**IN THE UNITED STATES DISTRICT COURT**
**FOR THE MIDDLE DISTRICT OF TENNESSEE**
**NASHVILLE DIVISION**

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| **PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY,** | ) | |
| **Plaintiff,** | ) | |
| **v.** | ) | **No. 3:09-0276** |
| | ) | **Judge Nixon** |
| **GERALD NICELY, *in his official capacity as* COMMISSIONER OF THE TENNESSEE DEPARTMENT OF TRANSPORTATION, THE TENNESSEE DEPARTMENT OF TRANSPORTATION, and UNKNOWN CONTRACTORS for the Tennessee Department of Transportation,** | ) | **Magistrate Judge Bryant** |
| **Defendants.** | ) | |

**ORDER**

Pending before the Court is Defendants Gerald Nicely and the Tennessee Department of Transportation's ("Defendants") Motion for Summary Judgment (Doc. No. 30), with accompanying Memorandum (Doc. No. 33) and Statement of Facts (Doc. No. 31) (collectively, "Defendants' Motion"). Plaintiff Public Employees for Environmental Responsibility ("Plaintiff") has filed a Memorandum in Opposition to Defendant's Motion (Doc. No. 34) and a Response to Defendants' Statement of Facts (Doc. No. 35). Defendants have filed a Reply to Plaintiff's Memorandum in Opposition (Doc. No. 37). For the reasons set forth below, Defendants' Motion is hereby **GRANTED in part and DENIED in part**.

## I. BACKGROUND

This case arises out of the construction of a road between Nashville, Tennessee and Ashland City, Tennessee. (Doc. No. 15, at 2.) As part of the construction, Defendants were required to obtain a permit, issued under 33 U.S.C. § 1344 of the Federal Water Pollution Control Act, 33 U.S.C. § 1311 et seq., also known as the Clean Water Act ("Clean Water Act"). This permit authorized the discharge of fill material into wetlands as part of the road construction project. (Id.) In exchange for the impact the construction would have on these wetlands, the permit required that Defendants create, restore, and preserve wetlands at four sites in the area. (Id.)

Plaintiff filed suit on March 20, 2009 under the citizen-suit provision of the Clean Water Act, 33 U.S.C. § 1365(a)(1), alleging that Defendants are in continuous violation of the Clean Water Act because they have not yet complied with the terms of the permit. (Doc. No. 15, at 2.) Specifically, Plaintiff alleges that Defendants have failed to initiate the required wetland construction or restoration work at two of the four sites specified in the permit. (Id.) Defendants admit that they have not initiated this work, but argue that they are not in violation of the Clean Water Act because they have complied with the terms of the permit by instead using a 9.75-acre wetland mitigation credit that they purchased from the Harpeth Wetland Mitigation Bank. (Id.)

Defendants have moved the Court for summary judgment on five (5) grounds: (1) Plaintiff's Amended Complaint fails to state a claim on which relief can be granted; (2) Plaintiff does not have standing to bring the claim; (3) any claim Plaintiff brings is moot; (4) Plaintiff's claim is barred by the statute of limitations; and (5) Plaintiff's claim is barred by the Eleventh Amendment.

## II. LEGAL STANDARD

Rule 56(a) of the Federal Rules of Civil Procedure provides in part that "the court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The Advisory Committee for the Federal Rules has noted that "[t]he very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." Fed. R. Civ. P. 56 advisory committee's note.

Mere allegations of a factual dispute between the parties are not sufficient to defeat a properly supported summary judgment motion; there must be a genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48. A genuine issue of material fact is one which, if proven at trial, would result in a reasonable jury finding in favor of the non-moving party. Id. The substantive law involved in the case will underscore which facts are material and only disputes over outcome-determinative facts will bar a grant of summary judgment. Id. at 248.

While the moving party bears the initial burden of proof for its motion, the party that opposes the motion has the burden to come forth with sufficient proof to support its claim, particularly when that party has had an opportunity to conduct discovery. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). In ruling on a motion for summary judgment, the court must review the facts and reasonable inferences to be drawn from those facts in the light most favorable to the non-moving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). Further, the Court will closely scrutinize the movant's papers while indulgently treating those of the opponent. Bohn Aluminum & Brass Corp. v. Storm King Corp., 303 F.2d 425, 427 (6th Cir. 1962) (citations omitted).

To determine if a summary judgment motion should be granted, the court should use the standard it would apply to a motion for a directed verdict under Rule 50(a) of the Federal Rules of Civil Procedure. Anderson, 477 U.S. at 250. The court must determine whether a reasonable jury would be able to return a verdict for the non-moving party and if so, the Court must deny summary judgment. Id. at 249. Thus, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Street v. J.C. Bradford & Co., 886 F.2d 1472, 1478 (6th Cir. 1989) (citations omitted).

## III. ANALYSIS

### *A. Failure to State a Claim*

Defendants Gerald Nicely and the Tennessee Department of Transportation move for summary judgment on grounds that Plaintiff has failed to state a claim on which relief can be granted. Defendants do not provide any support for this argument. The Court has looked at the complaint and finds that it contains non-conclusory allegations that, taken as true, "show[] that the pleader is entitled to relief." See Fed. R. Civ. P. 8(a)(2); Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009) ("[A] complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'") (citations omitted). Plaintiff alleges that Defendant failed to comply with a federal wetland permit issued pursuant to 33 U.S.C. § 1344. (Doc. No. 24, at 8.) Specifically, Plaintiff pleads that "Defendants failed to perform the wetland mitigation on Site 1 and Site 3 and failed to preserve some or all of the sites, as required by the Permit . . . as amended, modified and extended." (Id. at 7.) Such a failure would be a violation of the Clean Water Act, and would give rise to a valid cause of action under 33 U.S.C. § 1365(a)(1).

Accordingly, Defendants' Motion for Summary Judgment on grounds that Plaintiff has failed to state a claim on which relief can be granted is hereby **DENIED**.

*B. Standing*

Defendants assert that Plaintiff does not have standing to bring this claim because any violation of the Clean Water Act occurred prior to the date on which Plaintiff filed the instant lawsuit. (Doc. No. 33, at 8-9.) Plaintiff argues that Defendants continue to violate the Clean Water Act because they still have not complied with the conditions of the wetland permit issued pursuant to 33 U.S.C.§ 1344.

"[S]tanding concerns only whether a plaintiff has a viable claim that a defendant's unlawful conduct 'was occurring at the time the complaint was filed.'" Cleveland Branch, NAACP v. City of Parma, 263 F.3d 513, 525 (6th Cir. 2001) (quoting Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 184 (2000)). In order to establish standing, a plaintiff must be able to demonstrate three things: (1) "injury in fact . . . which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical"; (2) "a causal connection between the injury and the conduct complained of"; and (3) a likelihood "that the injury will be redressed by a favorable decision." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (citations and internal quotations omitted). Evaluating standing is completely separate from evaluating "the merits of the plaintiff's contention that [a] particular conduct is illegal." Warth v. Seldin, 422 U.S. 490, 500-02 (1975).

The Supreme Court has ruled that plaintiffs who allege violations of the Clean Water Act that occurred entirely before the filing of the lawsuit do not have standing to bring the claim. Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 64 (1987). Rather,

"standing [to bring claims under 33 U.S.C. § 1365 alleging violations of the Clean Water Act] is conferred by good faith *allegations* of continuous or intermittent violations." Ailor v. City of Maynardville, 368 F.3d 587, 599 (6th Cir. 2004) (emphasis added) (citing Gwaltney, 484 U.S. at 64).

It is the allegations in Plaintiff's complaint, and not whether Defendants are actually in continuous violation of the Clean Water Act, that are relevant to whether Plaintiff has standing to bring the claim in federal court. See Warth, 422 U.S. at 500-02; Ailor, 368 F.3d at 599. Plaintiff has alleged that:

> PEER and its individual members live, work, recreate, fish, boat, swim, hike, bird watch, picnic, and work to preserve the wetlands and streams, and engage in other forms of outdoor activities in and around the Cumberland River and its tributaries in Cheatham and Davidson County, Tennessee. Defendants' continuing violation of the CWA directly harms and will continue to harm the interests of PEER and its members in the environmental, recreational, and aesthetic values of the Cumberland River and its associated tributaries and wetlands.

(Doc. No. 24, at 3). Upon reviewing the complaint, the Court finds that Plaintiffs have made a good faith allegation of a continuous violation of the Clean Water Act. (Doc. No. 24, at 7.) This Court also finds that Plaintiff's pleading is sufficient to satisfy the injury in fact requirement of standing. See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 181-83 (holding that allegations of interference with recreation are sufficient to satisfy the injury in fact requirement of standing for claims arising under the Clean Water Act). Plaintiff also alleges a causal connection between Defendants' conduct and this injury. (Doc. No. 24, at 3.) Finally, there is a likelihood that Plaintiff's "injury will be redressed by a favorable decision." Plaintiff seeks declaratory and injunctive relief that, if awarded, is reasonably likely to redress Plaintiff's alleged injury of decreased ability to recreate in the affected areas. Therefore, Plaintiff has

standing to bring this action, and Defendants' Motion for Summary Judgment on grounds that Plaintiff lacks standing is hereby **DENIED**.

*C. Mootness*

Defendants next argue that the case is moot because "Defendants complied with the conditions of the Permit and Certification through the use of wetland mitigation credits. . . . Through this process the Defendants abated the alleged violation of the Permit and Certificate prior to the March 2009 filing of the Complaint in the instant civil action." (Doc. No. 33, at 9.) Plaintiffs argue that Defendants continue to violate the permit, and therefore the action is not moot.

"[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." L.A. County v. Davis, 440 U.S. 625, 631 (1979) (citations omitted). "The burden of demonstrating mootness 'is a heavy one.'" Id. (quoting United States v. W.T. Grant Co., 345 U.S. at 632-33 (1953)). A suit filed under the citizen-suit provision of the Clean Water Act becomes moot "when the alleged violation underlying [the] citizen suit ceases while the suit is pending [and] there is no reasonable expectation that the wrong will be repeated." Comfort Lake Ass'n, Inc. v. Dresel Contracting, Inc., 138 F.3d 351, 354 (6th Cir. 1998).

Defendants' argument that the case is moot relies on the contention that Defendants complied with the terms of the permit *prior to Plaintiff's filing of the Complaint*. This is really a standing argument, not a mootness argument. Compare Cleveland Branch, NAACP, 263 F.3d at 525 ("Standing concerns . . . whether a plaintiff has a viable claim that a defendant's unlawful conduct was occurring at the time the complaint was filed.") (internal quotations omitted) with Ailor, 368 F.3d at 596 ("If events that occur *subsequent to the filing of a lawsuit or an appeal*

deprive the court of the ability to give meaningful relief, then the case is moot and must be dismissed.") (emphasis added). The Court has already determined that Plaintiff has standing to bring this claim. See supra, at 5-6.

Putting this distinction aside, the Court finds a more substantive problem with Defendants' mootness argument. Defendants' theory of mootness is dependent on Defendants being found to be in compliance with the Clean Water Act. Defendants have not moved the Court for summary judgment on this issue and have not briefed the issue. The Court therefore declines to rule on whether Defendants are in compliance with the Clean Water Act, and finds that Defendants have failed to meet their heavy burden of showing that any relief that Defendants claim has occurred has "completely and irrevocably eradicated the effects of the alleged violation" or that "there is no reasonable expectation that the alleged violation will recur." See Davis 440 U.S. at 631. Accordingly, the Court **DENIES** Defendant's Motion for Summary Judgment on grounds that the case is moot.

*D. Statute of Limitations*

Defendants next argue that Plaintiff's claim is barred by the statute of limitations, 28 U.S.C. § 2462, because "the Permit and Certification expired more than nine years prior to the date of the filing of this civil action." (Doc. No. 33, at 10.) Defendants maintain that any violation of the Clean Water Act that occurred would have occurred on August 25, 1999, the date on which the permit expired. (Id.) Plaintiffs assert that the continuing violations doctrine tolls the statute of limitations because Plaintiff has alleged a continuous violation of the Clean Water Act, and "because the filled materials remain in the wetlands in violation of the permit and the required mitigation has not occurred." (Doc. No. 34, at 11.) In Defendants' Reply, Defendants

concede that the statute of limitations may not bar Plaintiff's claim in its entirety because Plaintiffs are seeking declaratory and injunctive relief. (Doc. No. 37, at 5.)

Because the Clean Water Act contains no statute of limitations, the Court must first determine whether 28 U.S.C. § 2462 is the appropriate statute of limitations. The Court has been unable to find any Sixth Circuit case that addresses the appropriate statute of limitations for suits brought under the Clean Water Act, but other circuits uniformly hold that 28 U.S.C. § 2462 is the applicable statute of limitations. See Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of N.Y., 451 F.3d 77, 88 n.2 (2d Cir. 2006); United States v. Telluride Co., 146 F.3d 1241, 1244 (10th Cir. 1998); United States v. Banks, 115 F.3d 916, 918 (11th Cir. 1997); Pub. Interest Research Group of N.J., Inc. v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 75 (3d Cir. 1990); Sierra Club v. Chevron, USA, Inc., 834 F.2d 1517, 1521 (9th Cir. 1987). The Court therefore holds that 28 U.S.C. § 2462 is the appropriate statute of limitations in the instant case.

That statute reads:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall be not entertained unless commenced within five years for the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

28 U.S.C. § 2462 (2010). The plain language of the statute makes clear that, if the continuous violations doctrine does not apply, a plaintiff has five years from the date the harm first accrues to file a claim.

The Court now turns to the applicability of the continuous violations doctrine. The continuous violations doctrine "constitutes an exception to the usual rule that statutes of limitations are triggered at the time the alleged [violation] occurred." McGrady v. U.S. Postal Serv., 289 Fed. App'x 904, 906 (6th Cir. 2008) (alteration in original) (quoting Alexander v.

Local 496, Laborers Int'l Union, 177 F.3d 394, 408 (6th Cir. 1999)). Plaintiffs assert that the continuous violations doctrine is applicable "because the filled materials remain in the wetlands in violation of the permit and the required mitigation has not occurred." (Doc. No. 34, at 11.)

The Court does not reach the issue. As Defendants concede in their Reply, the statute of limitations, if it bars Plaintiff's claim at all, only bars Plaintiff's request for civil penalties. See Holmberg v. Armbrecht, 327 U.S. 392, 396 (1946) (holding that, barring explicit language enacted by Congress, "statutes of limitations are not controlling measures of equitable relief"). As discussed infra p. 10-12, Plaintiff's request for civil penalties is barred by the Eleventh Amendment. It is therefore not necessary to determine whether the statute of limitations would also bar Plaintiff's request.

Accordingly, the Court **DENIES** Defendants' Motion for Summary Judgment on grounds that Plaintiff's claim is barred by the statute of limitations.

*E. Sovereign Immunity and Eleventh Amendment*

Finally, Defendants argue that the Eleventh Amendment bars Plaintiff's claims because 33 U.S.C. § 1365(a) was not intended to abrogate states' sovereign immunity, and Tennessee "has not consented to be sued in federal court for violations of the Clean Water Act." (Doc. No. 33, at 11-12.) Plaintiff asserts that, under the Supreme Court's decision in Ex parte Young, 209 U.S. 123 (1908), the Eleventh Amendment does not bar the suit. (Doc. No. 34, at 10-11.)

The citizen-suit provision of the Clean Water Act permits citizens to bring suits against state governments "to the extent permitted by the eleventh amendment to the Constitution." 33 U.S.C. § 1365(a)(1) (2010). The Eleventh Amendment states that "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or

prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." U.S. Const. amend. XI. Despite this general prohibition, the Supreme Court held in Ex parte Young that the Eleventh Amendment does not bar plaintiffs from seeking prospective injunctive relief against state officials acting in their official capacities. 209 U.S. 123, 155-56 (1908). "In determining whether the doctrine of Ex parte Young avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." Verizon Md., Inc. v. Pub. Serv. Comm'n of Md., 535 U.S. 635, 645 (2002) (alteration in original) (citation omitted). There are also exceptions to the Eleventh Amendment's general prohibition of suit against state officials in federal court when a state has agreed to waive sovereign immunity, or where Congress has abrogated sovereign immunity in a statute. Thiokol Corp. v. Dep't of Treasury, State of Mich., Revenue Div., 987 F.3d 376, 381 (6th Cir. 1993).

The Court first finds that the State of Tennessee has not agreed to waive sovereign immunity for claims arising out of violations of the Clean Water Act. Plaintiff does not argue that Tennessee has waived sovereign immunity, and Defendants explicitly assert that they has not consented to waive sovereign immunity. (Doc. No. 33, at 12.) Additionally, the Court holds that Congress did not intend to abrogate sovereign immunity under the Clean Water Act. See 33 U.S.C. § 1365(a)(1) (2010) (allowing citizen-suits under the Clean Water Act only "to the extent permitted by the eleventh amendment to the Constitution").

Therefore, the only way Plaintiff's claim can survive Defendants' Eleventh Amendment argument is under Ex parte Young. In order for the Ex parte Young exception to be applicable, Plaintiff must seek prospective relief and must allege "an ongoing violation of federal law."

Verizon Md., Inc., 535 U.S. at 645. Plaintiff seeks declaratory and injunctive relief (Doc. No. 24, at 9), which are both prospective in nature. Verizon Md., Inc., 535 U.S. at 645-46. Plaintiff also alleges an ongoing violation of the Clean Water Act. (Doc. No. 25, at 4); see also supra p. 6. Thus, Plaintiff's request for declaratory and injunctive relief is not barred by the Eleventh Amendment. However, Plaintiff's request for civil penalties pursuant to 33 U.S.C. § 1319 is not prospective in nature because it seeks to impose fines for each past day that Defendants have been in violation of the Clean Water Act. It is therefore barred by the Eleventh Amendment.

Accordingly, Defendants' Motion for Summary Judgment on grounds that the Eleventh Amendment bars Plaintiff's claims is hereby **GRANTED** with respect to Plaintiff's request for civil penalties under 33 U.S.C. § 1319 and **DENIED** with respect to Plaintiff's request for declaratory and injunctive relief. Plaintiff's request for civil penalties is **DISMISSED**.

## IV. CONCLUSION

For the reasons given above, Defendants' Motion for Summary Judgment is hereby **GRANTED** with respect to Plaintiff's request for civil penalties on grounds that such a request is barred by the Eleventh Amendment. Defendants' Motion for Summary Judgment on all other grounds is **DENIED**. Plaintiff's request for civil penalties is **DISMISSED**.

It is so ORDERED.

JOHN T. NIXON, SENIOR JUDGE
UNITED STATES DISTRICT COURT