to do so[.] . . . [D]iligence is presumed." Id. (quoting Friends of
16 Milwaukee's Rivers v. Milwaukee Metro. Sewerage Dist., 382 F.3d 743, 760
17 (7th Cir. 2004)).

18 The October 2008 probation order, which governs the criminal
19 Defendants' probation and incorporates by reference the three consent
20 orders, constitutes a "commenced . . . action in a court of . . . a
21 State" under § 1365(b)(1)(B). See Friends of Milwaukee's Rivers, 382
22 F.3d at 753 (stating that stipulations and consent orders filed during
23 pending lawsuits constitute "commenced judicial enforcement action[s]");
24 cf. Sierra Club, 2008 WL 1968317, at * 5 (analyzing consent decrees
25 filed as part of EPA judicial enforcement action when determining
26 whether a subsequently filed citizen suit was barred under §
27 1365(b)(1)(B)). The state court criminal probation orders also require
28 each criminal Defendant to comply with the effluent standards and

1 limitations in their NPDES permits. Further, the Petition for Violation
2 of Probation filed in the state court criminal cases evinces that
3 California is diligently prosecuting the criminal Defendants.
4 Therefore, the § 1365(b)(1)(B) bar prevents the federal court from
5 having jurisdiction in this federal lawsuit, even though some of the
6 defendants in this federal lawsuit were not on state probation in the
7 state criminal cases.

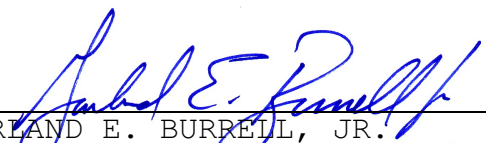
8 Section 1365(b)(1)(B) does not speak of diligently
9 prosecuting particular defendants but of
10 "diligently prosecuting a civil or criminal action
11 . . . to require compliance." Even a diligent
12 prosecutor may decide that the strategically
appropriate course of action is to [pursue an
action] against a particular set of parties rather
than to pursue further action against all parties
alleged to have violated provisions of the CWA.

13 Karr v. Hefner, 475 F.3d 1192, 1199-1200 (10th Cir. 2007) (affirming
14 dismissal of nine Defendants under § 1365(b)(1)(B) even though a prior
15 EPA action "resulted in a consent decree against only two of [those]
16 Defendants").

17 Therefore, Plaintiff's CWA claims are barred by 33 U.S.C. §
18 1365(b)(1)(B) and are dismissed for lack of jurisdiction. Because of
19 this ruling, the Court lacks supplemental jurisdiction over Plaintiff's
20 state claims, and those claims are dismissed.

21 This action shall be closed.

22 Dated: July 15, 2011

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GARLAND E. BURRELL, JR.
25 United States District Judge
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