

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ASSATEAGUE COASTKEEPER, <i>et al.</i>)	
)	
Plaintiffs,)	
)	Civil No. 1: 10-cv-00487 -WDQ
v.)	
)	
ALAN AND KRISTIN HUDSON FARM,)	
<i>et al.</i>)	
)	
Defendants.)	

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT
OF HUDSON FARM’S MOTION TO DISMISS**

Defendant Alan & Kristin Hudson Farm (“Hudson Farm”), by its attorneys, submits this Memorandum in support of its Motion to Dismiss the Complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) because this Court lacks subject matter jurisdiction and the Complaint fails to state a claim against Hudson Farm.

I. INTRODUCTION

This is case of mistaken identity that demonstrates the danger of assumptions. In December 2009, Plaintiff Kathy Phillips flew over Hudson Farm and observed from the air a pile of material on the farm which she, and the other Plaintiffs in this action, assumed was chicken manure. Without bothering to confirm this assumption, Plaintiffs immediately sent a Notice of Intent to Sue (“the NOI”) to Hudson Farm on December 17, 2009 accusing it and co-defendant Perdue Farms Incorporated (“Perdue”) of creating a “longstanding manure pile” that discharges pollutants via “trenches” into a field ditch in violation of the Clean Water Act (“the CWA”). In that letter, Plaintiffs further stated their intention to file suit at the end of the mandatory 60 day notice period under the

CWA. Although unstated in the NOI, the CWA requires the 60 day period to allow parties to remediate the alleged violations.

During the 60 day remediation period, several facts about this matter became public record: 1) the material Ms. Phillips observed on Hudson Farm was not, in fact, chicken manure, but instead biosolid material Hudson Farm lawfully received from the town of Ocean City's Wastewater Treatment Plant for use in assisting crop production; 2) upon its receipt of the NOI, the Maryland Department of the Environment ("MDE") promptly investigated the situation at Hudson Farm and Hudson Farm, under MDE's instructions, relocated the biosolid pile and filled in the "trenches;" and 3) once this work was complete, MDE concluded that ***"no further action is required on [the Farm's] part other than to spread the [biosolid pile] in the spring for the next crop growing season."***

Undeterred by their false assumption that the biosolid pile was chicken manure and unsatisfied by Hudson Farm's prompt compliance with MDE's instructions, Plaintiffs have chosen to file this suit anyway. But they have done so in disregard of the CWA's notice requirements and basic federal court pleading standards. In sum, the lawsuit goes far beyond the specific facts alleged in the NOI and is fatally flawed as a result.

As is explained in more detail below, and in the Motion to Dismiss and supporting Memorandum filed concurrently by Perdue, this Court should dismiss Plaintiffs' complaint on several grounds. First, this Court lacks subject matter jurisdiction to hear this case because the prerequisite for the Court's jurisdiction – the NOI – gives notice of alleged "violations" (the manure pile) that never existed and were in any event corrected by Hudson Farm under MDE's instruction. The lawsuit instead asserts broader

violations of the CWA about which Plaintiffs have never given Hudson Farm notice. The NOI is fatally flawed in other respects in that it fails to allege violations of the CWA with sufficient specificity. This Court should also dismiss Plaintiffs' complaint because Plaintiffs have failed to allege facts sufficient to demonstrate an injury in fact under the CWA and their standing to maintain this action.

II. FACTUAL BACKGROUND

Hudson Farm adopts and incorporates by reference the facts and exhibits submitted by Perdue in its Motion to Dismiss and supporting Memorandum ("the Perdue Memorandum").¹

Hudson Farm is family-owned and operated farm consisting of 300 acres in Worcester County, Maryland at 9178 Old Ocean City Road, Berlin, Maryland 21811. See Affidavit of Alan Hudson, attached as Exhibit 1, at ¶2. Alan and Kristin Hudson own the farm, which has been in the Hudson family for over 100 years. Id. Mr. Hudson grew up on the farm. Id. Mr. Hudson's parents, Roger and Mary Alice Hudson, operated the farm before Mr. Hudson and his wife. Id. Today, Mr. Hudson and his father principally work on the farm now, with occasional help from Kristin Hudson. Id. Other than seasonal help in the summer, the Farm has no other employees. Id.

The Farm's operations consist of several fields used for growing corn, soybeans and hay, two poultry houses, approximately 40 cows (primarily beef cows), a small number of sheep and two horses. Id. at ¶3. Mr. Hudson and his wife live in house

¹ A court may rely on evidence outside the pleadings in deciding a motion to dismiss for lack of subject matter jurisdiction filed pursuant to Rule 12(b)(1). *Evans v. B.F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999). Therefore, in addition to documents referenced and relied on by Plaintiffs in the Complaint, the Court may take into account government records, admissions by the Plaintiffs and other documents referenced in this and Perdue's Memorandum.

adjacent to the Farm located at 9101 Logtown Road, Berlin, Maryland 21811 with their two young children. Id.

On or about December 18, 2009, Hudson Farm received the NOI from the Waterkeeper's Alliance. See NOI, attached as Exhibit 2. The NOI described a "longstanding manure pile" in the farm's production area that "discharges pollutants into a field ditch that drains to the Franklin Branch." Id.; Exhibit 1 at ¶4. The NOI further described "discrete conveyances in the form of trenches . . . from the stockpile to the field ditch to facilitate this run off." Id.

The "stockpile" referred to by the Waterkeeper's is not, in fact, poultry manure, but rather treated biosolids ("the biosolid pile") delivered to Hudson Farm by the town of Ocean City, Maryland from its Wastewater Treatment Plant. Exhibit 1 at ¶5. In an effort to find a use for these biosolids, Ocean City distributes this material at no charge to local farms. Id. The material is used as a substitute for lime to condition the soils in farm fields to assist crop production. Id. The farm has received deliveries of biosolid material from Ocean City since approximately March 2009, and received the biosolid pile in question in approximately August 2009. Id.

On or about December 19, 2009, the day after Hudson Farm received the Notice of Intent, Brian Littlefield of MDE visited the Farm. Id. Under MDE's instruction, Hudson Farm regraded a different location on the farm selected by Mr. Littlefield, moved the biosolid pile to that location, covered the biosolid pile, and filled in some small channels (described in the NOI as "ditches") near the pile's previous location. Id.

Subsequent to December 19, 2010, representatives from MDE visited the farm on several different occasions, including January 7th, January 26th and January 29th, 2010. See Correspondence from MDE, attached as Exhibit 3.

On January 7, 2010, the Farm received notice from MDE that it had “**complied with all the recommendations of the Department” and that “no further action is required on [the Farm’s] part other than to spread the [biosolid pile] in the spring for the next crop growing season”** (emphasis added). Id.

III. LEGAL STANDARD

Hudson Farm moves to dismiss the Complaint pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction and 12(b)(6) for failure to state a claim. Plaintiffs have the burden of proving that subject matter jurisdiction exists. *Evans v. B.F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999); *Cambridge Environmental Health and Community Development Group v. City of Cambridge* (“*City of Cambridge*”), 115 F. Supp. 2d 550 (D. Md. 2000). When a defendant challenges subject matter jurisdiction pursuant to Rule 12(b)(1), “the district court is to regard the pleadings as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment.” *Evans v. B.F. Perkins Co.*, 166 F.3d at 647 (quoting *Richmond, Fredericksburg & Potomac R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991)). A 12(b)(1) motion should be granted “if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law.” *Id.* If a Plaintiff does not meet the statutory prerequisites of the CWA citizen suit provision, the Court lacks subject matter jurisdiction. *City of Cambridge*, 115 F. Supp. 2d at 553.

For purposes of a Rule 12(b)(6) motion, “[t]he pleadings must state ‘more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.’” *Flanagan v. Anne Arundel County*, 593 F. Supp. 2d 803, 808 (D. Md. 2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Rather:

To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a plaintiff must plead plausible, not merely conceivable, facts in support of his claim. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). This “plausibility standard” applies to all of plaintiffs’ claims.

Flanagan v. Anne Arundel County, 593 F. Supp. 2d 803, 808 (D. Md. 2009). The facts alleged must be sufficient “to raise a right to relief above the speculative level.” *Smith v. Smith*, 589 F.3d 736, 738 (4th Cir. 2009) (quoting *Twombly*, 550 U.S. at 555). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice,” and allegations in a complaint which are “not more than conclusions are not entitled to the assumption of truth.” *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S.Ct. 1937, 1950 (2009).

The court is not required to accept as true the legal conclusions set forth in a plaintiff’s complaint, nor is it required to accept as true “unwarranted inferences, unreasonable conclusions, or arguments.” *Giarratano v. Johnson*, 521 F.3d 298, 302 (4th Cir. 2008); *City of Cambridge*, 115 F. Supp. 2d at 553. To the contrary, Fed. R. Civ. P. 8 “requires a ‘showing,’ rather than a blanket assertion, of entitlement to relief.” *Twombly*, 550 U.S. at 555 n.3. In short, “Rule 8(a) ‘contemplates the statement of circumstances, occurrences, and events in support of the claim presented’ and does not authorize a pleader’s ‘bare averment that he wants relief and is entitled to it.’” *Id.* (quoting 5 Wright & Miller § 1202, at 94, 95).

IV. ARGUMENT

A plaintiff must meet certain jurisdictional prerequisites in order to bring a citizen suit under the CWA. Plaintiffs in this matter have failed to meet four of these prerequisites. First, the violation about which Plaintiffs gave Notice (the manure pile) never existed and in any event has ceased, which denies this court subject matter jurisdiction because there is no ongoing violation as required for a citizens' suit under the CWA. Second, Plaintiffs have failed to provide adequate notice of their intent to sue as required by the CWA because the complaint is far broader than the alleged violations which are the subject of the NOI, and because the NOI lacked requisite specificity as the violations it does describe. Third, Plaintiffs have failed to make basic allegations establishing their standing to file suit. Those failures require that the Complaint be dismissed pursuant to Rule 12(b)(1). Finally, Plaintiffs have failed to allege sufficient facts to assert a claim under the CWA. Therefore, the Complaint should be dismissed under Rule 12(b)(6).

A. This Court Lacks Jurisdiction and The Complaint Should be Dismissed Pursuant to Rule 12(b)(1) Because There is no Continuing Violation of the Clean Water Act.

A CWA citizen suit may be brought only if there is an “ongoing violation of the Act” that is a violation at the time the complaint is filed. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 I.S. 49 (1987) (interpreting 33 U.S.C. § 1365(a)(1)(ii)). *Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co., Inc.*, 989 F.2d 1305 (2d Cir. 1993). Thus, the requirement that there be an ongoing violation is not only an element of the claim that, if not adequately pled, would require dismissal

under Rule 12(b)(6), it is also jurisdictional. In other words, this matter cannot proceed unless there is an ongoing violation of the CWA.

As is demonstrated by Mr. Hudson's Affidavit, correspondence from MDE and the various admissions by Plaintiffs cited in the Perdue Memorandum, the biosolid pile was not in fact chicken manure, and the alleged violation described in the NOI – the manure pile – never existed. In any event, as is also demonstrated by these documents, any problems with the biosolid pile were rectified to MDE's satisfaction. Accordingly, there can be no "continuing violation" of the CWA and as a result this court lacks subject matter jurisdiction to hear this matter. Accordingly, the Complaint should be dismissed pursuant to Rule 12(b)(1).

B. Plaintiffs' Claims Should be Dismissed Pursuant to Rule 12(b)(1) Because Plaintiffs' Notice of Intention to File Suit was Inadequate.

Citizen plaintiffs must provide a notice of intent to sue to the alleged violator, the U.S. Environmental Protection Agency, and the relevant state enforcement agency at least 60 days prior to actually filing suit. 33 U.S.C. § 1365(b)(1)(A). Notice in citizen suits is a "mandatory condition precedent" to filing suit. *Hallstrom v. Tillamook Cty.*, 493 U.S. 20, at 26, 31 (1989). Without adequate notice, the court does not have subject matter jurisdiction to hear the case. *Community of Cambridge Environmental Health and Community Development Group v. City of Cambridge*, 1115 F. Supp. 2d 550 (D. Md. 2000). Notice must be given in the manner provided by the Administrator of EPA by regulation. 33 U.S.C. §1365(b).

There are numerous deficiencies in Plaintiffs' NOI: 1) it fails to provide notice of the violations alleged in the Complaint; 2) it fails to identify dates of violation; 3) it fails to properly identify plaintiffs; 4) it fails to allege violations of the CWA with sufficient

specificity as required by the statute; and 5) it fails to provide specific dates of violation of the CWA as required by the statute. Hudson Farms adopts and incorporates by reference the arguments and legal authorities contained in the Perdue Memorandum on the insufficiency of the NOI.

C. Plaintiffs' Claims Should be Dismissed Pursuant to Rule 12(b)(1) Due To Their Lack of Standing

Plaintiffs have failed to allege facts sufficient to demonstrate standing to bring this suit and this Court should accordingly dismiss it pursuant to Federal Rule of Civil Procedure 12(b)(6). Hudson Farm adopts and incorporates by reference the arguments and legal; authorities contained in the Perdue Memorandum on the standing issue.

D. The Complaint Should be Dismissed Pursuant to Rule 12(b)(6) Because Plaintiffs have Failed to Plead Sufficient Facts to State a Claim under the Clean Water Act.

The basic elements of claim under the Clean Water Act are: 1) an unauthorized discharge, 2) of a pollutant, 3) from a point source, 4) to the waters of the United States. *See Stephens v Koch Foods, LLC*, 667 F.Supp. 2d 768 (E.D. Tenn. 2009). Plaintiffs have alleged that the Defendants own or operate a CAFO, a point source, from which unauthorized discharges of pollutants to the waters of the United States occurred. *See e.g.* Complaint, par. 31. However, Plaintiffs say little more than that, providing only conclusory assertions of the elements of their claim, without providing factual details. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice," and allegations in a complaint which are "not more than conclusions are not entitled to the assumption of truth." *Ashcroft v. Iqbal*, 566 U.S. ___,

129 S.Ct. 1937, 1950 (2009). To the contrary, Fed. R. Civ. P. 8 “requires a ‘showing,’ rather than a blanket assertion, of entitlement to relief.” *Twombly*, 550 U.S. at 555 n.3.

The defects in Plaintiffs' claim are several. First, because Plaintiffs are undoubtedly aware that the stockpile about which they gave notice on December 17, 2009, was in fact biosolids and not the poultry manure specified in their Notice, the Complaint fails to allege at all that the substance actually discharged from the farm is poultry manure. Instead, Plaintiffs allege that "solid waste, biological materials, and agricultural waste, including fecal coliform, E coli bacteria, nitrogen, phosphorus, ammonia, and nitrates" were discharged. Complaint, par. 55, 60.

Because Plaintiffs failed to allege a discharge of poultry manure from the Hudson farm, the Complaint does not properly allege a discharge from a regulated *point* source.

Plaintiffs' claim is also insufficient because it does not allege dates on which actual discharges occurred. Instead, Plaintiffs claim to have documented the presence of pollutants in a drainage ditch downstream of the Hudson Farm on 8 occasions. Complaint, par. 33-36. Alleging that one has found pollutants in a drainage ditch on a given date is *not* the equivalent of alleging a *discharge* from a point source on a specific date. The mere presence of common agricultural pollutants in a discharge ditch does not state a claim that those pollutants originate from a regulated point source rather than unregulated nonpoint sources that are also in close proximity to the sampling point.

E. Plaintiff “Assateague Coastkeeper” Must Be Dismissed Pursuant to Rule 17(b)(3) Because It Has No Legal Existence And Thus Lacks Capacity To Sue.

As is set forth in more detail the Perdue Memorandum, Plaintiff Assateague Coastkeeper has no legal existence and thus lacks the capacity to sue. The Court should therefore dismiss this Plaintiff pursuant to Federal Rule of Civil Procedure 17(b)(3).

V. CONCLUSION

In light of the foregoing, the Complaint should be dismissed.

Respectfully submitted,

Dated: March 29, 2010

/s/

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