

THEME AND VARIATIONS IN STATUTORY  
PRECLUSIONS AGAINST SUCCESSIVE  
ENVIRONMENTAL ENFORCEMENT ACTIONS BY  
EPA AND CITIZENS

PART ONE:  
STATUTORY BARS IN CITIZEN SUIT PROVISIONS

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SUMMARY

When Congress enacted our modern environmental statutes<sup>1</sup> in the 1970s, it sought to provide effective enforcement.<sup>2</sup> It adopted several strategies to achieve that end, one of which was authorizing multiple enforcers against violations of the statutes: the Environmental Protection Agency (“EPA”), states, and private citizens.<sup>3</sup> It reasoned that three potential en-

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<sup>1</sup> The environmental statutes discussed in this Article are the pollution control statutes, including: the Clean Air Act (“CAA”), 42 U.S.C. §§ 7401–7671q (2000); the Clean Water Act (“CWA”), 33 U.S.C. §§ 1250–1387 (2000); the Resource Conservation & Recovery Act (“RCRA”), 42 U.S.C. §§ 6901–6992k (2000); the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”), 42 U.S.C. §§ 9601–9675 (2000); the Federal Insecticide, Fungicide and Rodenticide Act (“FIFRA”), 7 U.S.C. §§ 136–136y (2000); the Toxic Substances Control Act (“TSCA”), 15 U.S.C. §§ 2601–2692 (2000); the Safe Drinking Water Act (“SDWA”), 42 U.S.C. §§ 300f to 300j-26 (2000); the Marine Protection, Research, and Sanctuaries Act (“MPRSA”), 33 U.S.C. §§ 1401–1445 (2000); and the Emergency Planning and Community Right to Know Act (“EPCRA”), 42 U.S.C. §§ 11001–11050 (2000).

<sup>2</sup> William L. Andreen, *The Evolution of Water Pollution Control in the United States—State, Local, and Federal Efforts, 1789–1972, Part I*, 22 STAN. ENVTL. L.J. 145 (2003) (detailing the failure of and dissatisfaction with earlier water pollution control efforts that led to the enactment of modern water pollution control legislation in 1972). Prominent among these factors was the failure of government, particularly state governments, to implement and enforce earlier legislation. *Id.* at 194–99.

<sup>3</sup> Congress directly authorized EPA and citizens to enforce the statutes in specific EPA and citizen enforcement provisions. It indirectly authorized states to enforce the statutes by authorizing them to implement and enforce state programs in place of the federal program. *See, e.g.*, CWA, 33 U.S.C. § 1342(b) (2000). For an example of a state using the citizen suit authority, see *United States Dep’t of Energy v. Ohio*, 503 U.S. 607 (1992). In addition, by authorizing an interested “person” to bring a citizen suit and defining “person” to include a

vironmental plaintiffs would provide more comprehensive enforcement than one. But Congress recognized that empowering three enforcers could result in successive enforcement actions against the same violations, possibly causing duplication and conflict in enforcement proceedings and remedies. To limit duplication and conflict, it developed a three-element (notice, delay, and bar) preclusion device against some successive enforcement. It placed versions of the device in all of the statutes' citizen suit provisions and in many of their EPA enforcement provisions. The device generally bars subsequent citizen enforcement if the government "has commenced and is diligently prosecuting . . . an action . . . to require compliance."<sup>4</sup> EPA enforcement may be barred by state actions, and either EPA or state actions may bar citizen enforcement.

Many defendants have argued the preclusion device shields them from citizen and EPA enforcement actions when a state takes any action, no matter how weak or ineffective. Their arguments raise diverse legal issues and have resulted in a plethora of judicial decisions interpreting the device. Most of the reported decisions concern the preclusive effect of state enforcement on citizen actions.<sup>5</sup> Courts interpreting the provisions on these issues<sup>6</sup> divide into two camps: (1) those interpreting the device in accordance with its plain meaning, often favoring successive enforcers, and (2) those interpreting it to give deference to prosecutorial discretion, often disfavoring successive enforcers. The circuits split on some of the issues, clearing the way for the Supreme Court to resolve the division.<sup>7</sup>

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"State," it indirectly authorized states to use the federal citizen suit authorities that authorize any "person" to enforce. *See, e.g.*, CWA, 33 U.S.C. §§ 1365(g) (2000). It adopted other strategies for effective enforcement, primarily strict civil liability and severe sanctions and remedies in the enforcement provisions. *See, e.g., id.* §§ 1319, 1365.

<sup>4</sup> CAA § 304(b)(1)(B), 42 U.S.C. § 7604(b)(1)(B) (2000). The corresponding language in the citizen suit provisions of the other statutes is identical or virtually so.

<sup>5</sup> This could reflect either the fact that states take more enforcement actions than EPA (*see infra* note 68 and accompanying text) or the perception of citizen enforcers that EPA enforcement actions are more effective than state actions, or a combination of both. *See also infra* note 8.

<sup>6</sup> The issues are discussed *infra* in Part II.

<sup>7</sup> These splits occur most clearly under the CWA, 33 U.S.C. § 1319(g) (2000), which will be examined in Part Two. Under (6)(A)(ii) & (iii) of that provision, a state action may preclude a citizen suit only if the state acts under "a State law comparable to this subsection" or under "such comparable State law." The First and Eighth Circuits have interpreted the provision broadly to allow almost any state action to block a citizen suit. *See Ark. Wildlife Fed'n v. ICI Americas, Inc.*, 29 F.3d 376 (8th Cir. 1994) (holding that state authority need not afford citizens the same right of participation in enforcement as the federal statute, as long as it provides some meaningful participation); *N. & S. Rivers Watershed Ass'n, Inc. v. Town of Scituate*, 949 F.2d 552 (1st Cir. 1991) (holding that the state is not required to act under authority that is comparable to the federal enforcement subsection to block a citizen suit, as long as it has comparable authority elsewhere in its arsenal of enforcement remedies). The Sixth, Ninth, and Eleventh Circuits have interpreted the provision more narrowly to allow a citizen suit in the face of state action. *See McAbee v. City of Ft. Payne*, 318 F.3d 1248 (11th Cir. 2003) (holding that state authority must be comparable to federal provision in all regards to block citizen suit); *Jones v. City of Lakeland*, 224 F.3d 518 (6th Cir. 2000) (*en banc*) (holding that state authority must provide citizen with same rights of

There is obvious potential for procedural duplication and conflict from allowing successive enforcement actions. As discussed below, Congress recognized that disallowing all successive enforcement actions would pose a profound danger to achieving compliance with environmental requirements and therefore opted to limit rather than eliminate the potential. A bar on all successive enforcement actions would likely encourage a rationally acting violator, when faced with the prospect of zealous enforcement action, to solicit an immediate action by an enforcer it perceives to be less zealous, often the state.<sup>8</sup> By soliciting and settling that action on relatively favorable terms, the violator could invoke the preclusion device to avoid more effective action by another enforcer. This is not a hypothetical chimera; judicial decisions detail examples and commentators report it to be a common practice.<sup>9</sup> In over 125 reported citizen suits, almost all of the decisions examined in Part II of this Article, citizens filed complaints after states had taken action that citizen plaintiffs believed to be unacceptably weak.

The desire of some courts to honor the state's prosecutorial discretion by interpreting the preclusion device liberally encourages violators to seek the protection of state enforcement. The danger here is not merely that less effective enforcement may oust more effective enforcement; rather, the graver danger is that settlements between violators and state enforcers for remedies short of compliance may block subsequent enforcement for compliance with federal law. That result effectively allows agreements between violators and state enforcers, with the support of federal courts, to amend and weaken the federal statutes. Of course, much state enforcement is strong and effective and does not raise this specter. Fortunately, the preclusion device is worded to distinguish between effective and ineffective government enforcement.<sup>10</sup> But some courts disregard the distinction, to the detriment of the statutes and environmental protection. There is a major irony in the proclivity of some courts to be zealous guardians of prosecutorial discretion from the perceived ravages of citizen suits; prosecutors

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participation as federal statute to block citizen suit); *Citizens for a Better Env't-Cal. v. Union Oil Co. of Cal.*, 83 F.3d 1111 (9th Cir. 1996) (holding that state must act under authority comparable to federal enforcement section to block citizen suit, even if state has comparable authority elsewhere in its arsenal of enforcement remedies).

<sup>8</sup> See *supra* note 5. The tendency of violators to seek the protection of state rather than EPA enforcement could also reflect the fact that states generally can act faster than EPA. Thus it may be possible for the state to commence an action within the time period allowed for preclusion, while EPA may not be able to do so. An attorney for the DOJ noted that the federal government seldom files preclusive actions after receiving sixty day notices of violations from potential citizen enforcers because, among other reasons "it generally takes EPA longer than sixty days to develop an enforcement referral." Mark R. Haag, *The Department of Justice's Role in Monitoring Environmental Citizen Suits* (1997) (unpublished paper on file with the Harvard Environmental Law Review).

<sup>9</sup> See *infra* notes 388–390 and accompanying text.

<sup>10</sup> The preclusion device bars citizen suits only when the government has taken action "to require compliance;" see *infra* Part II.B.2.

are not seeking the protection of the courts, but violators are. Indeed, when state and federal prosecutors are heard in citizen enforcement cases, they support the maintenance of citizen suits.<sup>11</sup> That they do so is clear evidence that citizen suits do not interfere with the work of government enforcers or with the results they have achieved in earlier enforcement actions.<sup>12</sup> That violators are the vocal proponents of honoring the prosecutor's discretion should be greeted with skepticism, for their self-interest benefits from favoring the weakest enforcer.

This two-part Article examines the preclusion device, its legislative history, and the decisions interpreting it. Part One examines the device in citizen suit provisions. Part Two, to be published subsequently, will examine the device in EPA enforcement provisions. The two parts develop a unified interpretation of the device in both sets of enforcement provisions to resolve the tension between achieving compliance and protecting prosecutorial discretion. The Article concludes that Congress meant exactly what it wrote and enacted: the device solely precludes the successive enforcement it actually addresses. Several of the most common canons of statutory interpretation lead inexorably to this interpretation.<sup>13</sup> But a phenomenon not yet observed by the courts or commentators is even more suggestive of it. The preclusion device is a theme with many variations. While Congress constantly employed the theme of the device throughout the statutes, it employed variations of the theme's three elements in the different provisions, reflecting the varying roles it intended EPA, the states and, to a lesser extent, citizens to play in the implementation and enforcement of each statute.<sup>14</sup> The result is a nuanced pattern of variations, suggesting that Congress intended the meanings of the constants in the provisions to be identical, and the variations in them to have singular meanings.

The linchpin of the device is the bar element that precludes successive action when the government has commenced and is diligently prosecuting an enforcement action. The one issue not resolved by the words that Congress used in the device is the meaning of "diligent prosecution." The term is not precise, and Congress failed to define it. But the preclusions bar citizen suits only when the government "is diligently prosecuting . . . an action . . . to require compliance." Only compliance with the statutes can secure the environmental protections that are their very purposes. The wording of the preclusion device and the purposes of the statutes, therefore, suggest that diligent prosecution is prosecution that has brought or reasonably can be expected to bring about compliance. This is also consistent with the test that federal courts apply when they review consent decrees under the statutes: determining whether they are consis-

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<sup>11</sup> See *infra* note 388 and accompanying text.

<sup>12</sup> See *infra* Parts I.C–D.

<sup>13</sup> Including the plain meaning, *expressio unius, in pari material*, and narrow reading of exceptions canons. See *infra* note 32.

<sup>14</sup> See *infra* Part I.

tent with and carry out the statutes.<sup>15</sup> This strikes a principled balance between the divided judicial interpretations of the preclusion, affording the government prosecutor deference in how she attains compliance, yet barring subsequent suit only if she attains compliance.

The preclusion device does not stand alone in governing when successive enforcement actions may be brought and pursued. Both general statutory provisions<sup>16</sup> and common law doctrines<sup>17</sup> may apply as well. The degree to which the preclusion device supplants these provisions and doctrines or the extent to which they are interrelated are not explored by this Article.<sup>18</sup>

#### TABLE OF CONTENTS

<i>Introduction</i> .....	407
I. <i>The Environmental Statutes' Enforcement Provisions and Their Preclusions</i> .....	412
A. <i>Impacts of Federalism</i> .....	412
B. <i>EPA Enforcement Provisions and Their Preclusions</i> .....	414
C. <i>Citizen Enforcement Provisions and Their Preclusions</i> .....	416
1. <i>Statutory Bars in Citizen Suit Provisions</i> .....	417
2. <i>Legislative History</i> .....	420
D. <i>An Anomaly: CWA § 309(g)</i> .....	425
II. <i>Interpreting Preclusions in Citizen Suit Provisions To Implement Their Plain Meanings</i> .....	426
A. <i>What Government Entities May Act To Bar a Citizen Suit?</i> .....	429
1. <i>What "Administrator" May Act To Bar a Citizen Suit?</i> .....	429
2. <i>What "State" May Act To Bar a Citizen Suit?</i> .....	430
a. <i>States, Municipalities, and Indian Tribes</i> .....	431
b. <i>States with Unapproved Programs</i> .....	434
B. <i>What Government Actions May Bar a Citizen Suit?</i> .....	435
1. <i>When the Statute Provides that Particular Government Actions May Bar a Citizen Suit, May Other Government Actions Bar It?</i> .....	436
a. <i>Where the Statute Provides that Only Court Actions May Bar a Citizen Suit</i> .....	436
b. <i>Where the Statute Provides that Several Government Actions May Bar a Citizen Suit</i> .....	444

<sup>15</sup> See *infra* notes 351–353 and accompanying text.

<sup>16</sup> See, e.g., 28 U.S.C. § 1738 (2000) (providing, *inter alia*, “full faith and credit” for state judicial decisions in every court in the country).

<sup>17</sup> For example, *res judicata*, issue preclusion, abstention, and mootness.

<sup>18</sup> Others have begun to do so. See William V. Luneburg, *Claim Preclusion as it Affects Non-Parties to Clean Air Act Enforcement Actions: The Ghosts of Gwaltney*, 10 WIDENER L. REV. 113 (2003); and William D. Benton, *Application of Res Judicata and Collateral Estoppel to EPA Overfiling*, 16 B.C. ENVTL. AFF. L. REV. 199 (1988). See also *infra* note 300 and accompanying text.

2. <i>Must the Government Action Require Compliance To Bar a Citizen Suit, and When Do Government Actions Require Compliance?</i> .....	445
C. <i>When Must the Government Commence an Action To Bar a Citizen Suit?</i> .....	449
1. <i>Must the Government Commence an Action Prior to a Citizen Suit To Bar It?</i> .....	449
2. <i>When Does the Government Commence an Action?</i> .....	452
D. <i>How Diligently Must the Government Prosecute an Action in Order To Bar a Citizen Suit?</i> .....	456
1. <i>Must the Government Prosecution Be Ongoing To Bar a Citizen Suit?</i> .....	457
2. <i>What Is Diligent Prosecution?</i> .....	463
a. <i>In Continuing Prosecutions</i> .....	464
b. <i>In Completed Prosecutions and Continuing Enforcement of Orders</i> .....	465
E. <i>What Citizen Suits May a Government Action Bar?</i> .....	473
F. <i>Conclusions from Examination of the Preclusion Bar</i> .....	478
III. <i>Doctrinal Schism in Interpreting Citizen Suit Provisions and Their Preclusions</i> .....	479
A. <i>Plain Meaning Versus Deference to Prosecutorial Decisions</i> ..	479
B. <i>The Pernicious Effect of Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.</i> .....	484
IV. <i>Conclusion: Unified Interpretation of Preclusions in Citizen Suit Provisions</i> .....	492

## INTRODUCTION

Congress placed nearly twenty versions of the preclusion device in the EPA and citizen enforcement provisions of the environmental statutes. Its repeated use of the device signals the importance of the underlying tension Congress intended it to resolve: authorization of multiple enforcers to assure full compliance and recognition that successive enforcement could result in conflict and duplication. Congress's repetition of the constants in the device establishes that Congress chose it to resolve those tensions. Congress's use of variations in the device establishes that it resolved the tensions differently in the various enforcement provisions. This theme and variations pattern suggests Congress intended the words it used in each device to mirror the division of enforcement authority it envisioned in that provision.<sup>19</sup>

Most courts faithfully interpret the device in each provision according to its plain meaning, often favoring successive enforcement. Some courts, however, ignore the device's plain meaning and interpret it with deference to the prosecutorial discretion of the first enforcer, often disfavoring successive enforcement. These latter courts not only misinterpret the provision, they undermine the integrity of the statutes. They encourage violators to invite ineffective actions by the weakest government enforcers, anticipating that courts will forever bar later actions by others seeking compliance. These courts unwittingly aid violators to enshrine violation, rather than compliance, as their norm under the federal statutes.

A return to the era during which Congress enacted the environmental statutes illuminates why Congress authorized multiple enforcers of the environmental statutes and the role it intended the preclusion device play in the enforcement scheme. Prior to the 1970s, federal environmental legislation was either non-existent,<sup>20</sup> not oriented to environmental protection,<sup>21</sup> or lacking effective federal enforcement authority and entirely deferential to state action.<sup>22</sup> Instead, the federal government assisted states by

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<sup>19</sup> In CAA § 113, for instance, Congress established two approaches for EPA administrative and civil actions against violators. Where the violation is of a state established requirement, EPA must first give the State a notice of the violation and wait thirty days before proceeding. If the violation is of an EPA established requirement, EPA may proceed without the notice and delay. *Compare* § 113(a)(1) *with* § 113(a)(3).

<sup>20</sup> TSCA, MPRSA, CERCLA, and EPCKRA had not been enacted.

<sup>21</sup> At the time FIFRA was focused at protecting pesticide users by assuring the efficacy of pesticides rather than protecting the environment from inappropriate pesticide use.

<sup>22</sup> Although there were nascent federal CWA, CAA and RCRA programs, they largely relied on state regulation. Federal enforcement provisions were weak or non-existent. The early history of federal water pollution control programs, for instance, is detailed in Andreen, *supra* note 2. For a contemporary account of the shortfalls of pollution control efforts, see DAVID ZWICK & MARY BENSTOCK, *WATER WASTELAND* (1971). The cumbersome federal enforcement mechanisms are described in Murray Stein, *The Actual Operation of the Federal Water Pollution Control Administration*, 3 NAT. RESOURCES L. 47 (1970).

partially funding their regulatory programs and conducting research.<sup>23</sup> Cleveland's burning Cuyahoga River, killer smog in southern California, and other environmental catastrophes in the late 1960s testified to the inadequacy of these measures and coalesced growing public concern about environmental degradation. During the first Earth Day in 1970, an estimated twenty million people demonstrated across the country to demand environmental protection. During the 1970s, Congress heeded the demand of Earth Day and, in a bipartisan effort, enacted comprehensive and effective legislation to protect the environment.<sup>24</sup>

Much of the resulting legislation embraced variations of cooperative federalism, with EPA establishing standards to protect the environment and EPA or states implementing the federal standards. Most of the statutes offered states the option of implementing the federal statute with an EPA-approved state program. But mindful of past experience, Congress provided EPA oversight of state implementation. Indeed, Congress granted EPA a broad range of enforcement authorities to assure prompt compliance with federal mandates, regardless of whether EPA or a state implemented the federal program. Thus, when EPA approves a state program, the state may enforce against violations of the state program and EPA may enforce against violations of the federal statute, creating the possibility that both a state and EPA would enforce against the same violating acts. To ameliorate the possibility of conflict and duplication from successive enforcement, Congress created a preclusion device in the EPA enforcement provisions, with considerable variations among them, mirroring the different balances it struck between federal and state authorities in different statutes.<sup>25</sup>

Congress was not content with creating strong EPA enforcement authorities. Not confident that federal and state authorities would fully enforce against violations of the statutes, it also authorized citizens to enforce through an ingenious new device, the citizen suit provision. The device added members of the interested public, acting as private attorneys general,<sup>26</sup> to the existing federal and state environmental enforcement cad-

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<sup>23</sup> *E.g.*, Act of June 30, 1948, c. 758, 62 Stat. 1155.

<sup>24</sup> The statutes considered in this Article, *see supra* note 1, were all enacted or entirely revamped to their present forms in the 1970s, except CERCLA and EPCKRA, which were enacted in 1980.

<sup>25</sup> In TSCA, Congress envisioned no role for state implementation and in § 16, for instance, authorized EPA to enforce against violations with no notice to the state. On the other hand, Congress envisioned almost exclusive state implementation of the RCRA solid waste regulatory program and in § 4005(c)(2) authorized EPA to enforce against violations only in states lacking EPA-approved programs.

<sup>26</sup> The House Report on the CWA alluded to the "private attorney general" doctrine developed in case law. H.R. REP. NO. 92-911, at 132 (1972), *reprinted in* 1 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 753, 821 (1973) (hereinafter "CWA LEGISLATIVE HISTORY"). *See* *Middlesex Sewerage Authority v. Nat'l Sea Clammers Assn.*, 453 U.S. 1, 10 n.11 (1981). The Court first used the term in *Newman v. Piggy Park Enters., Inc.*, 390 U.S. 400 (1968), and has frequently used it in discussing

res. To ameliorate the possibility of conflict and duplication from successive government and citizen actions, Congress placed different versions of the same preclusion device in the citizen suit provisions. It incorporates three elements: (1) a notice of violation,<sup>27</sup> (2) a delay between the notice and the commencement of enforcement,<sup>28</sup> and (3) a bar on enforcement if a government enforcer has already commenced and is diligently prosecuting an enforcement action. For each of the above elements, Congress developed a range of variations.

The preclusion device was the child of a Congress seeking full compliance through more and better enforcement. Congress accepted successive enforcement against the same violations as a consequence; none of its versions of the preclusion device prevented all successive enforcement. The preclusion device, as an exception to the robust enforcement authorities, should be narrowly construed, consistent with the canon that “provisos and statutory exceptions should be read narrowly” to protect the general rule.<sup>29</sup> A corollary to the canon is that exceptions to exceptions should be construed broadly to protect the general rule. This corollary, in turn, suggests that limitation on the operation of the preclusion device be interpreted broadly to restrict the preclusions, thus protecting the general authority for EPA and citizen suits.<sup>30</sup> The device in citizen suit provisions, for instance, limits government actions that may bar citizen suits to government actions for compliance. Following the corollary canon, courts should assure that government actions actually seek compliance before allowing them to bar citizen suits.

The Supreme Court has commented that the structure and wording of the citizen suit provisions are so similar across the statutes that Congress’s

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private enforcement of environmental, antitrust and civil rights statutes. Judge Jerome Frank appears to have coined the term in *Assoc. Indus. v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943). See Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1, 4 n.7 (2002). See also discussion in *Westfarm Assocs. Ltd. P’ship v. Int’l Fabricare Inst.*, 1992 WL 315188, at \*4 (D. Md.).

<sup>27</sup> For instance, it required citizens to give notice to EPA and the violator in TSCA, 15 U.S.C. § 2619(b)(2)(B) (2000), but to EPA, the violator, *and* the appropriate state in CWA § 505(b)(1)(B), 33 U.S.C. § 1365(b)(1)(A) (2000). The difference reflects the greater role that Congress established for states in the CWA than in TSCA.

<sup>28</sup> For instance, in RCRA § 7002(b)(1) & (2), 42 U.S.C. § 6972(b)(1) & (2) (2000), Congress required citizens to give notice ninety days in advance of filing suit against imminent and substantial endangerments, sixty days in advance of filing against violations of non-hazardous waste provisions, and an unspecified time in advance of filing suit against violations of hazardous waste provisions.

<sup>29</sup> See WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 324 (1994) (citing *Comm’r v. Clark*, 489 U.S. 726, 739 (1989)). See also NORMAN J. SINGER, *STATUTES AND STATUTORY CONSTRUCTION* §§ 47.8 and 47.11, (6th ed. 2000). This is another of the intrinsic canons flowing from the plain meaning canon.

<sup>30</sup> “The logical extension of [the principle that exceptions should be construed narrowly] is that *exceptions* to the exceptions should be *broadly* construed.” *McCune v. Or. Senior Servs. Div.*, 894 F.2d 1107, 1113 (9th Cir. 1990). See also *Estate of Shelfer v. Comm’r of Internal Revenue*, 86 F.3d 1045, 1049 n.13 (11th Cir. 1996); *New Castle County v. Hartford Accident & Indem. Co.*, 933 F.2d 1162, 1199 n.67 (3d Cir. 1991).

use of the same or different terms in a particular provision is significant in interpreting it.<sup>31</sup> The theme and variations nature of the preclusion device suggests even more forcefully that the devices be read *in pari materia*, i.e., “similar statutes should be interpreted similarly,”<sup>32</sup> but in a more sophisticated manner. The theme and variations nature of the device, with some elements and words recurring from one provision to the next and others changing, emphasizes suggests the deliberate nature of Congress’s word choices. The constants in the device should be interpreted in the same manner and the differences should be interpreted singularly. The words Congress used in a particular provision express its precise intent and should be interpreted literally, consistent with the two most common canons of construction, the plain meaning rule and *expressio unius*, i.e., “follow the plain meaning of the statutory text: and “expression of one thing suggests the exclusion of others.”<sup>33</sup> When Congress placed the preclusion device in the EPA or citizen suit provisions, it intended the exact bars to successive enforcement it stated in the device, and no others. Congress’s pervasive use of the device in the EPA and citizen enforcement provisions also suggests that when Congress intended to preclude successive enforcement, it did so in the preclusion device it placed in the enforcement provision, rather than by implying it from another part of the statute.<sup>34</sup>

Congress achieved its goal of greatly increasing compliance by strengthened enforcement. Federal enforcement and citizen suits have played a large role in the improvement.<sup>35</sup> Courts interpreting the preclusion device in accordance with its plain meaning, often favoring successive enforcement, forward the congressional goal. However, compliance

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<sup>31</sup> “Congress used identical language in the citizen suit provisions of several other environmental statutes that authorize only prospective relief. Moreover, Congress has demonstrated in yet other statutory provisions that it knows how to avoid this prospective implication by using language that explicitly targets wholly past violations.” *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 57 (1987). The Court found differences between the wording of citizen suit provisions in different statutes significant and differences between the wording of similar provisions in the same statute “[e]ven more on point.” *Id.* at 57 n.2.

<sup>32</sup> *ESKRIDGE*, *supra* note 29, at 327 (citing *Morales v. TWA, Inc.*, 504 U.S. 374 (1992); *TWA, Inc. v. Indep. Fed’n of Flight Attendants*, 489 U.S. 326 (1989); *Communications Workers of Am. v. Beck*, 487 U.S. 735 (1988); and *Wimberly v. Labor & Indus. Relations Comm’n of Mo.*, 479 U.S. 511 (1987)). *See also* *SINGER*, *supra* note 29, at §§ 51.01–.08, particularly § 51.03.

<sup>33</sup> *ESKRIDGE*, *supra* note 29, at 323 (citing cases where the canons were applied).

<sup>34</sup> This is particularly relevant in rejecting the contention that the provisions governing EPA’s approval of state permit programs suggests state enforcement actions bar subsequent EPA enforcement actions. *See Harmon Indus. v. Browner*, 191 F.3d 894 (8th Cir. 1999). Part Two will address this in detail.

<sup>35</sup> To serve as a successful deterrent, civil penalties must be assessed in an amount “high enough to insure that polluters cannot simply absorb the penalty as a cost of doing business . . . . Additionally, the probability that a penalty will be imposed must be high enough so that polluters will not choose to accept the risk that non-compliance will go unpunished.” *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 890 F. Supp. 470, 491–92 (D.S.C. 1995).

is far from universal and enforcement against violators is far from universal.<sup>36</sup> Courts interpreting the preclusion device in derogation of its plain meaning, often disfavoring successive enforcement, not only ignore congressional intent, they thwart compliance with federal environmental protection requirements. Indeed, they threaten the integrity of the federal statutes. They encourage violators to invite ineffective actions by weak enforcers, in the expectation that courts will bar subsequent enforcement for compliance, thus making violation rather than compliance the norm. While some of these courts may be hostile to citizen enforcement, most simply interpret the provisions to defer to prosecutorial discretion, blindly following an ill-conceived, off-hand comment by the Supreme Court that citizen enforcement supplements rather than supplants government enforcement.<sup>37</sup> More importantly, these courts fail to understand that Congress severely limited such deference by the wording of its preclusion devices and that successive enforcement rarely interferes with the results the prosecutor obtained in the initial action.<sup>38</sup> If successive enforcement often interfered with prosecutorial discretion, we could expect to hear prosecutors complaining. But they are not. Indeed, when they are heard on this issue, prosecutors generally favor citizen suits without qualification.<sup>39</sup> Ironi-

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<sup>36</sup> David R. Hodas, *Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd when Enforcement Authority Is Shared by the United States, the States, and Their Citizens?*, 54 MD. L. REV. 1552, 1647–51 (1995). See also Victor Flatt, *A Dirty River Runs Through It (The Failure of Enforcement in the Clean Water Act)*, 25 B.C. ENVTL. AFF. L. REV. 1 (1997). Study after study by the General Accounting Office and EPA's own Inspector General conclude that there is widespread non-compliance with the statutes and that EPA and the states do not enforce against many of the violations. Hodas at 1603–17.

<sup>37</sup> See *infra* Part III.B.

<sup>38</sup> See *infra* Part III.A.

<sup>39</sup> See, e.g., *Ashoff v. City of Ukiah*, 130 F.3d 409, 411 n.2 (9th Cir. 1997) (stating that EPA argued that RCRA Subchapter IV (as encoded, Subchapter D as enacted) open-dumping regulations were enforceable by citizens despite EPA approval of state plan); *Citizens for a Better Env't-Cal. v. Union Oil Co. of Cal.*, 83 F.3d 1111, 1118 (9th Cir. 1996) (stating that EPA agreed with citizens that only state penalty assessment orders could bar citizen suits under CWA § 309(g), 33 U.S.C. § 1319(g)); *N. & S. Rivers Watershed Ass'n, Inc. v. Town of Scituate*, 949 F.2d 552, 556 n.8 (1st Cir. 1991) (stating that EPA argued that only states with approved CWA permit programs can issue orders that may bar citizen suits); *SPIRG of N.J., Inc. v. Fritzsche, Dodge & Olcott, Inc.*, 759 F.2d 1131, 1135 n.3 (3d Cir. 1983) (stating that EPA, New Jersey and New York argued that EPA CWA § 309(a), 33 U.S.C. § 1319(a) compliance order was not an action in court); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 890 F. Supp. 470, 474 (D.S.C. 1995) (stating that EPA brief “generally supported” citizen enforcer’s positions). Similarly, EPA officials have testified before congressional committees in support of citizen suits. See, e.g., *Pending Clean Water Act Legislation: Hearings Before the Subcomm. on Env't and Nat. Res. Of the House Comm. on Merch. Marine and Fisheries*, 103d Cong. 212–13 (1994) (statement of Steven A. Herman, Assistant Administrator for Enforcement, EPA); *The Water Quality Act of 1994, and Issues Related to Clean Water Act Reauthorization: Hearings on H.R. 3948 Before the Subcomm. on Water Res. and Env't of the House Comm. on Pub. Works and Transp.*, 103d Cong. 290 (1994) (statement of Carol M. Browner, Administrator, EPA).

cally, it is the violators who argue for prosecutorial discretion.<sup>40</sup> When lawbreakers extol respect for prosecutorial decisions, we should all beware.

### I. THE ENVIRONMENTAL STATUTES' ENFORCEMENT PROVISIONS AND THEIR PRECLUSIONS

This Part examines: (1) the enforcement authorities that environmental statutes<sup>41</sup> grant to citizen enforcers; (2) their preclusions against successive enforcement for the same violations; and (3) the legislative history of the authorities and their preclusions. But first it describes the diverse federalism strategies Congress adopted in the different statutes—strategies that explain much of the variation in the preclusion devices, particularly in EPA enforcement provisions.

#### A. Impacts of Federalism

Federal environmental statutes follow two general federalist strategies relevant to understanding the preclusion device. The first gives EPA authority to implement and enforce the statutory program, with little or no role for states.<sup>42</sup> Congress usually adopts this approach to regulate activities of single or centralized industries, such as registering pesticides as safe for sale or determining allowable emissions from motor vehicles. The second strategy provides roles for both EPA and states in implementing and enforcing the statutory program.<sup>43</sup> Congress usually adopts this approach to regulate widespread and decentralized pollution producing sources, such

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<sup>40</sup> Industry spokesmen before a House subcommittee hearing on amendments to the CWA, including the administrative penalty authority that became CWA § 309(g), testified that EPA had no business enforcing against violations of the CWA in states with approved CWA permit programs. A spokesperson for the Chemical Manufacturers' Association stated, "CMA urges that the Act be amended to give the states the sole authority to enforce state issued NPDES permits." *Possible Amendments to the Federal Water Pollution Control Act: Hearings Before the Subcomm. on Water Res. of the House Comm. on Pub. Works and Transp.*, 97th Cong. 966 (1982) (statement of Monte Throdahl, Sr. V.P. of Monsanto Chem. Co.). He further stated that "EPA should not be allowed to bring an enforcement action for a permit violation occurring in states administering approved programs. States that have assumed exclusive responsibility for implementation of NPDES program should be given sole enforcement responsibility." *Id.* at 987. A spokesperson for the American Paper Institute testified that EPA penalty actions could result in "undercutting state NPDES agency enforcement efforts. There is no useful purpose to be served by EPA initiating a separate enforcement action from that already undertaken by a state permitting agency." *Id.* at 939 (statement of Peter E. Wrist, V.P. for Forest Products, Mead Corp). Not surprisingly, both opposed enactment of CWA § 309(g), as did all other industry spokespeople testifying.

<sup>41</sup> See *supra* note 1.

<sup>42</sup> TSCA, 15 U.S.C. §§ 2605 & 2615 (2000); CERCLA, 42 U.S.C. §§ 9604 & 9606 (2000); MPRSA, 33 U.S.C. §§ 1412 & 1415 (2000); FIFRA, 7 U.S.C. §§ 136a & 136v (2000); CAA, 42 U.S.C. §§ 7521–7554 (2000).

<sup>43</sup> CAA, 42 U.S.C. §§ 7401–7671q, except for §§ 7521–7554 (2000); CWA, 33 U.S.C. §§ 1313, 1313a, 1329, 1341, 1342, & 1344 (2000); RCRA, 42 U.S.C. §§ 6926, and 6942–6949a (2000); FIFRA, 7 U.S.C. §§ 136v & 136u (2000); SDWA, 42 U.S.C. §§ 300g-1–300g-3 (2000).

as pesticide use or solid waste disposal. Statutes establishing multiple regulatory programs may employ both strategies for different purposes.<sup>44</sup>

Statutes following the first strategy give EPA sole regulatory authority, but provide a variety of accommodations with states. Some give states no role,<sup>45</sup> and some actually preempt state regulation.<sup>46</sup> Others, however, explicitly allow parallel state programs and authorize EPA to accomplish its mission by contracting with states.<sup>47</sup> Statutes adopting the second federal partnership strategy generally authorize EPA to establish national standards and allow states that so desire to assume the primary role in implementing them. These statutes establish a default EPA authority to implement the standards if a state elects not to do so or fails to meet the federal requirements. They also typically provide a variety of mechanisms for EPA oversight of implementation by states that elect to assume the primary role<sup>48</sup> and for EPA enforcement regardless of whether states have assumed the primary implementation role. Some of the laws mix programs with stronger and weaker state roles.<sup>49</sup> All but one of the statutes also provide for enforcement by citizens acting as private attorneys general.<sup>50</sup>

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<sup>44</sup> The CAA, for instance, adopts the first strategy for its program regulating automobile emissions, 42 U.S.C. §§ 7521–7554 (2000), and the second strategy for regulation of emissions from other sources, 42 U.S.C. §§ 7401–7431 (2000).

<sup>45</sup> See, e.g., MPRSA, 33 U.S.C. §§ 1401–1445 (2000), regulating disposal of material in international waters, with little role for states.

<sup>46</sup> CAA, 42 U.S.C. § 7543 (2000), preempts states from regulating motor vehicle emissions (other than ORVs), with the exception of California.

<sup>47</sup> See, e.g., CERCLA, 42 U.S.C. § 9604(d) (2000).

<sup>48</sup> The CAA, CWA and Subchapter III (as encoded, Subchapter C as enacted) of RCRA follow this model, establishing permit programs that may be administered by EPA or states, with EPA as the default administrator. If a state wishes to administer a program, it must establish a program that EPA approves as meeting all the requirements of the federal statute. EPA may withdraw its approval from the state program if it ceases to meet the federal requirements. CWA, 33 U.S.C. § 1342(b) & (c) (2000); RCRA, 42 U.S.C. § 6926(b) & (e) (2000); and CAA, 42 U.S.C. § 7661a(d) & (i) (2000). Under the CAA provision, however, EPA may impose sanctions on non-complying states rather than withdrawing its approval of their programs. 42 U.S.C. § 7661a(i) (2000).

<sup>49</sup> RCRA incorporates both types of programs. Subchapter IV (as encoded, Subchapter D as enacted) authorizes EPA to establish standards to be met by non-hazardous waste landfills, but leaves it to states to administer programs to assure compliance with the standards. 42 U.S.C. §§ 6941–6941a (2000). If the states fail to do so, the statute gives EPA no authority to administer the program in their stead but gives it only limited enforcement authority to enforce against landfills not meeting the standards. On the other hand, Subchapter III (as encoded, Subchapter C as enacted) authorizes EPA to establish standards to be met by hazardous waste handling facilities, 42 U.S.C. § 6924 (2000), and contemplates that states will administer programs to assure compliance with the standards. 42 U.S.C. § 6926 (2000). If the states fail to do so, the statute requires EPA to do so and gives it strong authority to enforce against facilities not meeting the standards. 42 U.S.C. § 6928 (2000).

<sup>50</sup> FIFRA contains no citizen suit authorization. This anomaly is explained by the differing jurisdictions of congressional authorizing committees over the statutes. All of the other statutes have in common at least one Senate or House authorizing committee with jurisdiction over other environmental statutes (the House Commerce Committee or the Senate Environment Committee), but FIFRA's authorizing committee in both chambers is the Agriculture Committee.

Congress rarely reflected the differences it intended in the federalist balances between EPA and states in the range of enforcement authorities that it provided EPA and citizen enforcers. Congress often did reflect differences in federalist balances, however, in the preclusions it placed on the exercise of those authorities. This was particularly true with regard to EPA enforcement authority: Congress generally placed no preclusion on EPA enforcement in programs in which EPA was granted authority to implement and enforce with little or no role for states,<sup>51</sup> but placed a wide variety of preclusions on EPA enforcement in programs with shared authority to implement and enforce between EPA and states. On the other hand, Congress placed a more uniform preclusion on citizen suits, regardless of whether implementation authority is shared between EPA and the states.<sup>52</sup> Thus, federalism considerations prompted the enactment of and many of the variations in the preclusion devices, particularly in the EPA enforcement provisions.

### B. EPA Enforcement Provisions and Their Preclusions

Congress developed quite different variations for each of the preclusion device's three elements.<sup>53</sup> They may or may not require the potential enforcer to delay commencement of its enforcement action for periods up to ninety days. They may or may not bar the potential enforcer from commencing particular actions, or any actions, if another enforcer has already commenced any action or a particular action. The many possible combinations of these variations provide Congress a nuanced device, with a wide

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<sup>51</sup> See, e.g., TSCA, 15 U.S.C. §§ 2615 & 2647 (2000).

<sup>52</sup> Compare CAA, 42 U.S.C. § 7413(a)(3) & (4) (2000) (requiring EPA to notify a state after EPA takes enforcement action in the state) with SDWA, 42 U.S.C. § 300h-2(c)(5) (2000) (barring some EPA enforcement actions if the state has taken particular enforcement actions). This may be because states had pollution control laws and bureaucracies before Congress found federal legislation and a federal bureaucracy necessary. Though Congress enacted strong federal environmental legislation in the 1970s because states had failed to assure environmental protection and, in particular, had failed to enforce existing environmental law, Congress maintained a strong state presence in much of the new legislation. See Andreen, *supra* note 2, at 194–99. See, e.g., CWA, 33 U.S.C. § 1251(b) (2000) (“It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce and eliminate pollution.”). Resulting tensions between state and federal laws and bureaucracies were inevitable, and a rich literature has documented those tensions. See, e.g., Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553 (2001). Federalist tensions in environmental enforcement have also been subject to study and commentary. See CLIFFORD RECHTSCHAFFEN & DAVID MARKELL, *REINVENTING ENVIRONMENTAL ENFORCEMENT AND THE STATE/FEDERAL RELATIONSHIP* (2003); David L. Markell, *The Role of Deterrence-Based Enforcement in a “Reinvented” State/Federal Relationship: The Divide Between Theory and Reality*, 24 HARV. ENVTL L. REV. 1 (2000); Hodas, *supra* note 36; Robert R. Kuehn, *The Limits of Devolving Enforcement of Federal Environmental Laws*, 70 TUL. L. REV. 2373 (1996); Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196 (1977).

<sup>53</sup> See *supra* notes 27–28 and accompanying text.

spectrum of effects on successive enforcement against the same violations. The broad range of variations that Congress crafted for the device underscores its understanding of federalism concerns. The congressional judgments can best be given their correct meaning by following the canons of statutory interpretation and giving the preclusions' different wordings different meanings.

The statutes provide an arsenal of EPA enforcement remedies, ranging from simple notices of violation<sup>54</sup> to criminal incarceration and fines.<sup>55</sup> Between are administrative orders to assess penalties,<sup>56</sup> require compliance,<sup>57</sup> revoke permits,<sup>58</sup> stop sales,<sup>59</sup> recall products,<sup>60</sup> seize goods,<sup>61</sup> prohibit federal grants or contracts to violating facilities;<sup>62</sup> and civil judicial actions to assess penalties,<sup>63</sup> to enjoin compliance,<sup>64</sup> to ban new connections to sewers,<sup>65</sup> and to abate imminent and substantial endangerments.<sup>66</sup> Some provide augmented incarceration and fines for knowing violations that place others in peril of life or limb.<sup>67</sup> While EPA and states have many potential enforcement actions to invoke, they conduct most enforcement by issuing administrative orders. EPA directs about ten percent of its enforcement effort, and states direct about five percent or less of their enforcement effort toward judicial actions.<sup>68</sup>

Congress included the preclusion device in many of the EPA enforcement provisions, with considerable variations in the three elements of the basic notice, delay, and bar provisions, ranging from no preclusion to almost

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<sup>54</sup> CAA, 42 U.S.C. § 7413(a)(1) (2000).

<sup>55</sup> *Id.* § 7413(c).

<sup>56</sup> CWA, 33 U.S.C. § 1319(g) (2000).

<sup>57</sup> *Id.* § 1319(a)(1) & (3).

<sup>58</sup> RCRA, 42 U.S.C. § 6928(a)(3) (2000).

<sup>59</sup> FIFRA, 7 U.S.C. § 136k(a) (2000).

<sup>60</sup> CAA, 42 U.S.C. § 7541(c) (2000).

<sup>61</sup> FIFRA, 7 U.S.C. § 136k(b) (2000).

<sup>62</sup> CWA, 33 U.S.C. § 1368 (2000).

<sup>63</sup> *Id.* § 1319(d).

<sup>64</sup> *Id.* § 1319(b).

<sup>65</sup> CWA, 33 U.S.C. § 1342(h) (2000).

<sup>66</sup> *Id.* § 1364.

<sup>67</sup> *Id.* § 1319(c)(3).

<sup>68</sup> Between 1977 and 1989, EPA annually referred to the DOJ between 20 and 60 cases for criminal prosecution, and between 100 and 350 cases for civil action. It also issued between 1000 and 4000 administrative orders annually. EPA, No. 20E-2001, ENFORCEMENT ACCOMPLISHMENTS REPORT: FY 1989 15-17, illustrations 1-3 (1990), at <http://www.epa.gov/Compliance/resources/reports/accomplishments/oeca/fy1989accomp-rpt.pdf>. Between 1985 and 1989, state environmental agencies annually referred between 400 and 900 cases to their attorneys general for judicial action and issued between 8500 and 12,500 administrative orders. *Id.* at 19, illustrations 5-6. Federal and state enforcement maintained these rough ratios in later years. In 1994, for instance, EPA referred to the DOJ 220 cases for criminal prosecution and 430 cases for civil prosecution, while EPA initiated 3,600 administrative enforcement actions on its own. At the same time, states took somewhat over 11,000 enforcement actions. EPA, No. 300-R-95-004, ENFORCEMENT AND COMPLIANCE ASSURANCE ACCOMPLISHMENT REPORT: FY 1994 2-2 to 2-3, 4-2 to 4-8 (1995), at <http://www.epa.gov/Compliance/resources/reports/accomplishments/oeca/fy94accomplishment.pdf>.

complete preclusion. Where a provision falls on the preclusion spectrum is a function of the relative strength of EPA authority in the balance Congress struck between federal and state implementation of the program being enforced. From the strongest to the weakest EPA enforcement provisions (and the correspondingly strongest to the weakest preclusion devices), they: (1) impose no preclusion on EPA enforcement in a statute authorizing exclusive federal implementation;<sup>69</sup> (2) require EPA to notify the state *after* EPA takes enforcement action against a violation of federally established standards in the state;<sup>70</sup> (3) require EPA to give the state notice *before* EPA takes enforcement action against a violation of state established standards in the state;<sup>71</sup> (4) require EPA to give the state notice *before* EPA takes enforcement action against a violation in the state and bar EPA action if the states takes “appropriate” enforcement action against the violation;<sup>72</sup> (5) bar EPA from taking some enforcement actions against a violation if EPA or the state has taken specific enforcement actions against the violation;<sup>73</sup> and (6) bar EPA from taking any enforcement action against a violation if the state has taken “appropriate” action.<sup>74</sup> States have similar arsenals of enforcement remedies in their statutes.

The legislative history of the EPA enforcement provisions emphasizes the relative enforcement roles of EPA and states in particular statutes.<sup>75</sup> While this history sheds little direct light on how Congress intended the preclusions to be applied, it does make clear that it intended the preclusions to achieve in the enforcement arena the federalist balances it struck in the different statutes.<sup>76</sup>

### C. Citizen Enforcement Provisions and Their Preclusions

All but one of the major statutes provide for citizen enforcement<sup>77</sup> (CAA § 304,<sup>78</sup> CWA § 505,<sup>79</sup> RCRA § 7002,<sup>80</sup> CERCLA § 310,<sup>81</sup> TSCA

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<sup>69</sup> TSCA, 15 U.S.C. §§ 2615 & 2647 (2000).

<sup>70</sup> CAA, 42 U.S.C. § 7413(a)(3) & (4) (2000) (enforcement against *federally* developed requirements).

<sup>71</sup> *Id.* § 7413(a)(2) (enforcement against *state* developed requirements).

<sup>72</sup> SDWA, 42 U.S.C. §§ 300g-3(a) & 300h-2(a) (2000).

<sup>73</sup> CWA, 33 U.S.C. § 1319(g) (2000).

<sup>74</sup> FIFRA, 7 U.S.C. § 136w-1(a) (2000).

<sup>75</sup> For an articulation of the roles of the federal and state governments in enforcement in the CAA, see S. REP. NO. 91-1196, at 21–22 (1970), *reprinted in* 1 A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1970 (hereinafter “CAA LEGISLATIVE HISTORY”), at 401, 421–22; and in CWA, see S. REP. NO. 92-414, at 73–74 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3735–39.

<sup>76</sup> *Id.*

<sup>77</sup> See *supra* note 50.

<sup>78</sup> 42 U.S.C. § 7604 (2000).

<sup>79</sup> 33 U.S.C. § 1365 (2000).

<sup>80</sup> 42 U.S.C. § 6972 (2000).

<sup>81</sup> *Id.* § 9659 (2000).

§ 20,<sup>82</sup> SDWA § 1419,<sup>83</sup> MPRSA § 105(g),<sup>84</sup> and EPKRA § 326).<sup>85</sup> They authorize citizens to sue EPA for failing to perform a duty mandated by the statute (a statutory mandamus action) and to sue violating members of the regulated public. While all three elements of the preclusion apply to citizen suits against members of the regulated public, only the first two apply to citizen mandamus actions against EPA. All of the statutes authorize courts to issue injunctions requiring members of the regulated public to comply with statutory requirements and most, but not all, authorize courts to assess civil penalties against the violators.<sup>86</sup> RCRA authorizes citizen suits to abate imminent and substantial endangerments, akin to a statutory common law of public nuisance action,<sup>87</sup> and authorizes citizen enforcement for some violations in which EPA lacks authority to enforce.<sup>88</sup> While the statutes provide a narrower range of remedies to citizens than to EPA, the difference results almost entirely from the administrative and criminal enforcement mechanisms granted to EPA and not to citizens: enforcement mechanisms that, by their very nature, are available only to the government.

### 1. Statutory Bars in Citizen Suit Provisions

The citizen suit provisions of the various environmental statutes are modeled on CAA § 304.<sup>89</sup> Indeed, the citizen suit provisions in the differ-

<sup>82</sup> 15 U.S.C. § 2619 (2000).

<sup>83</sup> 42 U.S.C. § 300j-8 (2000).

<sup>84</sup> 33 U.S.C. § 1415(g) (2000).

<sup>85</sup> 42 U.S.C. § 11046 (2000).

<sup>86</sup> See, e.g., CWA, 33 U.S.C. § 1365(a) (2000). See also MPRSA, 33 U.S.C. § 1415(g)(1) & (g)(4) (2000).

<sup>87</sup> RCRA, 42 U.S.C. § 6972(a)(1)(B) (2000).

<sup>88</sup> RCRA § 7002(a)(1)(A), 42 U.S.C. § 6972(a)(1)(A) (2000) authorizes citizens to enforce against violations of this “act,” i.e., all of RCRA. This includes violations of Subchapter IV (as encoded, Subchapter D as enacted), encouraging states to establish programs to control the disposal of non-hazardous solid waste to meet EPA established standards. See *Ashoff v. City of Ukiah*, 130 F.3d 409 (9th Cir. 1997). EPA lacks such authority except in limited circumstances. RCRA, 42 U.S.C. § 6945(c)(2)(A) (2000). EPA’s general enforcement authority in § 3008, 42 U.S.C. § 6928 (2000), extends only to violations of Subchapter III (as encoded, Subchapter C as enacted) of RCRA.

<sup>89</sup> 42 U.S.C. § 7604 (2000). Both the House and Senate Reports on the CWA, for example, acknowledge the provision’s origin in the CAA. CWA § 505, 33 U.S.C. § 1365 (2000) is “modeled on the provision enacted in the Clean Air Act Amendments of 1970,” S. REP. NO. 92-414, at 79 (1971), reprinted in 1972 U.S.C.C.A.N. 3668, 3745. The section “closely follows the concepts utilized in section 304 of the Clean Air Act.” H. REP. NO. 92-911, at 133 (1972), reprinted in CWA LEGISLATIVE HISTORY, at 753, 820 (1973). Indeed, they are so alike that the Senate Report on the CWA’s citizen suit provision follows the Senate Report on the CAA’s citizen suit provision almost paragraph by paragraph and word for word. Compare S. REP. NO. 91-1196, at 36–39 (1970), reprinted CAA LEGISLATIVE HISTORY, at 401, 436–39 (1974) with S. REP. NO. 92-414, at 79–82 (1971), reprinted in 2 CWA LEGISLATIVE HISTORY, at 1415, 1497–1500 (1973). This is particularly significant because the provision in the CAA originated in the Senate bill, with no counterpart in the House bill. H.R. CONF. REP. NO. 91-1783, at 55 (1970), reprinted in 1970 U.S.C.C.A.N. 5374, 5388.

ent statutes are so nearly alike that courts commonly interpret one of them by comparing and contrasting its wording with the wordings of others and by using legislative history and precedent from the others.<sup>90</sup> Section 304 of the CAA contains the preclusion device with notice, delay, and bar elements in forms followed closely by the citizen suit provisions in the other statutes. It provides that:

No action may be commenced . . .  
 . . . prior to 60 days after plaintiff has given notice of the violation [to EPA, the state and the violator] . . . or  
 if [EPA or the state] has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the standard, limitation, or order [sought to be enforced by the citizen]. . . .<sup>91</sup>

Under the notice and delay elements, citizens must give the government the first opportunity to sue in court.<sup>92</sup> Under the bar element, citizens may not sue if the government has filed an action to require compliance and is diligently prosecuting it. If the federal government takes such a preclusive action in federal court, however, a citizen may intervene as a matter of right.<sup>93</sup> The citizen suit provisions in the other statutes share these fea-

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<sup>90</sup> See *Dep't of Energy v. Ohio*, 503 U.S. at 615 (treating the CAA and RCRA citizen suit provisions alike); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 57 (1987) (comparing wording of CWA provisions to citizen suit provisions of several other statutes); *Hallstrom v. Tillamook County*, 844 F.2d 598, 600 (9th Cir. 1987), *aff'd* 493 U.S. 20 (1989) (comparing the citizen suit provisions of the CAA and RCRA); *Friends of the Earth v. Consol. Rail Corp.*, 768 F.2d 57, 63 (2d Cir. 1985) (employing CAA citizen suit provision legislative history to interpret CWA citizen suit provision); *NRDC v. Train*, 510 F.2d 692, 702 n.55 (D.C. Cir. 1975) (employing CAA citizen suit provision legislative history to interpret CWA citizen suit provision); *Vernon Village, Inc. v. Gottier*, 755 F. Supp. 1142 (D. Conn. 1990) (interpreting SDWA citizen suit provision); *SPIRG of N.J., Inc. v. Fritzsche, Dodge & Olcott, Inc.* 579 F. Supp. 1528, 1534 (D.N.J. 1984), *aff'd* 759 F.2d 1131 (3d Cir. 1983). *United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968, 981-82 (2d Cir. 1982) (comparing the wording of citizen suit sections in the CAA, CWA, and RCRA).

<sup>91</sup> CAA § 304, 42 U.S.C. § 7604(b)(1) (2000).

<sup>92</sup> A few variations on the notice and delay provision should be noted. All of the statutes require that citizens give notice to EPA before suing it for failure to perform a mandatory duty. Although most of the statutes require a sixty-day post-notice delay before a citizen may file suit against a violating polluter, RCRA, 42 U.S.C. § 6972(b)(2)(A) (2000), requires citizens to give EPA a ninety-day post-notice delay before they may file a suit to abate an imminent and substantial endangerment. On the other hand, many of the statutes do not require a post-notice delay period before citizens may sue for particular violations, often associated with hazardous substances, although prior notice must still be given. RCRA, 42 U.S.C. § 6972(b)(2) (2000), for instance, requires prior notice but no delay period for citizens filing complaints alleging violations of Subchapter III (as encoded, Subchapter C as enacted), regulating the treatment, storage and disposal of hazardous waste. See also CWA, 33 U.S.C. § 1365(b) (2000); CAA, 42 U.S.C. § 7604(b) (2000).

<sup>93</sup> See CAA, 42 U.S.C. § 7604(b)(1)(B) (2000). Most of the citizen suit provisions, like CAA § 304, 42 U.S.C. § 7604 (2000), allow "any person" to intervene. CWA, 33 U.S.C.

tures; indeed, the “has commenced and is diligently prosecuting” language in the bar element is identical in most of them.<sup>94</sup>

There are, however, four variations among the bar elements of the preclusion device in the citizen suit provisions. First, the citizen suit provisions of statutes not envisioning a state implementation role do not bar citizen suits because of a state action.<sup>95</sup> Second, several of the citizen suit provisions bar citizen suits when EPA has commenced and is diligently prosecuting a criminal action.<sup>96</sup> Third, some citizen suit provisions bar citizen suits if EPA has commenced assessing an administrative penalty<sup>97</sup> or has commenced and is diligently prosecuting the assessment of an administrative penalty.<sup>98</sup> Finally, RCRA bars some citizen suits if EPA or states have commenced one of a variety of judicial or administrative remedial actions under either RCRA or CERCLA.<sup>99</sup>

CERCLA § 113(h)<sup>100</sup> precludes citizen suits challenging that a CERCLA remedial action violates the statute, as long as the remedial action “is [yet] to be undertaken.” But this precludes an action for judicial review of final EPA actions, rather than an action for enforcement against violations by the regulated public. It is also a postponement of judicial review rather than a preclusion of it. Thus it is not the sort of preclusion addressed in this Article. It does demonstrate, however, that when Congress intends to include a different sort of preclusion, it does so explicitly, not inferentially.

This examination of preclusions in citizen suit provisions would be purely academic if citizens rarely used the provisions. While this Article cites more than one hundred twenty-five reported decisions in citizen suit cases, reliable statistics on the number of citizen suits filed are hard to develop. The first empirical evaluation of the conduct and results of citi-

§ 1365(b)(1)(B) (2000); SDWA, 42 U.S.C. § 300j-8(b)(1)(B) (2000); RCRA, 42 U.S.C. § 6972(b)(1) (2000). EPCKRA § 326(h)(2), 42 U.S.C. § 11046(h)(2) (2000), however, qualifies those who may intervene, and TSCA § 20(b)(1)(B), 15 U.S.C. § 2619(b)(1)(B) (2000), allows only those parties to intervene who have given notice of citizen suit before the government filed suit.

<sup>94</sup> Except as noted in the text below, it is identical in the CWA, 33 U.S.C. § 1365(b)(1)(B) (2000); RCRA, 42 U.S.C. § 6972(b)(1)(B) (2000); SDWA, 42 U.S.C. § 300j-8(b)(1)(B) (2000); TSCA, 15 U.S.C. § 2619(b)(1)(B) (2000); and EPCKRA, 42 U.S.C. § 11046(e) (2000).

<sup>95</sup> See, e.g., TSCA, 15 U.S.C. § 2619(b)(1)(B) (2000); EPCKRA, 42 U.S.C. § 11046(e) (2000); MPRSA, 33 U.S.C. § 1415(g)(2) (2000).

<sup>96</sup> See, e.g., CWA, 33 U.S.C. § 1365(b)(1)(B) (2000); RCRA, 42 U.S.C. § 6972(b)(1)(B) (2000); MPRSA, 33 U.S.C. § 1415(g)(1)(D) (2000). See also Endangered Species Act (“ESA”), 16 U.S.C. § 1540(g)(2)(A)(iii) (2000).

<sup>97</sup> See, e.g., MPRSA, 33 U.S.C. § 1415(g)(2)(C) (2000). See also ESA, 16 U.S.C. § 1540(g)(2)(A)(ii) (2000).

<sup>98</sup> See, e.g., TSCA, 15 U.S.C. § 2619(b)(1)(B) (2000); EPCKRA, 42 U.S.C. § 11046(e) (2000). The CWA includes a bar on EPA and citizen suits for penalties when EPA or a state has commenced and is diligently prosecuting the assessment of an administrative penalty or has assessed and collected such a penalty. 33 U.S.C. § 1319(g)(6) (2000).

<sup>99</sup> RCRA, 42 U.S.C. § 6972(b)(2) (2000).

<sup>100</sup> 42 U.S.C. § 9613(h) (2000).

zen suits noted that no-one kept comprehensive files of citizen suits, making it difficult or impossible to compile complete statistics on them.<sup>101</sup> Based primarily on interviews, the study determined that up to 100 citizen suits a year were filed in the early 1980s. Congress subsequently amended the citizen suit provisions of some of the statutes, requiring that citizen plaintiffs serve EPA and the Department of Justice (“DOJ”) with copies of complaints and proposed settlements, making it easier to compile statistics on them. A recent survey of citizen suits based on copies of complaints on file with the DOJ concluded that citizen suit filings averaged less than fifty cases a year from 1987 to 2000.<sup>102</sup> That is inherently an underestimate, however, for only some of the statutes require citizens to furnish copies of complaints to the government.<sup>103</sup> Indeed, another survey reported that citizen suit filings averaged over 100 a year over the same period.<sup>104</sup> In any event enough citizen suits are filed to seriously annoy the regulated community and to convince the authorizing committee in the Senate of their value.<sup>105</sup>

## 2. Legislative History

The legislative history indicates the overriding intent of Congress in authorizing citizen suits was to provide for both more frequent and effective enforcement and to provide for citizen participation in enforcement. Congress reasoned that citizen enforcement would both prod the government to enforce and enable others to enforce when the government failed to do so. Qualifying that purpose was a desire to assure that citizen enforcement did not unduly duplicate, disrupt, or conflict with government enforcement or harass violators. Because the citizen suit provisions are modeled upon CAA § 304, courts commonly cite the legislative history of that section to determine the legislative intent of citizen suits under subsequently enacted statutes.<sup>106</sup> Examination of the statutory preclusions in citizen suits therefore begins with the legislative history of CAA

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<sup>101</sup> ENVTL. LAW INST., AN ANALYSIS OF CITIZEN ENFORCEMENT UNDER EPA-ADMINISTERED STATUTES, II-1 to 7 (1984).

<sup>102</sup> Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1, 156 (2002).

<sup>103</sup> Compare CAA, 42 U.S.C. § 7604(c)(3) (2000), and CWA, 33 U.S.C. § 1365(c)(3) (2000) (both requiring such measures), with RCRA, 42 U.S.C. § 6972 (2000), and CERCLA, 42 U.S.C. § 9659 (2000) (not requiring so).

<sup>104</sup> James R. May, *Now More than Ever: Trends in Environmental Citizen Suits at 30*, 10 WIDENER L. REV. 1, 24 tbl. 4 (2003).

<sup>105</sup> A later Senate Committee Report commented: “Citizen suits are a proven enforcement tool. They operate as Congress intended to both spur and supplement to government actions. They have deterred violators and achieved significant compliance gains. In the past two years, the number of citizen suits to enforce [CWA] permits has surged so that such suits now constitute a substantial portion of all enforcement under this Act.” S. REP. NO. 99-50, at 28 (1985).

<sup>106</sup> See *supra* notes 89–90.

§ 304 and proceeds to the legislative histories of citizen suit provisions in other statutes.

This is particularly significant because the provision in the CAA originated in the Senate bill, with no counterpart in the House bill.<sup>107</sup> The legislative history of the citizen suit provision, therefore, is largely, but not entirely, contained in the evolution of the section in successive drafts of the Senate bill, in the Senate debates, Senate Committee Report, and the Conference Committee Report. The history does not appear particularly contentious, but the CAA was enacted during days when Congress was marked by comparative civility. The early 1970s were an era of bipartisanship on environmental legislation, and efforts were made on both sides of the aisle to promote such spirit.<sup>108</sup> Both chambers considered the citizen suit provision an expansion into the enforcement arena of the opportunities for citizen participation that characterized the revitalized environmental legislation.<sup>109</sup>

The sponsors of the bill and proponents of the citizen suit provision, mostly Democrats, justified it as an antidote to previously unambitious enforcement by the executive branch and states. “Government initiative in seeking enforcement under the Clean Air Act has been restrained. Authorizing citizens to bring suits for violations . . . should motivate governmental . . . enforcement and abatement proceedings.”<sup>110</sup> This, of course, impugned the environmental bona fides of the administration, which was Republican at the time. In an apparent effort to promote bipartisanship,<sup>111</sup> the sponsors changed their emphasis: “I think it is too much to presume that, however well staffed or well intentioned these enforcement agencies, they will be able to monitor the potential violations” of all the requirements of the statute, making citizen suits a default enforcement mecha-

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<sup>107</sup> H.R. CONF. REP. NO. 91-1783, at 55 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5374, 5388.

<sup>108</sup> Senator Scott, a Republican, heralded the CAA as representing “the highest form of non partisan political cooperation.” 116 CONG. REC. 33,101 (1970), *reprinted in* CAA LEGISLATIVE HISTORY, at 223, 349 (1974).

<sup>109</sup> The Senate Report stated the CAA citizen suit provision “would provide citizen participation in the enforcement of standards and regulations under this Act.” S. REP. NO. 91-1196, at 36 (1970), *reprinted in* CAA LEGISLATIVE HISTORY, at 401, 436 (1974). Senator Muskie, the chief sponsor of the legislation commented, “the bill extended the concept of public participation to the enforcement process.” 116 CONG. REC. 42,382 (1970). Senator Cooper commented, “The committee bill also breaks new ground in extending public participation, an essential element throughout the act, to enforcement proceedings.” 116 CONG. REC. 33,117 (1970). This is echoed in the House Report on CWA § 505, in which the public participation provisions of the statute are described as being prompted by public frustration at feeling excluded from the administrative process in earlier pollution control regulation. *See* CWA LEGISLATIVE HISTORY at 753, 821.

<sup>110</sup> S. REP. NO. 91-1196, at 37 (1970), *reprinted in* 1 CAA LEGISLATIVE HISTORY, at 401, 436–47 (1974).

<sup>111</sup> Senator Hruska included in the record a memorandum from his staff that complained bitterly that “[n]ever before in the history of the United States has the Congress proceeded on the assumption that the Executive Branch will not carry out the Congressional mandate.” 116 CONG. REC. 32,925 (1970).

nism when the government lacks the resources to enforce.<sup>112</sup> Despite this changing emphasis, it is clear throughout the legislative history that a major goal of the provision was to encourage government enforcement.<sup>113</sup> Under either rationale, the chief purpose of the provision was to provide a new enforcement tool, in the hopes of more and better enforcement overall.<sup>114</sup> Indeed, the Senate Reports for both the CAA and CWA emphasized that in bringing such actions “citizens would be performing a public service.”<sup>115</sup>

Opponents of CAA § 304 were generally restrained. They did speculate that plaintiffs would bring vexatious lawsuits against industry to get attorney fee awards and that multiple citizen suits against EPA would dissipate agency resources and divert its attention from its appointed tasks.<sup>116</sup> But they worried more about “burdening the [already overcrowded] courts with a large number of lawsuits.”<sup>117</sup> Reflecting these concerns, the Conference Committee strengthened the preclusion by extending the delay period from thirty to sixty days and adding the bar element, and amended the attorney fee provision to allow an award to defendants as well as plaintiffs, when appropriate.<sup>118</sup>

Congress intended citizen suits as a goad to government enforcement. The very purpose of the notice requirement was to “prod” or “trigger”

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<sup>112</sup> 116 CONG. REC. 32,927 (1970) (statement of Sen. Muskie). Senator Hart concurred: “[The] Government simply is not equipped to take court action against the numerous violations of legislation of this type which are likely to occur . . . we will find very likely noncompliance which in number or degree are far beyond the capacity of the Government to respond to.” *Id.* at 33,104. Senator Hart later noted, “The burden on the Department of Justice is so great that the agency cannot respond to it.” *Id.* at 33,105.

<sup>113</sup> That was the case with the original Senate bill, which required only thirty days prior notice and had no enforcement bar if the government did commence suit. S. 4358, 91st Cong. (1970). The Senate Report accompanying this bill stated that “[a]uthorizing citizens to bring suits . . . should motivate governmental agencies . . . to bring enforcement and abatement proceedings.” S. REP. NO. 91-1196, at 36-37 (1970), reprinted in CAA LEGISLATIVE HISTORY, at 401, 436-37 (1974). The thirty-day notice requirement was intended to “further encourage and provide for agency enforcement” by giving the government agency “an opportunity to act on the alleged violation.” *Id.* at 37, 437. And it was the rationale for expanding the required notice to sixty days and imposing a bar on citizen suits if the government did enforce within that period. “[T]o further encourage and provide for agency enforcement, the Committee has added” the notice and delay requirement. *Id.* Senator Muskie commented that the notice might “trigger” administrative action. 116 CONG. REC. 32,927 (1970). Senator Hart commented that the notice would have the “effect of prodding” government enforcement. *Id.* at 33,104.

<sup>114</sup> “Citizens can be a useful instrument for detecting violations and bringing them to the attention of the enforcement agencies and courts alike.” 116 CONG. REC. 32,927 (1970) (statement of Sen. Muskie). “Although the Senate did not advocate these suits as the best way to achieve enforcement, it was clear that they should be an effective tool.” *Id.* at 42,382.

<sup>115</sup> S. REP. NO. 91-1196, at 38 (1970), reprinted in CAA LEGISLATIVE HISTORY, at 401, 438 (1974); S. REP. NO. 92-414, at 81 (1971), reprinted in 1972 U.S.C.C.A.N. 3668, 3747.

<sup>116</sup> 116 CONG. REC. 32,924 (1970) (statement of Sen. Hruska).

<sup>117</sup> *Id.*

<sup>118</sup> See legislative history cited *supra* in note 113.

government enforcement.<sup>119</sup> But for some violations, although the provisions require citizens to give notice, they do not require a delay period before citizens may file their complaints.<sup>120</sup> Under those circumstances, the citizen suit notice is not likely to prod government enforcement.

The legislative history also emphasizes that not all government enforcement actions will bar a citizen suit. “[I]f the citizen believed efforts initiated by the agency to be inadequate, the citizen might choose to file the action . . . [I]f the court viewed the agency action as inadequate, it would have jurisdiction to consider the citizen action notwithstanding the pending agency action.”<sup>121</sup> If an agency does commence enforcement actions during the delay period, it “must prosecute them in good faith and with deliberate speed . . . or the citizen is free to initiate his action.”<sup>122</sup> This indicates congressional intent that the preclusions not eliminate all successive enforcement by citizens.<sup>123</sup> Finally, at least one citizen suit provision authorizes citizens to enforce against violations that the federal government has no authority to enforce against.<sup>124</sup>

The legislative history of CWA § 505 is similar to that of the CAA. Indeed, the Senate CWA Report commentary followed the Senate CAA Report almost paragraph-by-paragraph and line-by-line.<sup>125</sup> It added, “[i]t is the Committee’s intent that . . . citizens should be unconstrained to bring these actions, and that the courts should not hesitate to consider them.”<sup>126</sup> The legislative history of the CWA provision also anointed a citizen en-

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<sup>119</sup> See *supra* note 113. The delay between the citizen’s notice and when the citizen can file suit should give the government enforcer “an opportunity to act on the alleged violation.” S. REP. NO. 91-1196, at 36 (1970), *reprinted in* 1 CAA LEGISLATIVE HISTORY, at 401, 436 (1974).

<sup>120</sup> See *supra* notes 27–28.

<sup>121</sup> S. REP. NO. 91-1196, at 37 (1970), *reprinted in* 1 CAA LEGISLATIVE HISTORY, at 401, 437 (1974). It can be argued this is not a good mirror of legislative intent because it was written before the Conference Committee added the bar element to the preclusion in CAA § 304, 42 U.S.C. § 7604 (2000). But the same language appears in the Senate Report on CWA § 505, see *infra* note 125, accompanying a Senate bill that included the bar, making it reflective of the Senate’s view, with or without the bar.

<sup>122</sup> S. REP. NO. 91-1196, at 65 (1970), *reprinted in* 1 CAA LEGISLATIVE HISTORY, at 401, 465 (1974).

<sup>123</sup> Successive enforcement actions are contemplated in several situations: if the government action was commenced after the citizen suit; if the government action is not being diligently prosecuted; and if, under some statutes, the government action is not in court.

<sup>124</sup> RCRA § 7002(a)(1)(A), 42 U.S.C. § 6972(a)(1)(A) (2000), gives citizens authority to enforce against violations of any standard, prohibition, or requirement of the statute, including standards, prohibitions, and requirements of RCRA Subchapter IV (as encoded, Subchapter D as enacted) regulating disposal of non-hazardous solid waste. RCRA § 3008, 42 U.S.C. § 6928 (2000), authorizes EPA to enforce against violations of Subchapter III (as encoded, Subchapter C as enacted), regulating hazardous waste disposal, but only limited power to enforce Subchapter IV (as encoded, Subchapter D as enacted). 42 U.S.C. § 6945(c)(2) (2000).

<sup>125</sup> Compare S. REP. NO. 91-1196, at 36–39 (1970), *reprinted in* 1 CAA LEGISLATIVE HISTORY, at 401, 436–39 (1974), with S. REP. NO. 92-414, at 79–82 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3744–47.

<sup>126</sup> S. REP. NO. 92-414 at 78 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3743.

forcer as a "private attorney general," believing that the citizen suit provision "provides an open door for those who have legitimate interests in the courts, and encourages more meaningful participation in the administrative processes."<sup>127</sup> There is some evidence in the legislative history that Congress was aware that the citizen suit provisions were enacted against a backdrop of common law preclusions and intended the statutory and some common law preclusions to apply in an integrated fashion.<sup>128</sup>

Others have commented that the legislative history of the provisions is in conflict, on the one hand expansive, favoring citizen enforcement, and on the other hand restrictive, fearing it.<sup>129</sup> But the legislative history is more complex. It suggests Congress did not have a single intent in enacting the citizen suit provisions, but that it intended the provisions to serve several purposes. One clear purpose was to be a vehicle for citizen participation in government, with broader goals of providing transparency and openness in government, in turn promoting public ownership of and trust in government. Another was to assure compliance with environmental statutes by encouraging government enforcement and providing default enforcers when the government chose not to enforce or lacked the resources to do so. Indeed, Congress came to see citizen suits as an effective tool in that regard, one performing a substantial role in the total enforcement effort. It admonished courts to be receptive to citizen suits, recognizing that citizen enforcers performed a public service. Qualifying these purposes was the congressional desire that citizen suits not unduly duplicate, interfere or conflict with government actions or unduly harass violators.

Congress reconciled any conflict between its desire to promote citizen enforcement and its desire that citizen suits not unduly duplicate, interfere, or conflict with government actions in the preclusion device. Courts' elevation of the qualification that citizen suits not unduly duplicate, interfere, or conflict with government actions from its status as a limited con-

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<sup>127</sup> H.R. REP. NO. 92-911, at 134 (1972), reprinted in 1 CWA LEGISLATIVE HISTORY, at 753, 821 (1973).

<sup>128</sup> Commenting on the citizen suit provision, Rep. Reuss and ten other congressmen observed,

We are confident that the courts would be alert to invoke the doctrine of laches in the rare case where a group, despite ample notice and opportunity to prepare and participate in adequate administrative proceedings, nevertheless deliberately stayed out of those proceedings and immediately endeavored to use the judicial process for purposes of delay. The bill need and should not limit the right of all citizens and groups to obtain judicial relief, merely in order to deal with this remote problem, if it, indeed, exists.

*Id.* at 409, 878.

<sup>129</sup> Robert D. Snook, *Environmental Citizen Suits and Administrative Discretion: When Should Government Enforcement Bar a Citizen Suit?*, NAT'L ENVTL. ENFORCEMENT J. 3, 4-6 (1995).

gressional afterthought to a dominant intent ignores the very purpose of the provisions.

*D. An Anomaly: CWA § 309(g)*

Congress added § 309(g)<sup>130</sup> to the CWA in 1987, authorizing EPA to assess administrative penalties against violators of the statute. It was one of three amendments intended to strengthen the EPA enforcement provision.<sup>131</sup> The authority was a limited one, however. Whereas CWA § 309(d)<sup>132</sup> authorizes courts to assess penalties of up to \$25,000 for each violation per day with no upper limit on the total penalty, § 309(g) authorizes EPA to assess total penalties of only \$25,000 or \$125,000, regardless of how many violations or days of violations are charged, depending on the formality of the administrative process EPA uses.<sup>133</sup> To prevent duplicative penalties for the same violations, Congress included a variation of the preclusion device, providing that “any violation . . . shall not be the subject of a civil penalty action” by EPA or a citizen if

- (i) . . . [EPA] has commenced and is diligently prosecuting an action under this subsection,
- (ii) . . . a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection, or
- (iii) . . . [EPA or a State] has issued a final order . . . and the violator has paid a penalty under this subsection, or such comparable State law . . .<sup>134</sup>

The preclusion does not apply, however, if a citizen files an enforcement action before commencement of “an action under [§ 309(g)]” or serves a notice of violation prior to that time and commences a citizen suit less than 120 days thereafter.<sup>135</sup>

The subsection contains a version of the preclusion device found in EPA and citizen enforcement provisions throughout the statutes. Many of the terms it uses in the bar element are identical to terms used in the other provisions, such as “is diligently prosecuting.”<sup>136</sup> But the context in which it

<sup>130</sup> 33 U.S.C. § 1319(g) (2000).

<sup>131</sup> Water Quality Act, Pub. L. No. 100-4, §§ 312–14, § 309, 101 Stat. 7, 42–46 (1987). The amendment also increased the amounts of civil penalties courts may assess and added a new and severe criminal sanction for knowing violations placing people in danger of serious injury.

<sup>132</sup> 33 U.S.C. § 1319(d) (2000).

<sup>133</sup> CWA, 33 U.S.C. § 1319(d) & (g) (2000).

<sup>134</sup> *Id.* § 1319(g)(6)(A). EPA may assess penalties using informal proceedings, with a cap of \$25,000, or using formal APA proceedings, with a cap of \$125,000.

<sup>135</sup> *Id.* § 1319(g)(6)(B).

<sup>136</sup> Compare CWA, 33 U.S.C. §§ 1319(g)(6)(A)(i) & (ii) (2000), with CWA, 33 U.S.C. § 1365(b)(1)(B) (2000).

uses those terms calls for somewhat different interpretation. Indeed, the Supreme Court has suggested that wording in § 309(g) that differs from wording in the citizen suit sections warrants a different interpretation.<sup>137</sup> One important difference is that while the citizen suit sections couple “is diligently prosecuting” with “to require compliance,” CWA § 309(g) does not. This difference is not surprising, for the citizen suit provisions authorize courts to issue compliance injunctions, while § 309(g) authorizes EPA only to assess modest penalties.

The legislative history of § 309(g) emphasizes that EPA is to use the administrative penalty authority for minor violations not warranting serious enforcement efforts.<sup>138</sup> It recounts that Congress built explicit citizen participation authorities into the § 309(g) penalty assessment process, including intervention and judicial review, to assure that EPA did not misuse the provision.<sup>139</sup> Congress’s fear of misuse was not that EPA would assess excessive penalties, but that it would assess minor penalties for serious violations more appropriate for injunctive relief and large penalties.<sup>140</sup> The legislative history indicated the purpose of the § 309(g) preclusion was to prevent the assessment of duplicative penalties for the same violation, with no mention of preserving the government’s authority to enforce without the hindrance of a simultaneous citizen suit.<sup>141</sup> That is in great contrast to the purpose of the preclusion in the citizen suit provisions, enunciated in their legislative history, to preserve the government’s authority to do just that.<sup>142</sup> The very different purposes served by the preclusion in CWA § 309(g) and in the citizen suit sections suggests that they should be interpreted somewhat differently and that interpretations of the § 309(g) preclusion not be applied uncritically to the preclusions in the citizen suit sections.

## II. INTERPRETING PRECLUSIONS IN CITIZEN SUIT PROVISIONS TO IMPLEMENT THEIR PLAIN MEANINGS

There is considerable literature on citizen suits, with pioneering efforts dating back to the mid-1980s.<sup>143</sup> Some of the more recent literature

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<sup>137</sup> Authorizing citizens to sue those alleged to “be in violation” in CWA § 505(a)(1), 33 U.S.C. § 1365(a)(1) (2000), suggests violations must be ongoing to support a citizen suit, while authorizing EPA to assess penalties against a person who “has violated” in CWA § 309(g)(1), 33 U.S.C. § 1319(g)(1) (2000) “explicitly targets wholly past violations.” *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 50 (1987).

<sup>138</sup> S. REP. NO. 99-50, (1985).

<sup>139</sup> *Id.* at 26–27.

<sup>140</sup> *Id.* Two thirds of the Report’s discussion of § 309(g) is devoted to this concern.

<sup>141</sup> *Id.* at 28.

<sup>142</sup> *See supra* Part I.B.2.

<sup>143</sup> *See generally* Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits under Federal Environmental Laws*, 34 *BUFF. L. REV.* 833 (1985); Jeffrey G. Miller, *Private Enforcement of Federal Pollution Control Law*, (pts. 1–3), 13 *ENVTL. L. REP.* 10,309 (1983), 14 *ENVTL. L. REP.* 10,062 (1984), 14 *ENVTL. L. REP.* 10,407 (1984). Treatises on environmental law commonly devote considerable attention to citizen suits, e.g., WILLIAM H. RODGERS, *ENVIRONMENTAL LAW: HAZARDOUS*

focuses on the statutory bars to citizen suits generally, although much of it focuses on the statutory bars in CWA §§ 309(g) and 505.<sup>144</sup> None of it attempts a unified interpretation of the preclusions in citizen suit provisions, much less an integrated interpretation of the preclusions in the citizen suit and EPA enforcement provisions. None of it notices the theme and variations nature of the preclusion device, which underlies the unified integrated interpretation advocated in this Article.

A cursory reading of the bar element suggests that it raises a single legal question: what is diligent prosecution? A careful reading of the element, however, reveals that it raises five major issues: (1) What government entities may act to bar a citizen suit? (2) What government actions may bar a citizen suit? (3) When must the government commence an action to bar a citizen suit? (4) How diligently must the government prosecute an action to bar a citizen suit? (5) What citizen suits may a government action bar? Each of these questions raises subsidiary issues.

The provisions answer most of these questions directly and explicitly. Indeed, Congress did a remarkably good job drafting the citizen suit sections and their preclusion provisions. The provisions specify the government entities that may act to bar citizen suits, the government actions that may bar citizen suits, and that the government must commence one of those actions before the citizen commences suit for the government action to bar the citizen suit. They don't define "diligently prosecuting," but they illuminate its meaning by linking it to compliance. Finally, they specify that government actions may bar citizen suits to the extent both

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WASTES AND SUBSTANCES (West, 2003 update). There have been at least two treatises on citizen suits. MICHAEL AXLINE, ENVIRONMENTAL CITIZEN SUITS (3d ed. 1993); JEFFREY G. MILLER & ENVTL. L. INST., CITIZEN SUITS: PRIVATE ENFORCEMENT OF FEDERAL POLLUTION CONTROL LAWS (1987).

<sup>144</sup> See generally Peter A. Appel, *The Diligent Prosecution Bar to Citizen Suits: The Search for Adequate Representation*, 10 WIDENER L. REV. 91 (2003); Matthew D. Zinn, *Policing Environmental Regulatory Enforcement: Cooperation, Capture, and Citizen Suits*, 21 STAN. ENVTL. L.J. 81 (2002) (giving a particularly good theoretical analysis of citizen suits as an antidote to the capture of government enforcement by regulated industry); Jonathan H. Adler, *Stand or Deliver: Citizen Suits, Standing and Environmental Protection*, 12 DUKE ENV'T L. & POL'Y F. 39 (2001) (questioning the value of citizen suits); Barry S. Neuman & Jeffrey A. Knight, *When Are Clean Water Act Citizen Suits Precluded by Government Enforcement Actions?*, 30 ENVTL. L. REP. 10,111 (2000); Derek Dickinson, Note, *Is "Diligent Prosecution of an Action in a Court" Required to Preempt Citizen Suits Under the Major Federal Environmental Statutes?*, 38 WM. & MARY L. REV. 1545 (1997); Ross Macfarlane & Lori Terry, *Citizen Suits: Impacts on Permitting and Agency Enforcement*, NAT. RESOURCES & ENV'T, Spring 1997, at 20; Heather L. Maples, *Reforming Judicial Interpretation of the Diligent Prosecution Bar: Ensuring an Effective Citizen Role in Achieving the Goals of the Clean Water Act*, 16 VA. ENVTL. L.J. 195 (1996); Steven Russo, *States, Citizens, and the Clean Water Act: State Administrative Enforcement and the Diligent Prosecution Defense*, 4 N.Y.U. ENVTL. L.J. 211 (1995); Randall S. Schipper, Note, *Administrative Preclusion of Environmental Citizen Suits*, 1987 U. ILL. L. REV. 163; Cindi Ann Solomon, Note, *"Lenient" Penalty Is Strong Evidence that a State Enforcement Agency's Prosecution Is Not "Diligent" for Purposes of Section 505 of the Clean Water Act*, 4 S.C. ENVTL. L.J. 58 (1995). See also Snook, *supra* note 129, at 3; Hodas, *supra* note 36, at 1627-32.

actions seek compliance with the same requirements. Thus the plain language of the provisions anticipated and answered the issues arising under the preclusions, except one, and it gave guidance on that issue. Congress's use of the preclusion device with many nuanced variations in both the citizen and EPA enforcement provisions strongly reinforces that Congress meant the words it used in each variation of it to carry its own particular meaning. Most courts interpret the provisions in accordance with their plain language, but some depart greatly from it.

Some violators argue that the possibility of a subsequent citizen suit makes it impossible for an agency to settle an enforcement action with a violator, unless the settlement precludes citizens from suing.<sup>145</sup> That argument is empirically unsound, for violators settle cases daily with federal and state enforcers without knowing whether citizen plaintiffs will subsequently file suits. The argument presupposes that citizen enforcement threatens violators as much as government enforcement, which is not the case. When citizens take action against a violator, they can seek only civil penalties and an injunction. When the government takes action against a violator, it too can seek civil penalties and an injunction, but it can take many other actions, including inspecting the violator frequently and intrusively; revoking or denying permits or making them subject to difficult conditions; criminally prosecuting the violator, its officers, and employees; and barring the violator from government contracts. To believe that violators will not reach administrative and civil settlement with the government because of possible action by citizens is naive in light of the draconian powers the government has over violators who do not settle.

The latter argument implies that the resolution of a citizen suit may detract from the benefits the government achieved from resolving its own enforcement action. This could be true if the resolution of the citizen suit displaced the resolution of the government action, but citizen suit resolution does not do so. Both the government and citizen suit resolve its action by collecting a penalty, and the penalties remain in the Treasury. Thus, if the citizen suit is resolved by the assessment of a penalty, there is simply another deposit into the Treasury, which is doubly enriched. If the government resolved its action by an order for compliance, there is little left for a court to do in a citizen suit other than to enforce the government's resolution. If the government resolved its action by an order for something less than compliance, however, the court in a citizen suit must order compliance. This may take from the violator the benefits of the resolution of the government's action against it, but it takes no such benefits from the government.

In summary, one court considering the contention concluded:

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<sup>145</sup> See Snook, *supra* note 129, at 11; Macfarlane & Terry, *supra* note 144, at 25.

To contend that citizen suits undermine agency enforcement policy is . . . ultimately misleading. Unquestionably, such suits may disturb the course of agency action. But the agency nevertheless remains free to adhere to its own view of the appropriate enforcement policy by continuing to press for an informal resolution and devoting its enforcement resources to other matters. This should hardly be viewed as some sort of deprivation for the agency, since it will usually result from the agency's own determination that the steps necessary to retain enforcement control are not worth the resources required.<sup>146</sup>

#### *A. What Government Entities May Act To Bar a Citizen Suit?*

The provisions may bar citizen suits if the "Administrator or State" has commenced and is diligently prosecuting various enforcement actions. The first issue is what they mean by the "Administrator" and the "State." While the answers appear obvious (Congress meant EPA and each of the fifty states) the reasons for the answers may not be.

##### *1. What "Administrator" May Act To Bar a Citizen Suit?*

The provisions may bar citizen suits when the Administrator has commenced and is diligently prosecuting enforcement actions, usually civil actions and occasionally criminal actions. The statutes define "Administrator" to be the Administrator of EPA.<sup>147</sup> But the general law is that the Attorney General represents the United States in court.<sup>148</sup> Therefore the Administrator does not initiate civil or criminal actions in court, but refers actions to the Attorney General, who may file suit on behalf of the United States; indeed, the statutes provide so explicitly.<sup>149</sup> While a particular environmental statute may authorize EPA attorneys to bring an action if the Attorney General declines to do so,<sup>150</sup> the author is aware of no instance in which they have done so. This practice and the congressional intent that the practice effectuates is emphasized by subsequent legislative history.

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<sup>146</sup> *Gardeski v. Colonial Sand & Stone Co.*, 501 F. Supp. 1159, 1168 (S.D.N.Y. 1980).

<sup>147</sup> TSCA, 15 U.S.C. § 2602(1) (2000); CWA, 33 U.S.C. § 1251(d) (2000); MPRSA, 33 U.S.C. § 1402(a) (2000); SDWA, 42 U.S.C. § 300f(7) (2000); RCRA, 42 U.S.C. § 6903(1) (2000); CAA, 42 U.S.C. § 7602(a) (2000); CERCLA, 42 U.S.C. § 9601(2) (2000); EPCRA, 42 U.S.C. § 11049(1) (2000).

<sup>148</sup> "Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or an officer thereof is a party." 28 U.S.C. § 519 (2000).

<sup>149</sup> TSCA, 15 U.S.C. § 2615(a)(4) (2000); CWA, 33 U.S.C. § 1366 (2000); MPRSA, 33 U.S.C. § 1415(d) (2000); SDWA, 42 U.S.C. § 300j-9(f) (2000); CAA, 42 U.S.C. § 7605 (2000); CERCLA, 42 U.S.C. § 9622(d)(1)(A) (2000).

<sup>150</sup> CWA, 33 U.S.C. § 1366 (2000); MPRSA, 33 U.S.C. § 1415(d) (2000); SDWA, 42 U.S.C. § 300j-9(f) (2000); CAA, 42 U.S.C. § 7605 (2000).

The House passed a bill in 1977 to amend the CAA, adding a provision that would have granted EPA independent litigation authority. The accompanying House Report detailed a litany of EPA complaints about its representation by the DOJ to justify the proposal.<sup>151</sup> The DOJ quickly negotiated and entered into a memorandum of understanding with EPA governing their relationship and the Department's accountability for EPA case referrals. As a result, Congress dropped the proposal from the amendments.<sup>152</sup>

A formal plain meaning interpretation of the citizen suit preclusions limits the preclusion to those cases in which the Administrator or EPA attorneys commence an action. That reading of the provision, however, robs the preclusion of any application to judicial enforcement actions commenced by the federal government under the statutes, for the Attorney General and attorneys from the DOJ commence all such actions. Of course, statutes should be interpreted to give meaning to all parts of them, not to rob them of meaning.<sup>153</sup> Interpreting the provisions to include judicial actions brought by the Administrator *or at his request* solves this problem. While this may not be the rigidly formal reading of the statute, it is consistent with its plain meaning and with the intent of Congress. To the extent that it departs from the literal wording, the departure is justified to avoid the absurd result of effectively eliminating its application to federal enforcement action in court. Although defendants in EPA enforcement actions have raised the issue,<sup>154</sup> the author is unaware of any citizen suit decision in which the issue has been raised.

## 2. What "State" May Act To Bar a Citizen Suit?

The meaning of "State" is not an academic issue, but has arisen in several contexts. The apparently straightforward issues are whether municipalities and Indian tribes are "States" whose enforcement actions may bar citizen suits. A more complicated issue is whether a state lacking an approved program under the statute being enforced is a state whose enforcement actions may bar citizen suits.

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<sup>151</sup> H.R. REP. NO. 95-294, at 332-36 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1411-15.

<sup>152</sup> The Conference Report accompanying the amendments outlines the memorandum of understanding, H.R. CONF. REP. NO. 95-564, at 173-76 (1977) *reprinted in* 1977 U.S.C.C.A.N., 1502, 1554-57. The memorandum is referenced in CAA § 305(b), 33 U.S.C. § 1365(b) (2000).

<sup>153</sup> *See* ESKRIDGE, *supra* note 29, at 324 n.13. (citing *Kungys v. United States*, 485 U.S. 759, 778 (1988); *S. Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 510 n.22 (1986)).

<sup>154</sup> Most courts have rejected the contention that the Attorney General cannot initiate enforcement actions under the statutes. *United States v. REAG* 730 F. Supp. 482 (D. Conn. 1989); *See United States v. Zimmer Paper Prods.*, 733 F. Supp. 1265 (S.D. Ind. 1989); *United States v. Packaging Corp. of America*, 1982 WL 2123 (W.D. Mich.). *See also* FED. R. CIV. P. 17(a). *Contra United States v. Associated Elec. Coop., Inc.*, 503 F. Supp. 92 (E.D. Mo. 1980).

*a. States, Municipalities, and Indian Tribes*

Because municipal agencies often exercise their own enforcement authority over pollution control requirements, defendants in citizen suits have argued that municipal enforcement actions bar citizen suits to the same extent that state enforcement actions bar them. This argument has some appeal. Municipalities are creatures of states and states may invest them with some of the attributes of state authority. Municipal authorities may have a role to play in the enforcement of some of the pollution control statutes.<sup>155</sup> Successive citizen actions have as much potential to interfere with municipal enforcement actions as they have to interfere with state actions.

But both the statutory and plain meanings of “State” and “municipality” are different. The statutes commonly define “person” to include both a “State” and a “municipality.”<sup>156</sup> They also define “State,” however, and those definitions do not include “municipality.”<sup>157</sup> Many of them define “municipality.”<sup>158</sup> These definitions establish that Congress understood that states and municipalities were different entities and did not intend its use of “State” to include a municipality. The words also have different meanings in common usage. A state is “one of the constituent units of a nation having a federal government,” while a “municipality” is “a primarily urban political unit having corporate status and usual powers of self-government.”<sup>159</sup> Further, states are components of our federalist constitutional system, while municipalities are not.<sup>160</sup>

The statutes treat states and municipalities differently as a structural matter as well, regarding states as regulators in EPA’s stead and municipalities as members of the public to be regulated by EPA or states in its stead. Under the CWA, for instance, EPA, or states with EPA-approved programs, issue permits to industrial and municipal pollution sources.<sup>161</sup>

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<sup>155</sup> In the CWA, for example, municipalities are expected to develop and implement programs to regulate discharges by industry into municipal sewage treatment systems. 33 U.S.C. § 1342(b)(8) (2000).

<sup>156</sup> *See id.* § 1362(5).

<sup>157</sup> CWA § 502(3), 33 U.S.C. § 1362(3) (2000), for instance defines “State” as “a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands . . . [and other trust territories].” *See also* SDWA, 42 U.S.C. § 300f(13) (2000); RCRA, 42 U.S.C. § 6904(31) (2000); CAA, 42 U.S.C. § 7602(d) (2000).

<sup>158</sup> CWA § 502(4), 33 U.S.C. § 1362(4) (2000), for instance, provides that “‘municipality’ means a city, town, borough, county, parish, district, association, or other public body created by or pursuant to State law . . . .” *See also* SDWA, 42 U.S.C. § 300f(10) (2000); RCRA, 42 U.S.C. § 6903(13) (2000); and CAA, 42 U.S.C. § 7602(f) (2000).

<sup>159</sup> WEBSTER’S SEVENTH NEW COLLEGIATE DICTIONARY 855, 557 (1999).

<sup>160</sup> Thus, a plaintiff state cannot claim a defendant city is a state for purposes of invoking the Court’s original jurisdiction for suits between states in Article III of the Constitution. In *Milwaukee v. Illinois*, 406 U.S. 91 (1972), the Court declined to exercise its original jurisdiction over suits between states when Illinois sued Milwaukee to abate its pollution of Lake Michigan, because Milwaukee is a municipality not a state.

<sup>161</sup> CWA, 33 U.S.C. § 1342 (2000).

Although municipalities are expected to establish their own regulatory programs governing industrial discharge into sewage treatment systems, the requirements for those municipal programs are established in permits issued by EPA or states in its stead.<sup>162</sup> Nevertheless, some defendants in citizen suits enforcing requirements on industrial discharges into municipal sewage treatment systems have argued that enforcement actions by the municipalities barred the citizen suits. Courts have rightly rejected all of these arguments on plain meaning grounds, without much analysis.<sup>163</sup>

Defendants also have argued that actions by Indian tribes enforcing environmental statutes have the same preclusive effect as enforcement actions taken by states. As a definitional matter, this proposition appears dubious, for the statutes do not include "Indian tribe" within their definitions of "State."<sup>164</sup> Some define "Indian tribe," emphasizing that where the statute provides that a "state" enforcement action may bar a citizen suit, it does not mean an Indian tribe action may do so.<sup>165</sup> Other statutes define "municipality" to include an "Indian tribe," with the same result.<sup>166</sup> Because the definition of "State" does not include a municipality, as discussed above, it does not include an Indian tribe either. The one court to consider the issue, however, held to the contrary under the CWA because CWA § 518(e)<sup>167</sup> authorizes EPA to treat Indian tribes meeting specified criteria as states for particular purposes,<sup>168</sup> as do provisions in other statutes regarding EPA's treatment of Indian tribes.<sup>169</sup> The court relied heavily on correspondence from EPA treating the tribes' action as a state action.<sup>170</sup>

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<sup>162</sup> *Id.* §§ 1317(b) & 1342(b)(8) (2000). *See also* EPA, General Pretreatment Regulations for Existing and New Source of Pollution, 40 CFR §§ 403.1 & 403.4 (2004).

<sup>163</sup> *See, e.g.*, *Atl. States Legal Found., Inc. v. Pan Am. Tanning Corp.*, 993 F.2d 1017, 1022 (2d Cir. 1993); *Ohio PIRG v. Laidlaw Envtl. Servs., Inc.*, 963 F. Supp. 635, 638–39 (S.D. Ohio 1996); *Atl. States Legal Found., Inc. v. Montgomery County N. Reduction Plant*, 1996 WL 1670982, at \*4–\*5. (S.D. Ohio) (not deciding whether a city was a state, but holding that a city's action could not bar a citizen suit under CWA § 309(g), 33 U.S.C. § 1319(g), because the city had no provision for public participation in enforcement); *Ill. PIRG, Inc. v. PMC Specialties Group*, 835 F. Supp. 1070, 1074 (N.D. Ill. 1993); *PIRG of N.J., Inc. v. Top Notch Metal Finishing Co.*, 1987 WL 44393, at \*3 (D.N.J.); *N.Y. PIRG, Inc. v. Limco Mfg. Corp.*, 697 F. Supp. 608, 610 (E.D.N.Y. 1987). *See also* *City of Heath v. Ashland Oil Co.*, 834 F. Supp. 971, 976–77 (S.D. Ohio 1993), and *City of Toledo v. Beazer Materials & Servs., Inc.*, 833 F. Supp. 646 (N.D. Ohio 1993) (both examining a similar question under CERCLA and precedent under that statute). *But see* *Atl. States Legal Found., Inc. v. Eastman Kodak Co.*, 933 F.2d 124, 127 (2d Cir. 1991) (*dicta*).

<sup>164</sup> *See* provisions cited *supra* in notes 156–159.

<sup>165</sup> *See, e.g.*, CAA, 42 U.S.C. § 7602(r) (2000).

<sup>166</sup> CWA, 33 U.S.C. § 1342(4) (2000). *See also* RCRA, 42 U.S.C. § 6903(13) (2000). Because a municipality is a "person" who may be sued under the citizen suit provisions, an Indian tribe is also a person who may be sued under them. This definition therefore waives whatever immunity a tribe may have to suit by citizens for CWA violations. *Atl. States Legal Found., Inc. v. Salt River Pima-Maricopa Indian Cmty.*, 827 F. Supp. 608 (D. Ariz. 1993).

<sup>167</sup> 33 U.S.C. § 1377(e) (2000).

<sup>168</sup> *Atl. States Legal Found., Inc. v. Hamelin*, 182 F. Supp. 2d 235, 244–45 (N.D.N.Y. 2001).

<sup>169</sup> *See, e.g.*, CAA, 42 U.S.C. § 7601(d) (2000).

<sup>170</sup> *Hamelin*, 182 F. Supp. 2d at 245–46 n.14.

The court, however, failed to consider the counterargument, the fact that Congress specifically stated that tribes are to be treated as states for some purposes, implying that it did not intend that tribes be treated as states when it omitted reference to tribes. The treatment of tribes in the statutory definitions strengthens this argument. The court considered neither of these factors, and presumably it would have reached a different conclusion had it done so. The relationship of Indian tribes to states is a complicated one, including consideration of the treaties under which various tribes were accorded their reservations; as a result, the topic is beyond the scope of this Article.

*b. States with Unapproved Programs*

A potentially more common issue is whether actions brought by states without programs approved by EPA to implement a statute may bar citizen suits under that statute. For instance, will action by a state without an approved permit program under the CWA bar a citizen suit to enforce a water pollution permit issued by EPA? Neither the statutory definition nor the plain meaning of “state” is limited to a state with an approved program, suggesting that enforcement actions by states having or lacking EPA-approved programs can bar citizen suits. But the structures of the statutes suggest that enforcement actions by states lacking EPA-approved programs should not bar citizen suits. The citizen suit provisions of statutes contemplating federal rather than state implementation provide merely that federal actions preclude citizen suits.<sup>171</sup> Only statutes contemplating implementation by EPA or states with EPA-approved programs provide that federal or state actions may preclude citizen suits.<sup>172</sup> The latter statutes often provide different constraints on EPA enforcement when it has approved a state program instead of implementing the program itself.<sup>173</sup> These differences in constraints on EPA enforcement suggest that the preclusion triggered by state enforcement should occur only when a state is implementing an approved program. This limitation on the preclusion makes policy sense: when a state agrees to assume the laboring oar in implementing and enforcing a federal program, the state has a stake in the federal program. States not implementing an EPA-approved program, however, have no such stake. It is understandable that an action by EPA or a state with an EPA-approved program may preclude a citizen suit. But why

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<sup>171</sup> See, e.g., TSCA, 15 U.S.C. § 2619(b)(1)(B) (2000).

<sup>172</sup> See, e.g., CWA, 33 U.S.C. § 1365(b)(1)(B) (2000).

<sup>173</sup> See CWA, 33 U.S.C. § 1342(h) (2000) (authorizing EPA to seek a judicial ban on new sewer hookups with municipal sewage treatment systems that are not in compliance with their CWA permits). The authority is unconstrained in states where EPA is administering the permit program, but in states with approved programs, EPA may use the authority only if it determines that the state has not taken “appropriate” action with regard to the permit. *Id.*

would Congress provide that an action by a state may preclude a citizen suit when the state is not implementing an approved program, not assuming the laboring oar in the federal program, not having a stake in the federal program, and, therefore, lacking a motivation to undercut the federal program?

Allowing actions by unapproved states to preclude citizen suits and perhaps EPA enforcement as well appears counter to the structure and policy of the statutes, and could do violence to their implementation.<sup>174</sup> The one time this question was raised in the legislative history of any of the statutes, it was taken as a given that only actions by states with approved programs could preclude further enforcement. Senator John Chaffee, a chief sponsor of the CWA amendments of 1987, which added CWA § 309(g), commented in the Senate debates that the preclusion in § 309(g) “clearly applies only in cases where the state in question has been authorized under section 402 to implement the relevant permit program.”<sup>175</sup> The issue ap-

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<sup>174</sup> Such an interpretation of the citizen suit provisions, of course, would not preclude EPA from enforcement unless EPA enforcement provisions contain a similar preclusion, as some do. Under CWA § 309(g), 33 U.S.C. § 1319(g) (2000), for instance, a state action bars both EPA and citizen action. Under some courts’ interpretation of that provision, a state may, by assessing a small penalty against a violator, bar EPA and citizens from seeking a court order requiring the violator to comply. *N. & S. Rivers Watershed Ass’n, Inc. v. Town of Scituate*, 949 F.2d 552 (1st Cir. 1991). Thus a state could effectively insulate all violators within its boundaries from compliance with federal pollution control requirements simply by assessing small penalties against all of them. States with approved programs would not be expected to do so because they have a stake in the programs and EPA could withdraw its approval of their programs should they commence such activities. *See, e.g., CWA*, 33 U.S.C. § 1342(d)(2) (2000). States without approved programs, however, have no stake in them and may be motivated to undercut them. If so, EPA has no recourse against them. This issue under the CWA, 33 U.S.C. § 1319(g) (2000), will be addressed further in Part Two.

<sup>175</sup> 133 CONG. REC. 1264 (1987). He elaborated:

A single discharge may be a violation of both State and Federal law and a State is entitled to enforce its own law. However, only if a State has received authorization under section 402 to implement a particular permitting program can it prosecute a violation of Federal law. Thus, even if a non-authorized State takes action under State law against a person who is responsible for a discharge which also constitutes a violation of the Federal permit, the State action cannot be addressed to the Federal violation, for the State has no authority over the Federal permit limitation or condition in question. In such case, the authority to seek civil penalties for violation of the Federal law under subsections 309(d) or 311(b) or section 505 would be unaffected by the State action, notwithstanding paragraph 309(g)(6).

Senator Chaffee’s statement ignores the possibility of the State enforcing federal law in a citizen suit. The statutes generally define “person” to include a state, *see, e.g., CWA*, 33 U.S.C. § 1362(5) (2000), and the citizen suit provisions generally authorize a “person” to bring suit, *see, e.g., CAA*, 42 U.S.C. § 7604(a) (2000). CWA § 505(a), however, authorizes a “citizen” to enforce, but it defines “citizens” to be a “person.” 33 U.S.C. § 1365 (2000). States may bring citizen suits under such statutes. *See Dep’t of Energy v. Ohio*, 503 U.S. at 607 (1992); *Hancock v. Train*, 426 U.S. 167 (1976); *Illinois v. Outboard Marine Co.*, 619 F.2d 623 (7th Cir. 1980); *Massachusetts v. U.S.V.A.*, 541 F.2d 119 (1st Cir. 1976). *But see United States v. City of Hopewell*, 508 F. Supp. 526 (E.D. Va. 1980). States cannot bring citizen suits under statutes not defining “person” to include states. Warren

appears to have been raised in court only once and then it was not considered because it was raised for the first time on appeal in an amicus brief.<sup>176</sup>

The wording and structures of the statutes and absence of relevant legislative history suggest that Congress simply did not think about whether actions by states, both with and without approved programs, could preclude citizen suits. They also suggest that, had it done so, it would have limited preclusions to actions by states with approved programs. But because the statutory and plain English meanings of “State” clearly include all fifty states, “State” should be interpreted to include all states, regardless of whether they have approved programs. Moreover, Congress clearly knows how to limit provisions to states with approved programs when it so desires, as it did in the provision authorizing EPA enforcement after notice to such states in the CWA.<sup>177</sup> This issue can, and should, be addressed in a simple amendment to the citizen suit provisions, defining “State” for the purposes of the provision to mean states with an approved program under the particular statute.

### B. What Government Actions May Bar a Citizen Suit?

Each of the citizen suit provisions specifies particular government actions that will preclude a citizen suit. They range from a simple “civil action in a court of the United States or a State to require compliance” in the CAA<sup>178</sup> to a laundry list of differing federal and state actions in RCRA.<sup>179</sup>

The first issue is whether the provisions should be interpreted to limit government actions that may bar a citizen suit to those specified in the particular provision. So understood, the question almost answers itself. The most obvious and best interpretation is the plain meaning of the

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County v. North Carolina, 528 F. Supp. 276 (E.D.N.C. 1981).

Senator Chaffee’s statement also ignores the possibility of the State’s enforcing federal law in state court as the supreme law of the land. *See Hudson Riverkeeper Fund, Inc. v. Harbor at Hastings Assocs.*, 917 F. Supp. 251, 255–56 (S.D.N.Y. 1996) (stating that RCRA may be enforced in state court because, under the Supremacy Clause, it is the law of the land) (citing *Howlett v. Rose*, 496 U.S. 356, 367 (1990)).

Senator Chaffee’s use of “notwithstanding paragraph 309(g)(6)” at the end of the quoted language may be unavailing, for even committee reports cannot “trump a textual plain meaning” of the statute itself. *See* ESKRIDGE, *supra* note 29, at 325.

<sup>176</sup> *Scituate*, 949 F.2d at 556 n.3. In a variant to this issue, when citizens of state A brought a RCRA citizen suit against a polluter in state A, the defendant sought to preclude the suit based on a pending action against it by state B. The court noted that the RCRA citizen suit provision did not define “State” and proceeded to a disguised *parens patriae* analysis concluding that, since state B was not suing on behalf of the citizens of state A, they were free to proceed. *Greenpeace, Inc. v. Waste Techs. Indus.*, 1993 WL 134861 (N.D. Ohio), *remanded on other grounds*, 9 F.3d 1174 (6th Cir. 1993). The court failed to note, however, that RCRA defines “State” generally to include all states. 42 U.S.C. § 6903(31) (2000). The Court’s interpretation of the statute is in derogation of the plain meaning of that definition.

<sup>177</sup> 33 U.S.C. § 1319(a)(1) (2000).

<sup>178</sup> 42 U.S.C. § 7604(b)(1)(B) (2000).

<sup>179</sup> 42 U.S.C. §§ 6972(b)(2)(B) & (C) (2000).

clause, augmented by the *expressio unius* canon of interpretation.<sup>180</sup> The provisions state exactly what Congress intended: the listed government actions and only the listed government actions bar citizen suits. This is reinforced by the theme and variations nature of the preclusion device. The fact that Congress listed different types of actions as potential bars to citizen suits in the different provisions reinforces the conclusion that it intended the government actions it listed in a particular statute, and no others, to bar a citizen suit under that statute.<sup>181</sup> As discussed below, most courts agree, although there is a significant division among them on the interpretation of CWA § 309(g).

The second issue is the meaning of the limitation on government actions that may bar a citizen suit to government actions that “require compliance” with the statutory requirements the citizen plaintiff seeks to enforce. Again, the plain meaning and *expressio unius* canons suggest that the limitation means exactly what it says. Such an interpretation also serves the statutory goal of protecting the environment through full compliance with the statute’s requirements. Surprisingly, courts have not often focused on the meaning and significance of the condition.

*1. When the Statute Provides that Particular Government Actions May Bar a Citizen Suit, May Other Government Actions Bar It?*

To ask the question is to answer it in the negative. The issue arises in two contexts: where the provision lists only court actions as precluding citizen suits and where the provision lists a variety of government actions as precluding citizen suits.

*a. Where the Statute Provides that Only Court Actions May Bar a Citizen Suit*

The plain meaning of such statutory provisions is that only a judicial action by the government may bar a citizen suit. A “court” is commonly understood to be a judicial, not an administrative tribunal. At the federal level, that means an Article III court. Neither the environmental statutes nor the Administrative Procedure Act<sup>182</sup> refer to administrative tribunals as courts. EPA named its appellate tribunal the Environmental Appeals Board, not the Environmental Appeals Court. Nothing in the citizen suit provisions or their legislative history indicates Congress intended to depart from this pattern of limiting the meaning of “court” to include only

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<sup>180</sup> See ESKRIDGE, *supra* note 29, at 323 n.1 (citing *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469 (1992) and *United States v. Providence Journal Co.*, 485 U.S. 693 (1988)).

<sup>181</sup> See ESKRIDGE, *supra* note 29 (citing *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991); *Jett v. Dallas Indep. Sch. Dist.* 491 U.S. 701 (1989); and *Chan v. Korean Air Lines*, 490 U.S. 112, 132–33 (1989)). See also discussion, *supra* note 29.

<sup>182</sup> 5 U.S.C. §§ 551–559, 701–706 (2000).

judicial tribunals. To the contrary, Congress underscored its intention that “court” mean an Article III court in several ways.

First, in some provisions it authorized citizens to enforce against violation of “an order issued by the Administrator,” or a state, which could refer only to an administrative order.<sup>183</sup> To bar citizen enforcement of an administrative compliance order because the government had issued that compliance order prior to the filing of the citizen’s complaint would be circular and render meaningless the authorization for the citizen to enforce the order. Second, in other provisions it precluded citizen suits when the government took either judicial or administrative actions. In RCRA, it precluded citizen suits because of an action in “court” in one subparagraph and because of various administrative actions in two other subparagraphs.<sup>184</sup> In the CWA it precluded citizen suits because of an action in “court” in § 505 and because of particular administrative penalty actions in § 309(g).

By referring to both judicial and administrative enforcement actions in the same provisions or in different preclusions in the same statute, Congress indicated that it knew they were different types of actions, knew how to describe each, and meant its references to each as discrete types of actions. It indicated the same intent by providing in some statutes that only judicial actions could bar a citizen suit, while providing in other statutes that judicial or administrative actions could bar a citizen suit.<sup>185</sup> Moreover, in some provisions it precluded citizen suits when the government has commenced a “civil or criminal action in a court.”<sup>186</sup> Criminal actions, of course, are prosecuted only in Article III courts, never in administrative tribunals.

All but two of the more than thirty courts asked to rule that an administrative tribunal is a “court” for the purposes of the preclusion have refused to do so.<sup>187</sup> Although they have come to the same conclusion, they have done so for different reasons. The most obvious and best approach is that the plain meaning of “court” is an Article III court or its state equivalent. Almost all courts beyond the Third Circuit have adopted this interpretation. The Third Circuit, however, reasoned that an administrative tribunal might be invested with sufficient quasi-judicial powers to make it a court for this purpose. But its departure from the plain meaning

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<sup>183</sup> See, e.g., CAA, 42 U.S.C. § 7604(a)(1)(B) (2000).

<sup>184</sup> Compare RCRA, 42 U.S.C. § 6972(b)(1)(B) (2000), with *id.* §§ (b)(2)(B) & (C).

<sup>185</sup> Compare CAA, 42 U.S.C. § 7604(b)(1)(B) (2000), with TSCA, 42 U.S.C. § 2619(b)(1)(B) (2000).

<sup>186</sup> See, e.g., CWA, 33 U.S.C. § 1365(b)(1)(B) (2000); RCRA, 42 U.S.C. § 6972(b)(1)(B) (2000); and MPRSA, 33 U.S.C. § 1415(g)(2)(D) (2000).

<sup>187</sup> See *Gardeski v. Colonial Sand & Stone Co.*, 501 F. Supp. 1159 n.161 (S.D.N.Y. 1980), which stands alone among the more than thirty decisions cited in this subsection on the issue, except for the bizarre decision in *SURCCO v. PRASA*, 157 F. Supp. 2d 160 (D.P.R. 2000). *Gardeski* is discussed *infra* in notes 200–203 and accompanying text. The decision is no longer good precedent, following a subsequent ruling *contra* in the Second Circuit, *Friends of the Earth v. Consol. Rail Corp.*, 768 F.2d 57 (2d Cir. 1985). Note 198, *infra*, addresses *SURCCO*.

of the statute has not led it to different results, for the Circuit has never found that an administrative tribunal has sufficient quasi-judicial powers to make it a court. Indeed, following the Third Circuit's analysis, it is difficult to imagine how an administrative body could ever be considered a court. In any event, the circuit may subsequently have repudiated its reasoning in favor of a plain English interpretation.<sup>188</sup>

In *Baughman v. Bradford Coal, Inc.*, the Third Circuit acknowledged that "court" usually denotes only judicial tribunals, not administrative tribunals with quasi-judicial powers. But it commented that "court" could be interpreted to incorporate administrative tribunals if "necessary to achieve the statutory goals."<sup>189</sup> The court never explained when interpreting "court" to include administrative tribunals was necessary to achieve statutory goals. Instead, it enunciated a two-part test to determine if an administrative tribunal had sufficient quasi-judicial powers to be the functional equivalent of a court. First, the tribunal must possess the power to achieve all of the remedies that EPA could ask a court to exercise under the statute at issue, here the CAA. Second, the tribunal's procedures must be similar to judicial procedures, including a provision for intervention by citizens. It found a state agency's authority deficient in both respects, as it lacked authority to enjoin violations and had authority to assess penalties of only one tenth the amount that federal courts could assess under the CAA. While it could grant citizen intervention at its discretion, citizens had no intervention by right in its proceedings.

The Third Circuit revisited the issue in *Proffitt v. Comm'rs, Twp. of Bristol*<sup>190</sup> and *SPIRG of N.J., Inc. v. Fritzsche, Dodge & Olcott, Inc.*<sup>191</sup> in which it held that EPA was not a court when it issued a compliance order under CWA § 309(a). The trial court in *Fritzsche* based its ruling that EPA was not a court on the lack of procedures for citizen intervention in EPA's administrative compliance order proceedings. The Third Circuit commented that lack of citizen intervention was not the sole criterion for making the determination, but rather part of a "dual inquiry."

The first question to be answered is whether the coercive powers that the administrative agency possesses compel compliance with effluent limitations (to determine whether the agency has "the power to accord relief which is the substantial equivalent to that available to the EPA in federal court"). The second inquiry concerns the procedural similarities the agency proceeding might have to a suit in federal court (to determine, among other things,

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<sup>188</sup> See *infra* note 195 and accompanying text discussing *Sun Buick, Inc. v. Saab Cars USA, Inc.*, 26 F.3d 1259 (3d Cir. 1994).

<sup>189</sup> *Baughman*, 592 F.2d at 217.

<sup>190</sup> 754 F.2d 504 (3d Cir. 1985).

<sup>191</sup> 759 F.2d 1131 (3d Cir. 1983).

whether citizens have a right to intervene in the agency proceeding).<sup>192</sup>

The Third Circuit agreed with the lower court that EPA was not a court for several reasons: EPA lacked authority under § 309(a) to assess penalties;<sup>193</sup> EPA's compliance order was not self-enforcing, for EPA had to seek judicial enforcement if its order was not obeyed; EPA's order issuance procedures lacked any similarity to judicial procedures; and EPA's procedures under § 309(a) did not provide citizens a right of intervention. Indeed, EPA had refused the citizen plaintiffs in the case the opportunity to intervene in its proceedings. Of course, by its very nature an administrative agency order is never self-enforcing, for agencies have no powers of contempt. If the respondent does not obey an administrative order, the agency must seek judicial enforcement. It is therefore difficult to imagine how an administrative body could ever be held to be a court under the *Baughman* approach, as elaborated by *Fritzsche*.

The Third Circuit later addressed the issue of whether a state administrative agency could be considered a state court for purposes of removing a case to federal court under 28 U.S.C. § 1441(a). In *Sun Buick, Inc. v. Saab Cars USA, Inc.*,<sup>194</sup> the court was clearly uncomfortable applying its "functional equivalent" doctrine in that context. Examining its precedents under the environmental statutes, it commented, "[w]e need not decide the validity of the *dictum* in these cases" (emphasis added).<sup>195</sup> It concluded with regard to them "[e]ven if we were still inclined to follow *Baughman*'s application of the "functional" test for purposes of permitting maintenance of a private citizen enforcement suit in environmental litigation, the removal context is sufficiently distinct to make the cases distinguishable."<sup>196</sup> It continued to determine that the state agency involved did not have sufficient judicial powers to make it a court for purposes of the removal statute, much as it had in *Baughman*, *Proffitt v. Bristol*, and *Fritzsche*. The court strongly questioned the viability of these precedents but noted that it would take an *en banc* court to jettison them.

Some district courts have followed *Baughman*, although none had the advantage of considering the effect of *Sun Buick* on the continued viability of *Baughman*. All but one found that the administrative agencies whose actions were invoked to preclude a citizen suit lacked sufficient quasi-

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<sup>192</sup> *Fritzsche*, 759 F.2d at 1137.

<sup>193</sup> 33 U.S.C. § 1319(a). *Fritzsche* was decided before Congress gave EPA administrative penalty assessment authority in CWA § 309(g), 33 U.S.C. § 1319(g) (2000). This would not appear to affect the court's holding, because penalty assessment was but one of the factors it considered, and EPA continues to lack penalty assessment authority in CWA § 309(a), 33 U.S.C. § (1319)(a) (2000), the provision at issue.

<sup>194</sup> 26 F.3d 1259 (3d Cir. 1994).

<sup>195</sup> *Id.* at 1264.

<sup>196</sup> *Id.*

judicial powers to be the functional equivalents of courts.<sup>197</sup> Another bizarre opinion reached the same result but for other reasons.<sup>198</sup> The exception was the first decision to consider the issue following *Baughman*. *Gardeski v. Colonial Sand & Stone Co.*<sup>199</sup> held that New York's air pollution agency was a court. The opinion was based, in part, on a finding that the New York agency had substantially more power than the Pennsylvania agency the Third Circuit had considered in its opinion. But the court

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<sup>197</sup> The exception was *Gardeski v. Colonial Sand & Stone Co.*, 501 F. Supp. 1159 (S.D.N.Y. 1980), discussed immediately *infra*. Other district courts held the agencies at issue not to be courts, following a *Baughman* analysis. *See, e.g.*, *Ill. PIRG, Inc. v. PMC Specialties Group*, 835 F. Supp. 1070 (N.D. Ill. 1993) (holding that a municipal sewer agency was not a court under the CWA, because it could not enforce its orders except by resort to court, it did not give citizens the right to intervene, and it had no power to issue injunctions); *PIRG of N.J., Inc. v. Rice*, 774 F. Supp. 317 (D.N.J. 1991) (holding an EPA administrative order on consent with Air Force no bar to citizen suit because EPA lacked power to enjoin violations and the CAA, 42 U.S.C. § 7413(a) (2000), requires no citizen participation in the issuance of compliance orders); *PIRG of N.J., Inc. v. Hercules, Inc.*, 830 F. Supp. 1525 (D.N.J. 1993), *rev'd in part on other grounds*, 50 F.3d 1239 (3d Cir. 1995); *Atl. States Legal Found., Inc. v. Universal Tool & Stamping Co.*, 735 F. Supp. 1404 (N.D. Ind. 1990) (holding that under CWA § 505, the Indiana Department of Environmental Management was not a court, because it lacked power to enforce its penalty assessments); *PIRG of N.J., Inc. v. Witco Chem. Corp.*, 1990 WL 66178 (D.N.J.) (holding that New Jersey Department of Environmental Protection was not a court because it lacked injunctive power, power to enforce its orders, public notice of administrative enforcement, and public intervention); *Wiconisco Creek Watershed v. Kocher Coal Co.*, 641 F. Supp. 712 (M.D. Pa. 1986) (holding that Pennsylvania Department of Environmental Protection was not a court because it lacked the requisite judicial procedures, including citizen intervention); *Sierra Club v. Simkins Indus.*, 617 F. Supp. 1120 (D. Md. 1985), *aff'd*, 847 F.2d 1109 (4th Cir. 1988) (holding that, under CWA § 505, 33 U.S.C. § 1365, the Maryland environment agency was not a court because it lacked power to enforce its compliance orders); *SPIRG of N.J., Inc. v. Tenneco Polymers, Inc.*, 602 F. Supp. 1394, 1398 (D.N.J. 1985); *SPIRG of N.J., Inc. v. Monsanto Co.*, 600 F. Supp. 1479 (D.N.J. 1985) (holding that CWA § 309(a), 33 U.S.C. § 1319(a) administrative order was not an action in court); *Brewer v. City of Bristol*, 577 F. Supp. 519 (E.D. Tenn. 1983) (holding that *Baughman* test was assumed to apply under CWA § 505, 33 U.S.C. § 1365, but that no factual basis had been established whereby to rule on issue); and *Sierra Club v. SCM Corp.*, 572 F. Supp. 828, 830 (W.D.N.Y. 1983).

<sup>198</sup> *SURCCO v. PRASA*, 157 F. Supp. 2d 160, 169 (D.P.R. 2000), held that an EPA compliance order under CWA § 309(a), 33 U.S.C. § 1319(a), was the action of a court because "EPA by its very nature belongs to that class of typical or traditional agencies endowed with adjudicative powers." Of course, EPA has adjudicative powers; Congress explicitly gave it such powers under CWA § 309(g), 33 U.S.C. § 1319(g) (2000). But the court in *SURCCO* didn't consider whether the powers under which EPA acted were adjudicative powers, and, if so, whether Congress intended EPA adjudicative actions to bar a citizen suit. Indeed, the court did not even identify the authority under which EPA had acted. It appeared to act under CWA § 309(a), 33 U.S.C. § 1319(a) (2000), granting EPA authority to issue compliance orders. If so, the court failed to note that EPA actions under § 309(a) are accomplished with absolutely no adjudication. Instead the court relied on a First Circuit decision under CWA § 309(g), reasoning that the issue wasn't one of the wording of the statute, but whether the government had taken an enforcement action to remedy the same violations, making a citizen action duplicative. *N. & S. Rivers Watershed Ass'n, Inc. v. Town of Scituate*, 949 F.2d 552, 556 (1st Cir. 1991). Because CWA § 309(g) does not limit the preclusion on citizen suits to actions in court, *Scituate* did not consider the question before the *SURCCO* court, making the *Scituate* holding inapposite. The only apposite part of the *Scituate* statement relied upon was that the wording of the statute is not important, a dubious proposition.

<sup>199</sup> 501 F. Supp. 1159 (S.D.N.Y. 1980).

essentially made a policy choice motivated by its view of what best served the purpose of the CAA, the first part of the *Baughman* test, which the Third Circuit had neglected to explain in its opinion. The *Gardeski* court began by mischaracterizing a fragment of the Senate Report that the purpose of citizen suits “was *only* to ‘motivate governmental agencies charged with responsibility to bring enforcement and abatement proceedings.’”<sup>200</sup> The Report language, however, contains no “only” and not the slightest hint that the Committee’s *only* purpose in authorizing citizen suits was to prompt government enforcement.<sup>201</sup> The court considered the preclusive effect of a state consent administrative order imposing an expeditious schedule for compliance negotiated shortly after the State agency became aware of the violations. The court concluded, not illogically from its premise, that “[t]o require an agency to commence any form of proceeding would be senseless where the agency has already succeeded in obtaining the respondent’s agreement to comply with the law in some enforceable form.”<sup>202</sup> Moreover, “[t]o hold that the CAA requires agencies to commence a court suit in all cases, in order to retain enforcement control, would be inconsistent with the statutory purpose as well as Congress’s desire that the states be primarily responsible for enforcing the Act.”<sup>203</sup> But it went on to hold that although the initial consent order was diligent prosecution, the state’s subsequent failure to enforce against immediate and continued violation of the compliance order was not diligent prosecution. Indeed, the decision contains one of the best analyses of what constitutes diligent prosecution.

The opinion appears reasoned in its evenhandedness. But its holding that an administrative agency can be a court is based on the false premise that the sole congressional purpose of the citizen suit provision was to prompt government enforcement. This false premise caused the court to disregard the plain meaning of the statute and the complex nature of congressional intent in authorizing citizen suits. The court’s misperception of congressional intent was caused by its mischaracterization of the legislative history. The court began an unfortunate tradition, followed all the way to the Supreme Court, of misstating legislative history to justify disregard of the wording of the citizen suit provisions.<sup>204</sup> Any characterization of the legislative history to indicate that Congress had a sole intent when enacting the citizen suit provisions is a misunderstanding at best

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<sup>200</sup> 501 F. Supp. at 1159 (emphasis added). The text of the Report was “Government initiative in seeking enforcement under the Clean Air Act has been restrained. Authorizing citizens to bring suits for violations of standards should motivate governmental agencies charged with the responsibility to bring enforcement and abatement proceedings.” S. REP. No. 91-1196, at 36–37 (1970), reprinted in 1 CAA LEGISLATIVE HISTORY, at 401, 436–37 (1974).

<sup>201</sup> See *supra* the discussion of the legislative history of citizen suits in subsection I.B.2.

<sup>202</sup> *Gardeski*, 501 F. Supp. at 1166.

<sup>203</sup> *Id.* at 1163.

<sup>204</sup> See *infra* notes 424–428.

and a mischaracterization at worst. Congress had more than one purpose in mind when it conceived citizen suits and it had more than one policy consideration when it placed limitations on citizen suits.<sup>205</sup> Those purposes and policies were both complementary and conflicting, requiring Congress to craft compromises in the provision and its language. Under these circumstances, Congress's intent is more likely to be found in the language it used in the statute than in assumptions based on one of its multiple goals.

The Second Circuit was the next court of appeals to consider the issue. It flatly rejected the *Baughman* analysis. It found that CWA § 505<sup>206</sup> used "court" "unambiguously and without qualification," therefore making it "inappropriate to expand this language to include administrative enforcement actions."<sup>207</sup> In addition to its plain English reading of the statute, it could find no legislative history indicating that Congress intended to include administrative agencies as courts. Finally, it noted that Congress had barred citizen suits under other statutes because of both judicial and administrative enforcement actions, e.g., TSCA, MPRSA, and RCRA.<sup>208</sup> Because the citizen suit provisions in the environmental statutes are closely related and Congress clearly knew how to specify that administrative enforcement precluded citizen suits under other environmental statutes, its failure to specify them in CWA § 505 indicated its intent that administrative enforcement not preclude citizen suits under that provision.<sup>209</sup> All other courts of appeal considering the issue have followed *Consol. Rail*, specifically rejecting *Baughman* for the same reasons the Second Circuit rejected it.<sup>210</sup> Many district courts in the Second Circuit and beyond have followed *Consol. Rail* and rejected *Baughman*.<sup>211</sup> Congress

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<sup>205</sup> See the discussion of the legislative history of citizen suits, *supra* at Part I.B.2, particularly the last paragraph.

<sup>206</sup> 33 U.S.C. § 1365 (2000).

<sup>207</sup> *Friends of the Earth v. Consol. Rail Corp.*, 768 F.2d 57, 62 (2d Cir. 1985).

<sup>208</sup> Of course, this applies only to citizen suits against violations of RCRA, not citizen suits to abate an imminent and substantial endangerment.

<sup>209</sup> *Friends of the Earth*, 768 F.2d at 63. The Court itself has interpreted CWA § 505, 33 U.S.C. § 1365, in part by comparing it to citizen suit provisions in other environmental statutes. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 57 (1987).

<sup>210</sup> See *Texans United for a Safe Econ. Educ. Fund v. Crown Cent. Petroleum Corp.*, 207 F.3d 789, 795 (5th Cir. 2000); *Jones v. City of Lakeland*, 224 F.3d 518, 522 (6th Cir. 2000) (*en banc*) (holding that language of CWA § 505 is "plain and unambiguous"); *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 618–19 (7th Cir. 1998); *Dague v. City of Burlington*, 935 F.2d 1343, 1353 (2d Cir. 1991), *rev'd on other grounds*, 502 U.S. 1071 (1992) (holding that an administrative "Assurance of Discontinuance" was not an action in court even though it was filed in court); *Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517 (9th Cir. 1987).

<sup>211</sup> See *Kara Holding Corp. v. Getty Petroleum Mktg., Inc.*, 67 F. Supp. 2d 302, 308 (S.D.N.Y. 1999) (CWA and RCRA); *Cnty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy*, 2001 WL 1704240, at \*5 (E.D. Wash. 2001) (CWA) (reaching the result of *Consol. Rail* and rejecting the result of *Baughman*, without citing them); *Orange Env't, Inc. v. County of Orange*, 860 F. Supp. 1003, 1024–25 (S.D.N.Y. 1994); *Ill. PIRG, Inc. v. PMC Specialties Group*, 835 F. Supp. 1070, 1075–76 (N.D. Ill. 1993) (holding that a mu-

subsequently amended CWA § 505(a)<sup>212</sup> to cross reference the § 309(g) bar on citizen suits for administratively assessed penalties under specific circumstances, reinforcing its intent that “court” in § 505 does not include administrative agencies.<sup>213</sup> If it had meant “court” in § 505 to include administrative agencies, it would have had no need to add this cross-reference.<sup>214</sup>

The approach of the majority of the circuits is clearly correct. It is faithful to the plain wording of the provisions and is faithful to their structures. It also made policy sense for Congress to limit the activation of bars against citizen suits to government actions in court rather than to administrative actions. When Congress developed and enacted the citizen suit provisions, Congress and the public were skeptical of administrative action as lacking transparency and being ineffective.<sup>215</sup> Court actions, however, are taken in public and are transparent. Even settlements of EPA’s civil judicial actions are subject to a public notice and comment procedure.<sup>216</sup> While administrative agencies frequently issue administrative orders that do not require compliance,<sup>217</sup> when federal courts find a defendant in violation of the statutes, they must order it to comply.<sup>218</sup>

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nicipal agency is not a court under the CWA); *Coalition for Health Concern v. LWD, Inc.*, 834 F. Supp. 953, 955–57 (W.D. Ky. 1993), *rev’d on other grounds*, 60 F.3d 1188 (6th Cir. 1995) (holding that RCRA “court” action in § 7002(b)(1)(B), 42 U.S.C. § 6972(b)(1)(B) (2000), does not include administrative action because § 7002(b)(2)(B) & (C) specifically provide that administrative actions bar citizen suits); *City of Toledo v. Beazer Materials & Servs., Inc.*, 833 F. Supp. 646, 657 (N.D. Ohio 1993) (RCRA § 7002); *PIRG of N.J., Inc. v. Hercules, Inc.*, 830 F. Supp. 1525, 1538 (D.N.J. 1993), *rev’d in part on other grounds*, 50 F.3d 1239 (3d Cir. 1995); *PIRG of N.J., Inc. v. N.J. Expressway Auth.*, 822 F. Supp. 174, 183–84 (D.N.J. 1992) (CWA § 505); *Proffitt v. Borough of Morrisville*, 716 F. Supp. 837, 841 (E.D. Pa. 1989), *aff’d*, 897 F.2d 323 (3d Cir. 1990); *Lykins v. Westinghouse*, 715 F. Supp. 1357, 1358–59 (E.D. Ky. 1989) (CWA § 505); *McGregor v. Indus. Excess Landfill, Inc.*, 709 F. Supp. 1401, 1407 (N.D. Ohio 1987), *aff’d on other grounds*, 856 F.2d 39 (6th Cir. 1988) (holding, without discussion, that state action in court barred RCRA § 7002(a)(1)(A) action); *Atl. States Legal Found., Inc. v. Koch Refining Co.*, 681 F. Supp. 603, 611 n.2 (D. Minn. 1988); *Mumford Cove Ass’n, Inc. v. Town of Groton*, 640 F. Supp. 392, 396 (D. Conn. 1986) (CWA § 505); *Md. Waste Coalition v. SCM Corp.*, 616 F. Supp. 1474, 1480–81 (D. Md. 1985) (CAA § 304); and *SPIRG of N.J., Inc. v. Georgia-Pacific Corp.*, 615 F. Supp. 1419 (D.N.J. 1985). *See also* *PIRG of N.J., Inc. v. Top Notch Metal Finishing Co.*, 1987 WL 44393, at \*3 (D.N.J. 1987) (following *Georgia-Pacific* and holding that negotiation about a violation with an administrative agency is not an action in court).

<sup>212</sup> 33 U.S.C. § 1365(a) (2000).

<sup>213</sup> CWA § 505, 33 U.S.C. § 1365(a) (2000), begins with a reference to § 309(g)(6), 33 U.S.C. § 1319(g)(6), which, in turn, provides that particular administrative penalty assessments bar citizen suits.

<sup>214</sup> Of course, it might have added the cross-reference to countermand *Consol. Rail* and its progeny. But, although the legislative history of § 309(g), § 1319(g) (2000), is quite detailed, it makes no mention of such an intent. *See supra* notes 125–128 and accompanying text.

<sup>215</sup> *See* legislative history cited *supra* notes 109 & 110.

<sup>216</sup> DOJ, Consent Judgments in Actions to Enjoin Discharges of Pollution, 28 C.F.R. § 50.7 (2004).

<sup>217</sup> *See infra* cases cited in notes 338 & 349 and accompanying text.

<sup>218</sup> *See infra* cases cited in notes 129 & 354 and accompanying text.

*b. Where the Statute Provides that Several Government Actions May Bar a Citizen Suit*

When a statute precludes a citizen suit because the government has commenced one of several listed enforcement actions, does the statute also preclude it because the government has commenced an unlisted enforcement action? The plain meaning of such a statutory provision is that only one of the listed actions by the government may bar a citizen suit. The issue arises primarily under RCRA. While RCRA<sup>219</sup> citizen suits to enforce against violations of the statute are barred only by a government action in court, RCRA citizen suits to abate an imminent and substantial endangerment are barred by seven specified federal and state judicial and administrative enforcement and remedial actions under both RCRA and CERCLA.<sup>220</sup> Thus, state administrative enforcement actions may not bar a citizen suit against a violation of RCRA under 42 U.S.C. § 6972(a)(1)(A) (2000), but may bar a citizen suit to abate an endangerment under 42 U.S.C. § 6972(a)(1)(B) (2000).<sup>221</sup> When defendants have argued that citizen suits to abate endangerments were barred by other government enforcement and remedial actions under RCRA or CERCLA, courts have followed the *Consol. Rail* line of reasoning and have quickly rejected those arguments. For instance, in *Coalition for Health Concern v. LWD, Inc.*<sup>222</sup> defendants claimed that an EPA administrative order under RCRA § 3008(h)<sup>223</sup> requiring defendants to determine the nature and extent of hazardous waste releases from a facility, barred a citizen suit against defendants to abate an imminent and substantial endangerment caused by the releases. An action under 42 U.S.C. § 6928(h) (2000) was not on the list of specified actions barring citizen suits, although EPA could have used several of the listed actions to order the same study. In rejecting the claimed bar, the court reasoned that “[w]hen Congress explicitly enumerates exceptions to a statutory provision, a court cannot infer additional exceptions without evidence of contrary legislative intent.”<sup>224</sup> It could find no such intent in

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<sup>219</sup> 42 U.S.C. § 6972(b)(1)(A) (2000).

<sup>220</sup> *Id.* at § 6972(b)(2)(B) & (C).

<sup>221</sup> See *N. Cal. River Watch v. Humboldt Petroleum, Inc.*, 2000 WL 1639524 (N.D. Cal.).

<sup>222</sup> 834 F. Supp. 953 (W.D. Ky. 1993), *rev'd on other grounds*, 60 F.3d 1188 (6th Cir. 1995).

<sup>223</sup> 42 U.S.C. § 6928(h) (2000).

<sup>224</sup> *Coalition for Health Concern*, 834 F. Supp. at 957.

the statute or its history.<sup>225</sup> Other courts considering the issue under RCRA have come to the same conclusion.<sup>226</sup>

*2. Must the Government Action Require Compliance To Bar a Citizen Suit, and When Do Government Actions Require Compliance?*

Congress augmented EPA's enforcement authorities and created the backstop citizen suit authority to improve compliance with the environmental statutes. Consistent with this objective, it is provided that for a government action to bar a citizen suit, the government action must be commenced and diligently prosecuted "to require compliance."<sup>227</sup> The plain meaning of the term is to coerce the defendant to cease violating the requirement being enforced. Non-coercive actions cajoling compliance or assessing modest penalties are not actions that require compliance. When

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<sup>225</sup> *Id.* The court observed the government actions Congress specified to bar a citizen suit seeking abatement of an endangerment all required the government to find that such an endangerment existed. It distinguished a RCRA § 3008(h) action as requiring no such finding. Indeed, it noted that the legislative history of § 3008(h) indicated the provision was to enable EPA to implement corrective action on RCRA interim status facilities, a power that EPA previously had only with regard to permitted facilities and that the provision did not alter the statute as to EPA's imminent and substantial endangerment authority.

<sup>226</sup> *See, e.g.,* Tanglewood East Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568, 1574 (5th Cir. 1988) (holding that a government action listed as barring RCRA citizen suit under 42 U.S.C. § 6972(a)(1)(B) did not bar suit under 42 U.S.C. § 6972(a)(1)(A)); Mejdreck v. Lockformer Co., 2002 WL 1838141 (N.D. Ill.) (holding that RCRA § 7002(b)(2)(C), 42 U.S.C. § 6972(b)(2)(C) (2000), preclusion by a state suit under RCRA does not apply to a suit brought by a state under a similar state statute); Kara Holding Corp. v. Getty Petroleum Marketing, Inc., 67 F. Supp. 2d 302, 307 (S.D.N.Y. 1999) (holding that RCRA 7002(b)(2)(C)(i), 42 U.S.C. § 6972(b)(2)(C)(i) (2000), bars citizen suits to abate endangerments if the state brings a citizen suit in court to do the same); Briggs & Stratton Corp. v. Concrete Sales & Servs., 20 F. Supp. 2d 1356, 1375 (M.D. Ga. 1998) (holding that state action under a state statute that "would not necessarily be in compliance with RCRA" does not bar citizen suit); Gilroy Canning Co. v. Cal. Cannery and Growers, 15 F. Supp. 2d 943 (N.D. Cal. 1998) (holding that state action does not bar citizen suit where section specifies that an EPA action bars suit); A-C Reorg. Trust v. E.I. Du Pont de Nemours & Co., 968 F. Supp. 423, 430 (E.D. Wis. 1997); Interfaith Cmty. Org. v. Allied Signal Inc., 928 F. Supp. 1339, 1346-48 (D. N.J. 1996); Murray v. Bath Iron Works Corp., 867 F. Supp. 33, 41 (D. Me. 1994); Orange Env't, Inc. v. County of Orange, 860 F. Supp. 1003, 1026-28 (S.D.N.Y. 1994); McGregor v. Indus. Excess Landfill, Inc., 709 F. Supp. 1401 (N.D. Ohio 1987), *aff'd on other grounds*, 856 F.2d 39 (6th Cir. 1988) (holding that specified federal and state actions under CERCLA bar citizen suit under RCRA § 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B)); Merry v. Westinghouse Elec. Corp., 697 F. Supp. 180 (M.D. Pa. 1988) (holding that remedial funds spent by third parties do not bar citizen suit where section specifies that EPA expenditure of remedial funds bars suit); Fishel v. Westinghouse Elec. Corp., 617 F. Supp. 1531 (D. Pa. 1985). *See also* Davies v. Nat'l Co-op. Refinery Ass'n, 963 F. Supp. 990, 997 (D. Kan. 1997) (abstaining from exercising jurisdiction to allow state completion of investigation and development of plan to remediate releases of hazardous waste, but noting that "when Congress has set forth the conditions under which state or administrative actions will preclude a federal claim, as it did in [42 U.S.C.] § 6972(a)(1)(B), a federal district court must be cautious about refusing to exercise jurisdiction when those conditions are not present lest it frustrate Congress's scheme for vindicating important federal interests").

<sup>227</sup> *See, e.g.,* CAA, 42 U.S.C. § 7604(b)(1)(B) (2000).

Congress intended non-coercive actions to bar successive enforcement, it did not include the “to require compliance” language in the statute, i.e., in CWA § 309(g).<sup>228</sup> This difference emphasizes the significance of the “to require compliance” language in those statutes where it appears and highlights the unique nature of § 309(g), which authorizes only modest penalties that are not enough, in many cases, to deter violations.

The legislative history affirms that Congress deliberately used the term “to require compliance.” The House and Senate Reports accompanying the CAA and CWA citizen suit provisions stated that commencement and diligent prosecution of “abatement actions” by the government would preclude citizen suits.<sup>229</sup> Indeed, the Senate CAA bill, containing the prototype citizen suit provision,<sup>230</sup> required prior notice by the citizen to “afford [the government the opportunity] . . . to initiate enforcement proceedings . . . to abate such alleged violation.”<sup>231</sup> “Abate” is defined as “to put an end to.”<sup>232</sup> The plain meaning of “abate” and “abatement” in the legislative history is the cessation of the violation. The Senate Report accompanying this language made it clear that the citizen plaintiff and, ultimately, the court were to make a judgment whether a government action met this test:

[I]f the citizen believed efforts initiated by the agency to be inadequate, the citizen might choose to file the action. In such case, the courts would be expected to consider the petition against the background of the agency action and could determine that such action would be adequate to justify suspension, dismissal, or consolidation of the citizen petition. On the other hand, if the court viewed the agency action as inadequate, it would have jurisdiction to consider the citizen action notwithstanding any pending agency action.<sup>233</sup>

The legislative history equated the adequacy or inadequacy of the government action with its capability of compelling compliance. The Conference Committee changed the language of the Senate bill requiring the government “to initiate enforcement proceeding . . . to abate such alleged

<sup>228</sup> 33 U.S.C. § 1319(g) (2000).

<sup>229</sup> H.R. CONF. REP. NO. 91-1783, at 56 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5374, 5388 (“If an abatement action is pending . . .”); S. REP. NO. 91-1196, at 37 (1972), *reprinted in* 1 CAA LEGISLATIVE HISTORY, at 401, 437 (1974) (“if the agency had not initiated abatement proceedings . . .”); H.R. REP. NO. 92-911, at 133 (1972), *reprinted in* 1 CWA LEGISLATIVE HISTORY, at 753, 820 (1973) (“If an abatement action is pending and is being diligently pursued . . .”); S. REP. NO. 92-414, at 80 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3746 (“if the agency had not initiated abatement proceedings . . .”).

<sup>230</sup> *See supra* notes 89–90 and accompanying text.

<sup>231</sup> S. 4358, 91st Cong. § 304(b) (1970).

<sup>232</sup> WEBSTER’S SEVENTH NEW COLLEGIATE DICTIONARY 1 (1999).

<sup>233</sup> S. REP. NO. 91-1196, at 37 (1970), *reprinted in* 1 CAA LEGISLATIVE HISTORY, at 401, 437 (1974).

violation”<sup>234</sup> to the language of the enacted provision requiring the government to have “commenced and [be] diligently prosecuting . . . action . . . to require compliance.”<sup>235</sup> As discussed above, Congress’s reference to abating a violation meant compelling compliance with the statute. The statute’s final language was more elegant than the earlier Senate text from which it was derived, but the Senate Report explains both.<sup>236</sup> The legislative history also demonstrates Congress’s intent that the trial court determine that a government action is adequate (i.e., whether the government action is one capable of and calculated to require compliance) before it can bar a citizen suit.

The Supreme Court in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.* seized on the present tense in another subsection of CWA § 505, as a justification for holding that the section authorized citizen suits only to address continuing violations.<sup>237</sup> It found additional support for its conclusion by noting that the provisions “specifically provide that citizen suits are barred only if the Administrator or State has commenced an action ‘to require compliance.’ This language supports the conclusion that the precluded citizen suit is also an action for compliance, rather than an action solely for civil penalties for past, nonrecurring violations.”<sup>238</sup> The Seventh Circuit cited similar language in RCRA § 7002<sup>239</sup> to support its holding that an EPA suit to abate violations barred a citizen suit to abate the same violations, although directed against different defendants.<sup>240</sup>

What government actions “require compliance” and, as a result, may preclude a citizen suit? Clearly, an injunction against a continuing violation is a coercive act and, therefore, may preclude a citizen suit. The Supreme Court reminds us in *Laidlaw*<sup>241</sup> that penalties also may be used to coerce compliance. To coerce compliance and deter violations, a penalty must recover from a violator more than the economic benefit it has realized from the violations; in *Laidlaw* because the penalty agreed upon be-

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<sup>234</sup> S. 4358, 91st Cong. § 304(a)(3) (1970).

<sup>235</sup> CAA § 304(b)(1)(B), 42 U.S.C. § 7604(b)(1)(B) (2000), as it was enacted and is worded today.

<sup>236</sup> The Senate Report accompanying the Senate CWA bill contains the same language as the Senate Report accompanying the Senate CAA bill. Compare S. REP. NO. 91-1196, at 37 (1970), reprinted in 1 CAA LEGISLATIVE HISTORY, at 401, 437 (1974), with S. REP. NO. 92-414, at 80 (1971), reprinted in 1972 U.S.C.C.A.N. 3668, 3744-47. Since the language contained in the Senate CWA bill is the same as the language contained in the CAA Conference Committee bill, the quoted language from the Senate Report explains both versions equally.

<sup>237</sup> See 484 U.S. 49, 57 (1987). The Court was interpreting the “alleged to be in violation” present tense in CWA § 505(a), 33 U.S.C. § 1365(a).

<sup>238</sup> *Gwaltney*, 484 U.S. at 60 n.3 (quoting 33 U.S.C. § 1365(b)(1)(B)) (emphasis added).

<sup>239</sup> 42 U.S.C. § 6972 (2000).

<sup>240</sup> *Supporters to Oppose Pollution, Inc. v. Heritage Group*, 973 F.2d 1320, 1323 (7th Cir. 1992) (“Notice that this statute refers to an action to ‘require compliance with such permit [or] regulation’—not an action against the private party’s chosen adversary, but an action to require compliance” (quoting 42 U.S.C. § 6972(b)(1)(B) (2000)).

<sup>241</sup> 528 U.S. 167, 185-87 (2000).

tween the defendant and the state was insufficient to do so, it did not preclude a citizen suit.<sup>242</sup> Generally, if a government action is not a traditionally recognized coercive device, it probably is not one to require compliance.

To preclude a citizen suit, a government action must not only be capable of requiring compliance, it must be calculated to do so. Although the Court in *Weinberger v. Romero-Barcelo* reminds us that there may be several forms of injunction that can lead to compliance, not all injunctions will do so.<sup>243</sup> The Second Circuit implicitly recognized this in remanding a citizen suit case for the district court to determine whether the defendant's settlement of a government enforcement action "caused the violations alleged by [plaintiff] to cease and eliminated any realistic prospect of their recurrence."<sup>244</sup> If so, the citizen suit was to be dismissed, if not, it was to go forward. The decision was therefore based on mootness, but it required the trial court on remand to determine not only whether the state's settlement rendered the citizen suit moot, but also whether the settlement was complied with and whether it covered all of the types of violations alleged by the citizen suit.<sup>245</sup> Other courts have held that administrative orders do not bar citizen suits unless they purport to and do, in fact, prevent the continuance of violations alleged in the citizen suits.<sup>246</sup> States may use a common enforcement mechanism, such as an administrative compliance order, not to coerce compliance, but as a means of extending a compliance date. Mere compliance extensions do not coerce compliance, even though they are contained in compliance orders.<sup>247</sup> Of course, it may not be clear from the face of an order whether the state intends to compel compliance or merely extend a compliance date. Some courts may be hostile to such an inquiry.<sup>248</sup>

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<sup>242</sup> *Id.* at 186 n.2, citing district court opinion, *U.S. v. Laidlaw Env'tl Servs., Inc.*, 890 F. Supp. 470, 491–94, 497–98 (D.S.C. 1995).

<sup>243</sup> 456 U.S. 305 (1982). The Court held that the district court was not mandated to issue an injunction requiring the Navy to cease discharging practice bombs into the waters of the United States without a CWA permit, but could instead order the Navy to apply for a permit. It concluded that the CWA provided several means for a court to assure compliance. "An injunction is not the only means of ensuring compliance." *Id.* at 314. "Rather than requiring a district court to issue an injunction for any and all statutory violations, the [CWA] permits the district court to order that relief it considers necessary to secure prompt compliance with the Act. That relief can include, but is not limited to, an order of immediate cessation." *Id.* at 320.

<sup>244</sup> *Atl. States Legal Found., Inc. v. Eastman Kodak Co.*, 933 F.2d 124, 128 (2d Cir. 1991).

<sup>245</sup> *Id.*

<sup>246</sup> *See* *N. Cal. River Watch v. Sonoma County Water Agency*, 1998 WL 886645, at \*3 (N.D. Cal.); *Culbertson v. Coats American, Inc.*, 913 F. Supp. 1572, 1578–79 (N.D. Ga. 1995); *Love v. N.Y. Dept. of Env'tl. Conservation*, 529 F. Supp. 832, 843–44 (S.D.N.Y. 1981).

<sup>247</sup> *Culbertson*, 913 F. Supp. at 1579.

<sup>248</sup> Indeed, one court suggested that a citizen plaintiff's argument that an administrative compliance order was merely a compliance date extension came close to warranting a Rule 11 sanction. *Atl. States Legal Found., Inc. v. Tyson Foods, Inc.*, 682 F. Supp. 1186, 1188 (N.D. Ala. 1988).

C. *When Must the Government Commence an Action To Bar a Citizen Suit?*

The citizen suit provisions typically provide that no citizen suit may be “commenced” if the government “has commenced” and is diligently prosecuting an enforcement action. Congress’s use of “has commenced” raises the related issues of when the government action must be commenced to be preclusive and what constitutes commencement of a government action. Because the provisions use the term “commenced” describing government and citizen actions in the same sentence, the word must have the same meaning with regard to both. That “commenced” has the same meaning in both uses is not only consistent with the plain meaning canon of construction, it follows from the canon to “interpret the same or similar terms in a statute the same way.”<sup>249</sup> The fact that Congress used the past tense of the same verb in all versions of the preclusion device reinforces this conclusion.

1. *Must the Government Commence an Action Prior to a Citizen Suit To Bar It?*

The uses of the present or future “may be commenced,” the past tense “has commenced,” and the present tense “is diligently prosecuting” in the same paragraph suggest that Congress used the different tenses purposefully and intended the temporal meanings they convey. No citizen suit “may be commenced” if the government “has commenced” and “is diligently prosecuting” an action. Thus the government must have commenced its action before the citizen suit is commenced in order to preclude the citizen suit. The Court held in *Gwaltney* that Congress used differences between present and past tenses in citizen suit provisions deliberately and that courts should accord significance to those differences.<sup>250</sup> This literal interpretation of “has commenced” is consonant with the Court’s notion in *Gwaltney* that the purpose of the notice and delay elements of the preclusion device is to give the government the first chance to enforce, and allow citizens to enforce when the government fails to do so,<sup>251</sup> a notion that is consistent with legislative history.<sup>252</sup> Most courts have had little trouble in holding that a government enforcement action will preclude only subsequently commenced citizen suits.<sup>253</sup> Interpreting “has commenced,” based

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<sup>249</sup> See ESKRIDGE, *supra* note 29, at 324 (citing *Sullivan v. Stroop*, 496 U.S. 478, 84 (1990) and *United Sav. Ass’n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 366 (1988)).

<sup>250</sup> *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 57–59 (1987). The Court concluded that Congress used the present tense “is in violation” in CWA § 505 advisedly, for when it wished to refer to past acts, as it did in RCRA § 7002, it knew how to do so by using the past tense “has contributed.” *Id.* at 57 n.2.

<sup>251</sup> See *Frilling v. Village of Anna*, 924 F. Supp. 821, 836 (S.D. Ohio 1996).

<sup>252</sup> See discussion of legislative history, Part I.B.2, *supra*.

<sup>253</sup> Thus in *Conn. Fund for the Env’t v. Job Plating Co.*, 623 F. Supp. 207, 215 (D.

on its tense, to mean the government action was previously filed implies that “is diligently prosecuting,” which follows one word later, also should be interpreted, based on its tense, to mean a presently pending government prosecution. This present tense meaning of “is diligently prosecuting” has a significance not fully recognized by the case law, as discussed *infra* in Part II.D.1.

It follows from this interpretation that once a citizen suit is commenced, the subsequent commencement of a government enforcement action does not activate the statutory preclusion. That subsequent commencement of a government action does not activate the statutory preclusion is consistent with the general rule that, once jurisdiction is properly invoked, it is not ousted by subsequent events, although Congress can provide to the contrary.<sup>254</sup> It is also supported by the plain meaning and *expressio unius* canons of statutory interpretation; by specifying that an action the government *has* commenced and *is* diligently *prosecuting* may bar a citizen

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Conn. 1985), the court held that the CWA, 33 U.S.C. § 1365(b)(1)(B), “[o]n its face . . . does not apply to a case in which the state did not take enforcement action until *after* the citizen suit was filed.” Indeed, it found the language of the statute to be “unambiguous.” *Id.* at 216. Courts have had no trouble drawing a bright line in this regard. “The fact that DEC filed its complaint in state court less than one half hour after plaintiffs filed their complaint in this Court does not change the fact that plaintiff’s suit was filed first.” Long Island Soundkeeper Fund, Inc. v. N.Y. City Dept. of Env’tl. Protection, 27 F. Supp. 2d 380, 383 (E.D.N.Y. 1998). *See also* Atl. States Legal Found., Inc. v. Hamelin, 182 F. Supp. 2d 235, 243–44 (N.D.N.Y. 2001); Conn. Fund for the Env’t, Inc. v. The Upjohn Co., 660 F. Supp. 1397, 1402–03 (D. Conn. 1987). In *Chesapeake Bay Foundation v. American Recovery Co.*, 769 F.2d 207, 208 (4th Cir. 1985), the court held that a citizen action was not preempted by state action commenced three and a half hours later. The court commented that “the verb tenses used in subsection [33 U.S.C. § 1365] (b)(1)(B) and the scheme of the statute demonstrate that the bar was not intended to apply unless the government files suit first.” *Id.* at 208. It noted further that courts had other mechanisms to avoid duplicative litigation. *See* Altamaha Riverkeepers v. City of Cochran, 162 F. Supp. 2d 1368, 1373 (M.D. Ga. 2001); Briggs & Stratton Corp. v. Concrete Sales & Servs., 20 F. Supp. 2d 1356, 1374 (M.D. Ga. 1998); PIRG Pub. Interest Lobby v. Dow Chem. Co., 1996 WL 903838, at \*6–\*7 (W.D. Mich.) (stating that state filed two days later); Westfarm Assocs. Ltd. P’ship v. Int’l Fabricare Inst., 1992 WL 315188, at \*3 (D. Md.) (holding that state’s intent to enforce is not enough to bar citizen suit); Glazer v. Am. Ecology Env’tl. Servs. Corp., 894 F. Supp. 1029, 1036 (E.D. Tex. 1995) (holding that state action must be “pending” when citizen suit is filed to bar suit); PIRG of N.J., Inc. v. Hercules, Inc., 830 F. Supp. 1525, 1538–39 (D.N.J. 1993), *rev’d in part on other grounds*, 50 F.3d 1239 (3d Cir. 1995); Mass. PIRG, Inc. v. ICI Americas, 777 F. Supp. 1032, 1036 (D. Mass. 1991) (holding that federal and state actions filed after citizen suit didn’t bar it under the CWA, 42 U.S.C. § 1319(g)); PIRG of N.J., Inc. v. Yates Indus., 757 F. Supp. 438, 444–45 (D.N.J. 1991); Chesapeake Bay Found., Inc. v. Bethlehem Steel Corp., 652 F. Supp. 620 (D. Md. 1987); Brewer v. City of Bristol, 577 F. Supp. 519, 527–28 (E.D. Tenn. 1983) (holding that a citizen suit was not barred under the CWA, 33 U.S.C. § 1365, by subsequently filed state enforcement action). *See also* Dedham Water Co. v. Cumberland Farms Dairy, Inc., 889 F.2d 1146, 1147 (1st Cir. 1989) (holding without discussion that an earlier state suit bars CWA and RCRA citizen suits).

<sup>254</sup> Freeport-McMoRan, Inc. v. K. N. Energy, Inc., 498 U.S. 426, 428 (1991). *See* Acme Printing Ink Co. v. Menard, Inc., 881 F. Supp. 1237, 1244–48 (E.D. Wisc. 1995) (holding after considerable analysis that the issuance of a CERCLA § 106 administrative order didn’t divest it of jurisdiction over a previously commenced citizen suit for abatement of an imminent and substantial endangerment under RCRA, 42 U.S.C. § 6972(b)(2)(B)(iv) (2000)).

suit, the provision implies that an action that has not yet commenced or has concluded will not bar a citizen suit.<sup>255</sup> Congress did not provide to the contrary by using the past tense “has commenced” in the preclusion provision, and neither the structure of the statute nor the legislative history contain any hint that Congress intended a subsequently filed government action to oust the court’s jurisdiction over a pending citizen suit.<sup>256</sup> Indeed, the preclusion device only bars the citizen from commencing an action, not from prosecuting an action once it has properly commenced.<sup>257</sup> Several decisions have held that subsequently filed government actions do not bar the filing or continuance of citizen suits, but they do not illuminate the issue further.<sup>258</sup>

The defendant in one case acknowledged that a subsequently filed government enforcement action did not automatically oust the court from jurisdiction to hear a previously filed citizen suit, but made a more subtle suggestion based on the Court’s description in *Gwaltney* of citizen suits as purely secondary.<sup>259</sup> The defendant argued that the court should determine whether to dismiss a citizen suit by evaluating “on a case-by-case basis, whether permitting a properly filed citizen suit to go forward would serve the underlying objectives of the Act in light of the subsequently filed government action.”<sup>260</sup> The court commented that the citizen suit at issue indeed had served its statutory purpose by prompting diligent government enforcement and that the continuance of the citizen suit frustrated judicial economy and was needlessly burdensome to the defendant.<sup>261</sup> But it held that it had no statutory authority on which to dismiss

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<sup>255</sup> See ESKRIDGE, *supra* note 29.

<sup>256</sup> See *Acme Printing Ink*, 881 F. Supp. at 1237. Indeed, the opinion also noted that Justice Scalia argued, in his concurrence in *Gwaltney*, that “commencing” and “maintaining” an action are different concepts and that Congress used the “commencement” concept advisedly in CWA § 505. *Id.* at 1247 (citing 484 U.S. at 68).

<sup>257</sup> *The Old Timer, Inc. v. Blackhawk-Central City Sanitation Dist.*, 51 F. Supp. 2d 1109, 1113 (D. Colo. 1999).

<sup>258</sup> See *Am. Recovery Co.*, 769 F.2d at 208–09; *The Old Timer*, 51 F. Supp. 2d at 1109 (holding that state administrative penalty assessment commenced after filing a CWA citizen suit complaint does not bar citizen suit under CWA § 309(g)(6)(ii), 33 U.S.C. § 1319(g)(6)(ii)); *Long Island Soundkeeper Fund*, 27 F. Supp. 2d at 380; *Briggs & Stratton*, 20 F. Supp. 2d at 1356; *Glazer*, 894 F. Supp. at 1035; *NRDC, Inc. v. Loewengart & Co.*, 776 F. Supp. 996 (M.D. Pa. 1991); *PIRG of N.J., Inc. v. Yates Indus.*, 757 F. Supp. 438 (D.N.J. 1991); *Sierra Club v. United States Dept. of Energy*, 734 F. Supp. 946, 951 (D. Colo. 1990); *Sierra Club v. Coca-Cola Corp.*, 673 F. Supp. 1555 (M.D. Fla. 1987) (holding that entry of a consent decree settling the government’s case did not bar continuation of the citizen suit when the citizen plaintiffs refused to agree to the decree); *Job Plating*, 623 F. Supp. at 215–16; and *Sierra Club v. Simkins Indus.*, 617 F. Supp. 1120, 1132 (D. Md. 1985), *aff’d*, 847 F.2d 1109 (4th Cir. 1988) (holding that state enforcement action commenced after commencement of CWA citizen suit does not bar citizen suit under the CWA § 505(b), 33 U.S.C. § 1365(b)). See also *Hamelin*, 182 F. Supp. 2d at 235.

<sup>259</sup> *Atl. States Legal Found., Inc. v. Koch Refining Co.*, 681 F. Supp. 603, 609 (D. Minn. 1988).

<sup>260</sup> *Id.* at 614.

<sup>261</sup> *Id.* at 613.

it.<sup>262</sup> The court did warn, however, that it would deny plaintiff any attorneys fees if plaintiff pursued purely duplicative litigation.<sup>263</sup>

## 2. When Does the Government Commence an Action?

While the statutes do not define “commenced,” FEDERAL RULES OF CIVIL PROCEDURE 3 provides that “[a] civil action is commenced by filing a complaint with the court.” Courts have readily adopted this definition of “commenced” in the citizen suit provision.<sup>264</sup> The Senate Report accompanying the CWA citizen suit provision suggests that this is what Congress intended: “The time between notice and *filing* of the action should give the administrative enforcement office an opportunity to act on the alleged violation.”<sup>265</sup> When Congress provided in 1987 that penalty assessments would bar citizen suits for penalties under the CWA, it exempted from the bar citizen suits that had “been filed prior” to the commencement of the penalty action.<sup>266</sup> In a similar vein, EPA’s Consolidated Rules of Practice provide that administrative penalty proceedings within EPA’s jurisdiction are commenced when EPA files a complaint with the Regional Hearing Clerk.<sup>267</sup> Because the statutes do not suggest interpreting “commenced” otherwise, the term should be interpreted in a manner consistent with the FEDERAL RULES OF CIVIL PROCEDURE and EPA’s rules for administrative procedures.

One court suggested that for purposes of uniformity, federal rather than state law should govern the meaning of “commenced.”<sup>268</sup> Of course, the commencement of federal actions is determined by federal law, primarily the rules of civil procedure and EPA regulations. To the extent that Congress drafted the statutes to preclude citizen suits because of the commencement of a state action, however, Congress implicitly accepted non-uniformity to the extent that state civil and administrative procedures vary in minor ways from their federal counterparts. The provisions authorize citizens to enforce against a violation, but not if the government already has commenced an action against the same violator. Because the verb “commenced” is used twice in the same sentence, the word should be interpreted similarly in both contexts. Citizen suits cannot be commenced by

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<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> See *Clorox Co. v. Chromium Corp.*, 158 F.R.D. 120, 125 (N.D. Ill. 1994).

<sup>265</sup> S. REP. NO. 92-414 at 80 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3745 (emphasis added).

<sup>266</sup> CWA, 33 U.S.C. § 1319(g)(6)(B)(i) & (ii) (2000).

<sup>267</sup> EPA, Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, Prehearing Procedures, 40 C.F.R. § 22.13 (2004).

<sup>268</sup> *Conn. Fund for the Env’t, Inc. v. The Upjohn Co.*, 660 F. Supp. 1397, 1403 n.8 (D. Conn. 1987). The court also examined the state law governing when suit was commenced and found it to be the same as federal law.

the statutorily required notice of violation to the governments and the violator. Congress intended that notice to enable the governments to preclude the citizen suit by commencing government enforcement action first, but the government could not do so if the citizen suit is commenced by the notice.<sup>269</sup> If “commencement” has the same meaning both times it is used in the same paragraph, it must mean the filing of a complaint by the state rather than a preliminary notice or action. Not surprisingly, most courts considering the question have held that actions short of filing complaints do not constitute commencement of enforcement actions,<sup>270</sup> and that the actual filing of an administrative complaint or the issuance of an administrative order does commence an enforcement action, provided that the other requirements of the preclusion bar are met.<sup>271</sup>

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<sup>269</sup> “The time between notice and filing of the action should give the administrative enforcement office an opportunity to act on the alleged violation.” S. REP. NO. 92-414 at 80 (1971), reprinted in 1972 U.S.C.C.A.N. 3668, 3745 (discussing CWA § 505, 33 U.S.C. § 1365).

<sup>270</sup> See *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 618–19 (7th Cir. 1998) (holding that writing a letter does not commence an action in court); *Dague v. City of Burlington*, 935 F.2d 1343, 1353 (2d Cir. 1991), *rev’d on other grounds*, 502 U.S. 1071 (1992) (holding that filing of an “Assurance of Discontinuance” in court did not constitute commencing an action in court under RCRA § 7002, 42 U.S.C. § 6972); *Cnty. Ass’n for Restoration of the Env’t v. Henry Bosma Dairy*, 2001 WL 1704240, at \*6–\*7 (E.D. Wash. 2001) (holding that notice of violation does not commence a CWA § 309(g), 33 U.S.C. § 1319(g), penalty action); *NRDC v. NVF Co.*, 1998 WL 372299, at \*11 (D. Del. 1998) (holding that state and federal monitoring of defendant’s activities and discussions with defendant do not constitute commencement of an action under CWA § 309(g)); *Molokai Chamber of Commerce v. Kukui (Molokai), Inc.*, 891 F. Supp. 1389, 1405 (D. Hawaii 1995) (holding that notice that the state might commence an administrative penalty assessment did not “commence” an action under CWA § 309(g): “The commencement of an action for penalties is not signaled by a letter stating that penalties *may* be sought under a separate statutory section, particularly where, as here, the DOH has taken no further steps toward the imposition of penalties.”). See also *Westfarm Assocs. Ltd. P’ship v. Int’l Fabricare Inst.*, 1992 WL 315188 (D. Md. 1992) (holding that state’s intention to enforce does not constitute commencement of an action); *Tobyhanna Conservation Ass’n v. County Place Waste Treatment Co.*, 734 F. Supp. 667, 669–70 (M.D. Pa. 1989) (holding that an unsigned letter setting up compliance meeting with state does not commence a CWA § 309(g) penalty action); *Atl. States Legal Found., Inc. v. Koch Refining Co.*, 681 F. Supp. 603, 611 n.2 (D. Minn. 1988); *PIRG of N.J., Inc. v. Elf Atochem N. Am., Inc.*, 817 F. Supp. 1164, 1173 (D.N.J. 1993) (holding that a letter accompanying an inspection report notifying defendant that it was in violation and that an enforcement action might be commenced if it did not come into compliance did not commence a government enforcement action). *But see Williams Pipe Line Co. v. Bayer Corp.*, 964 F. Supp. 1300, 1329 (S.D. Iowa 1997) (apparently holding that a state agency can commence an action by informal means, such as entering into negotiations or orally telling a violator to submit corrective plans).

<sup>271</sup> See *Ark. Wildlife Fed’n v. ICI Americas, Inc.*, 29 F.3d 376, 383 (8th Cir. 1994) (holding that issuance of administrative penalty order by consent commenced action for purposes of CWA § 309(g), 33 U.S.C. § 1319(g)); *Sierra Club v. Colo. Refining Co.*, 852 F. Supp. 1476, 1483 (D. Colo. 1994) (holding that administrative order on consent commenced action for purposes of CWA § 309(g)); *Zands v. Nelson*, 779 F. Supp. 1254, 1258 (S.D. Cal. 1991); *PIRG of N.J., Inc. v. Witco Chem. Corp.*, 1990 WL 66178 at \*5 (D.N.J.) (holding that state oversight of site remediation was not commencement of a CWA § 309(g) penalty action).

The question of when a citizen suit or a government action is commenced becomes complicated when the citizen first files a complaint alleging a claim not requiring prior notice and later amends the complaint to allege a claim requiring prior notice. For instance, a citizen might file a public or private nuisance suit to enjoin pollution, an action not requiring prior notice, and amend the complaint to add citizen suit claims requiring prior notice. Both the policy behind the prior notice requirement and the logic of the FEDERAL RULES OF CIVIL PROCEDURE lead to the conclusion that the action requiring prior notice was commenced with the filing of the amended complaint, not the initial complaint. The primary policy behind the prior notice, delay, and bar provision is to allow the government to assume its enforcement responsibility against the violation unencumbered by another's pending enforcement action.<sup>272</sup> If filing the initial complaint constituted commencement of the amended action, the citizen would not have given notice of the violation of the statute and the government would not have had the opportunity to enforce against the violation unencumbered by the citizen suit. Only by giving the requisite notice and observing the requisite delay period before filing the amended complaint is this goal accomplished. The pendency of the initial suit against the defendant on another matter does not deprive the government of its opportunity to enforce against the violation unencumbered by another's enforcement action,<sup>273</sup> for the government is free to initiate an action once it receives notice of the citizen's intent to amend the complaint. Moreover, as noted above, under Rule 3, an action is commenced when filed.<sup>274</sup> The cause of action against the violation requiring prior notice does not exist until the amended complaint is filed, making it difficult to argue it is commenced before that time. Finally, "once amended, the initial action is no longer before the court,"<sup>275</sup> thereby making it impossible for it to have been commenced earlier. Not surprisingly, most courts considering this issue and its variants hold that the action against a violation requiring prior notice,

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<sup>272</sup> See *supra* Part I.C.2.

<sup>273</sup> Of course, there is a spectrum of situations in which the citizen suit case may become increasingly intrusive on the government's ability to conduct its action against the violation requiring prior notice unencumbered by the initial case. If a citizen filed suit against a defendant for breach of an employment contract, served notice of its intent to amend its complaint to include a citizen suit count for violation of the CWA, and EPA brought suit on the CWA violation within the delay period, the citizen would be barred from filing the amended complaint and EPA could prosecute its action entirely unencumbered by the pending breach of contract case. If the initial case concerned breach of a contract to construct the treatment facility that was needed to comply with the CWA, the two cases would overlap, but EPA's ability to pursue its action on the violations would be unencumbered. If the initial case was a common law nuisance action for damages caused by the violating discharge, the two cases would overlap even more, but EPA's ability to pursue its action on the violations would still be unencumbered.

<sup>274</sup> See *supra* note 258 and accompanying text.

<sup>275</sup> *Clorox Co. v. Chromium Corp.*, 158 F.R.D. 120, 125 (N.D. Ill. 1994).

first alleged in an amended complaint, is commenced when the amended complaint is filed.<sup>276</sup>

Other courts came to a different conclusion, on the basis that FEDERAL RULES OF CIVIL PROCEDURE 15(c) provides an amended complaint relates back to the original complaint if the Rule's requirements are met. They did so, however, to preserve citizen suits when a potentially barring government action was commenced after the initial citizen suit complaint was filed, but before an amended citizen suit complaint was filed.<sup>277</sup> The Court's use of the "relation back" provision of Rule 15(c) to allow plaintiffs to amend properly filed complaints to add citizen suit counts without the otherwise required prior notice is novel. The purpose of the Rule is to integrate the operation of statutes of limitation with the amended complaints, as acknowledged by the court that first adopted this "relation back" theory.<sup>278</sup> Allowing citizen suit plaintiffs to amend properly filed complaints to include previously unnoticed citizen suit counts wrongfully deprives the government of the opportunity to receive notice of the newly complained of violations and to commence an action on them, unencumbered by a citizen suit. If notice is required before commencement of the complaint, the initial citizen suit could continue unaffected by any government action on the initially complained of violations.

The situation may appear more complicated when the original complaint alleges violation of requirement *A*, requiring prior notice, and the amended complaint alleges either subsequent violations of requirement *A* or violations of requirement *B*, both requiring prior notice. These allegations could reflect either violations of requirement *A* continuing after the complaint is filed or violations of requirement *B* during discovery. As to the added allegations of violations, however, the situation is not different from when the original complaint contained no allegation subject to the notice, delay, and bar provision. The government did not receive notice of these violations before the initial complaint was filed and therefore will not have an opportunity to take action against them unencumbered by a

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<sup>276</sup> See *id.* at 122 (stating that initial complaint apparently alleged no violation requiring prior notice); *City of Heath v. Ashland Oil Co.*, 834 F. Supp. 971, 983–84 (S.D. Ohio 1993) (stating that initial complaint contained CERCLA claims, and amended complaint contained RCRA claims); *Zands*, 779 F. Supp. at 1254 (stating that RCRA claims were first included in amended complaint); *Chesapeake Bay Found., Inc. v. Bethlehem Steel Corp.*, 652 F. Supp. 620, 627–28 (D. Md. 1987) (stating that notice sent before complaint filed suffices for later violations of the same nature cited in the notice); *Sierra Club v. Simkins Indus.*, 617 F. Supp. 1120, 1125–1126 (D. Md. 1985), *aff'd*, 847 F.2d 1109 (4th Cir. 1988).

<sup>277</sup> See *Acme Printing Ink Co. v. Menard, Inc.*, 881 F. Supp. 1237, 1246 (E.D. Wisc. 1995) (using "relation back" theory to sustain citizen suit RCRA counts added in amended complaint filed after government CERCLA action). See also *A-C Reorg. Trust v. E.I. Du Pont de Nemours & Co.*, 968 F. Supp. 423, 432 (E.D. Wisc. 1997).

<sup>278</sup> *Acme Printing Ink*, 881 F. Supp. at 1246 n.6. The Advisory Committee Notes for the 1966 Amendment to FED. R. CIV. P. 15(c) commented, "Relation back is intimately connected with the policy of the statute of limitations." FED. R. CIV. P. 15, Advisory Comm. Notes (1960). See also *Bethlehem Steel Corp.*, 652 F. Supp. at 627–28 (stating that relation back is for purpose of applying the statutes of limitations).

citizen suit unless the citizen gives notice before filing the amended complaint. It is less prejudicial to the government's unencumbered enforcement ability, however, not to give notice of filing an amended complaint if the new violations are of the same requirement as alleged in the initial complaint, for which prior notice was given. Because the citizen suit provisions typically grant authority to sue only for ongoing violations, it is reasonable for the government to know when it received the citizen's notice before the citizen filed her complaint, that the violations were alleged to ongoing at the time the complaint was filed and continued thereafter.<sup>279</sup> The pre-complaint notice of violations of particular requirements, therefore, effectively gave the government notice of post-complaint violations of the same requirements and the ability to enforce against them unencumbered by a citizen suit. The better practice would be for citizen plaintiffs to further alleviate prejudice to the government's unencumbered enforcement ability regarding these subsequent violations of the same requirements by including allegations of continuing and future violations of the requirement the pre-complaint notice.

*D. How Diligently Must the Government Prosecute an Action in Order To Bar a Citizen Suit?*

The statutes do not define the phrase "diligently prosecuting," perhaps because prosecution is an activity for which courts have far more experience than Congress; the statutes focus instead on how much deference should be accorded to prosecutorial choices.<sup>280</sup> The phrase raises two interpretive questions. Must the prosecution be ongoing to bar a citizen suit? What is diligent prosecution?

A word of caution is necessary before delving into judicial interpretation of the phrase. Many of the decisions interpreting it do so in the context of CWA § 309(g). While the preclusions in citizen suit provisions apply when the government "is diligently prosecuting . . . to require compliance," the preclusion in § 309(g) lacks the second phrase. That is not surprising, since even the most diligent prosecution of § 309(g) will yield only modest penalties and will not result in a compliance order. That is decidedly not the case under EPA's other enforcement authorities or under the citizen suit provisions. Using them, diligent prosecution can yield enormous penalties and injunctions for costly compliance.

Defendants in CWA citizen suit cases, stymied by limitations on the use of preclusion under CWA § 505 have sought to transform the preclu-

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<sup>279</sup> The Court held that allegations of continuing violations are required to establish jurisdiction for a citizen suit under CWA § 505, 33 U.S.C. § 1365 (2000), and similarly worded provisions. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49 (1987). The concurring opinion suggested there would be no continuing injury to support standing and defeat mootness without a continuing violation.

<sup>280</sup> See discussion *infra* in Part II.D.2.b.

sion under CWA § 309(g) from a narrow one preventing only duplicative penalties for the same violation, to a broad one precluding citizen enforcement if the government has taken virtually any administrative action.

Many courts have accepted this reasoning and fail to observe that distinction, freely drawing from § 309(g) “diligently prosecuting” precedent when interpreting citizen suit preclusions. Even courts sympathetic to citizen suits are swayed by *N. & S. Rivers Watershed Ass’n, Inc. v. Town of Scituate*,<sup>281</sup> and its progeny, approaching “diligently prosecuting” issues as if they were prosecutorial discretion issues and ignoring the wording and intent of the statute. Because the decisions are already a jumble, mixing “diligently prosecuting” decisions under § 309(g) and citizen suit provisions as if there were no difference between the two, this Article examines decisions interpreting “diligently prosecuting” under both the citizen suit provisions and CWA § 309(g). But it marks § 309(g) cases in the footnotes in bold to indicate how those decisions have influenced the state of “diligently prosecuting” law.

*1. Must the Government Prosecution Be Ongoing To Bar a Citizen Suit?*

The environmental statutes bar citizen suits if the government “*has commenced and is diligently prosecuting*” an action “to require compliance” (emphasis added). As discussed above, almost all courts considering the issue have held that Congress’s use of the past tense “has commenced” was deliberate, and therefore is significant and should be interpreted in accordance with its plain meaning. “Has commenced,” in the past tense, is separated by one word from “is . . . prosecuting,” in the present tense. The separation of the two verbs by a single word and the juxtaposition of their tenses in the same sub-paragraph, suggest the tense difference was deliberate and that the government’s prosecution must be ongoing to bar to a citizen suit. This interpretation is supported by the plain meaning and *expressio unius* canons of interpretation; by specifying that continuing prosecutions may be preclusive, the provisions imply that concluded prosecutions cannot be.<sup>282</sup> “To require compliance” reinforces this conclusion, for it suggests that a preclusive government action is one in which compliance is yet to be achieved and hence that a concluded government action is not preclusive, for a concluded government action should have led to compliance. Modifying “is . . . prosecuting” with “diligently” adds to the strength of this interpretation. “Diligent” means “characterized by steady, earnest, and energetic application and effort.”<sup>283</sup> Asking whether a prosecution is diligent inquires more into the energy put into an

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<sup>281</sup> 949 F.2d 552 (1st Cir. 1991).

<sup>282</sup> See ESKRIDGE and discussion, *supra* note 29, at 323, 327.

<sup>283</sup> WEBSTER’S SEVENTH NEW COLLEGIATE DICTIONARY 233 (1999).

ongoing process than into the results or success of a concluded process; once the case is concluded, no more energy is put into the prosecution of the case. Although energy may be devoted to monitor compliance with an injunctive order, that is not “prosecution” of the case.

The structure of the CWA suggests that Congress intentionally used the present tense “is diligently prosecuting” in the citizen suit provision. When Congress added § 309(g) to the CWA in 1987, it barred successive EPA and citizen actions for penalties when EPA or a state “*is* diligently prosecuting” a § 309(g) penalty action and also when one of them “*has issued*” a final penalty order and the violator “*has paid*” a penalty.<sup>284</sup> This juxtaposition of tenses in a similar context re-emphasizes that Congress knows the difference between ongoing and completed actions, that it used different verb tenses deliberately, and that it meant the differences to have meaning. This re-emphasis is underscored by congressional knowledge of the linkage between §§ 309(g) and 505, for Congress cross-referenced each section in the other. When it amended § 505 to cross reference the preclusion in § 309(g), it did not disturb the juxtaposed tenses in § 505(b), indicating its intent to let the meaning of the different tenses stand.

The legislative history underlines the deliberate nature of the congressional choice to use the present tense in the preclusion provisions. The CAA Conference Committee Report and the House CWA Report both stated that a citizen suit is barred if a government “abatement action *is pending* and *is being diligently pursued*.”<sup>285</sup> The Senate CAA and CWA Reports both contain similar language,<sup>286</sup> reinforcing that the legislative intent that the present tense “is diligently prosecuting” was to denote current prosecution. The Senate Report demonstrated the same approach in stating that government agencies must prosecute enforcement actions “in good faith and with deliberate speed . . . or the citizen is free to initiate

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<sup>284</sup> CWA, 33 U.S.C. § 1319(g)(6)(A) (2000) (emphasis added). Indeed, Congress intentionally changed tenses in the subsection to implement its policy objectives. In the initial version of the Senate bill, S. 2652, 97th Cong. § 8 (1982), and the final version of the House bill, H.R. 8, 99th Cong. § 24 (1985), it provided EPA with authority to commence a penalty proceeding against a person who “*is in violation*” of the CWA (emphasis added). But, in the enacted version, it authorized EPA to assess penalties only against a person who “*has violated*” the statute. 33 U.S.C. § 1319(g)(1)(A) (2000) (emphasis added). The reason for the change in tenses was to prevent EPA from assessing paltry penalties against continuing violations warranting injunctions or substantial penalties. Congress was aware of tense differences and used tenses advisedly.

<sup>285</sup> H.R. CONF. REP. NO. 91-1783 at 56 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5374, 5388 (emphasis added); H.R. REP. NO. 92-911 at 133 (1972), *reprinted in* 1 CWA LEGISLATIVE HISTORY, at 753, 820 (1973).

<sup>286</sup> “[I]f the court viewed the agency action as inadequate, it would have jurisdiction to consider the citizen action notwithstanding any *pending* agency action.” S. REP. NO. 91-1196, at 37 (1970), *reprinted in* 1 CAA LEGISLATIVE HISTORY, at 401, 437 (1974) (emphasis added); S. REP. NO. 92-414, at 80 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3746 (emphasis added).

his action.”<sup>287</sup> Again, the question of whether a particular prosecution is diligent requires the assessment of an ongoing rather than a concluded process.

Application of the preclusions only when there is an ongoing government prosecution makes sense as a matter of policy, for the likelihood of disruption and conflict from successive prosecution is greatest when two enforcement actions for prospective relief are proceeding simultaneously. Once the government’s action is concluded, the potential for disruption and conflict in judicial proceedings is over. The likelihood that resolution of successive citizen suits will disrupt or conflict with the resolutions of earlier government actions is minimal for several reasons discussed above.<sup>288</sup>

Not surprisingly, courts routinely have interpreted the citizen suit provisions in general and their preclusion bar elements in particular to give meaning to the tenses Congress used in them.<sup>289</sup> Many of them note that the Supreme Court in *Gwaltney* based its decision that CWA § 505 conferred no jurisdiction for a citizen suit to enforce against wholly past violations on the present tense “alleged to be in violation” in § 505(a)(1). The Court’s primary interpretation of the phrase was its plain meaning:

The most natural reading of “to be in violation” is a requirement that citizen-plaintiffs allege a state of either continuous or intermittent violation—that is, a reasonable likelihood that a past polluter will continue to pollute in the future. Congress could have phrased its requirement in language that looked to the past (“to have violated”), but it did not choose this readily available option . . . . [T]he prospective orientation of that phrase could not have escaped Congress’s attention . . . . [C]ongress has demonstrated in yet other statutory provisions that it knows how to avoid this prospective implication by using language that explicitly targets wholly past violations.<sup>290</sup>

The Court’s admonition to give meaning to the tenses used in § 505(a)’s limitation on citizen enforcement authority<sup>291</sup> hardly can be disregarded in interpreting § 505(b)’s limitation on that authority.<sup>292</sup> Almost all of the many courts considering the “has commenced and is diligently prosecuting” language have reasoned that Congress’s use of the past tense “has prosecuted” was deliberate, is significant and should be interpreted in accordance with its plain meaning to hold that only government

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<sup>287</sup> S. REP. NO. 91-1196, at 65 (1970), reprinted in 1 CAA LEGISLATIVE HISTORY, at 401, 465 (1974).

<sup>288</sup> See *supra* text between notes 145 & 146.

<sup>289</sup> See *supra* note 253 and accompanying text.

<sup>290</sup> *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 57 (1987).

<sup>291</sup> 33 U.S.C. § 1365(a) (2000).

<sup>292</sup> *Id.* § 1365(b).

actions filed before citizen suits will bar them.<sup>293</sup> Similarly, all but one of the few courts considering the language have reasoned that Congress's use of the present tense "*is prosecuting*" was deliberate, is significant, and should be interpreted in accordance with its plain meaning to hold that only government actions ongoing at the time citizens suits are filed will bar them.<sup>294</sup>

The district court ruling in *Laidlaw*,<sup>295</sup> is in some ways a schizophrenic decision. It allowed a citizen suit to continue in the face of the defendant's entry into a consent decree with the state assessing a civil penalty in excess of \$400,000. It is a landmark decision for holding that a state action was not diligently prosecuted to bar a citizen suit because the penalty amount in the state action was not sufficient under the circumstances.<sup>296</sup> But the court rejected the easier, plain meaning approach of holding that the state action did not bar the citizen suit because the state action was concluded; the state was no longer "prosecuting" its action, diligently or not. Indeed, the decision is the only one to holding that Congress's use of "prosecuting" does not mean the state action must be continuing to bar a citizen suit. The court doubted that Congress intended the meanings of the tenses it used, for doing so would allow the citizen suit preclusion erected by an ongoing diligently prosecuted government action to dissolve once a diligently prosecuted government action was concluded, thus allowing citizens to evade preclusion simply by waiting until the government's action concluded, a result the court considered senseless.<sup>297</sup> The court failed to note that its own conclusion also led to a senseless result: why would Congress authorize citizens to file suit when the government already had commenced an action but was not diligently prosecuting it, but later bar the citizens from concluding their action because the government had concluded its action in a non-diligent and unsatisfactory manner? The most likely answer to these two questions is that Congress intended an ongoing government action to bar citizen suits only if the government is diligently prosecuting the action and for a settled government action to bar citizen suits only if the government settled for an injunction requiring compliance or a penalty adequate to provide deterrence.

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<sup>293</sup> See *supra* decisions cited in Part II.C.1; see *supra* note 253 and accompanying text.

<sup>294</sup> See *Citizens for a Better Env't-Cal. v. Union Oil Co. of Cal.*, 83 F.3d 1111, 1118 (9th Cir. 1996); *Knee Deep Cattle Co. v. Bindana Inv. Co.*, 94 F.3d 514, 516 (9th Cir. 1996); *A-C Reorg. Trust v. E.I. Du Pont de Nemours & Co.*, 968 F. Supp. 423, 429-30 (E.D. Wisc. 1997); *Glazer v. Am. Ecology Env'tl. Servs. Corp.*, 894 F. Supp. 1029, 1034-38 (E.D. Tex. 1995) (CAA, 42 U.S.C. § 7604, RCRA, 42 U.S.C. § 6972); *PIRG of N.J., Inc. v. GAF Corp.*, 770 F. Supp. 943 (D.N.J. 1991) (interpreting CWA, 33 U.S.C. § 1319(g)); *Conn. Fund for the Env't v. Contract Plating Co.*, 631 F. Supp. 1291 (D. Conn. 1986) (interpreting CWA, 33 U.S.C. § 1365); *Conn. Fund for the Env't v. L & W Indus., Inc.*, 631 F. Supp. 1289 (D.Conn. 1986) (interpreting CWA, 33 U.S.C. § 1365). *But see* *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 890 F. Supp. 470 (D.S.C. 1995).

<sup>295</sup> 890 F. Supp. 470 (D.S.C. 1995).

<sup>296</sup> See *infra* notes 334-335 and accompanying text.

<sup>297</sup> See *Laidlaw*, 890 F. Supp. at 485.

The court admitted that its decision was contrary to the plain meaning of the statutory language. It did not examine the legislative history, discussed above, that supports the plain meaning of the statutory language.<sup>298</sup> The only justification the court gave for its decision was that it thought an opposite result was senseless.<sup>299</sup> However, In light of *Gwaltney*, the opposite result is supported by the policy reasons examined above. Congress was more concerned with avoiding conflict between two ongoing court proceedings than with avoiding conflicting resolutions of two enforcement actions. Successive citizen suits have only a small chance of interfering with the results the government obtained in a concluded action. Moreover, if successive citizen suits interfere with the ability of violators to carry out their obligations under concluded government actions, courts may apply a variety of common law doctrines to prevent the conflict.<sup>300</sup> Indeed, the district court in *Laidlaw* noted that if the statutory bar ceased when the government action was concluded, duplicative suits might still be avoided under the doctrine of *res judicata*; but the court could not consider *res judicata* in the case, because the defendant had not plead it as a defense and both parties agreed it did not apply.<sup>301</sup> Congressional awareness of common law preclusions<sup>302</sup> to prevent disruptive successive suits could explain why Congress used the present tense “is . . . prosecuting.” But that would lead to the question, why would Congress intend that citizen suits be allowed to proceed while the government pursued its action without diligence, only to be barred by common law preclusions once the government concluded its action in an equally unsatisfactory manner? Congress could not have intended that result. In any event, the court’s interpretation was dicta, because the court found the government’s prosecution had not been diligent in settling for too small a penalty, and therefore did not preclude a citizen suit.<sup>303</sup>

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<sup>298</sup> See *supra* notes 285–287, and accompanying text.

<sup>299</sup> See *Laidlaw*, 890 F. Supp. at 485–86.

<sup>300</sup> See, e.g., *United States v. Cargill, Inc.*, 508 F. Supp. 734 (D. Del. 1981). The relationship between statutory and common law preclusions in citizen suits is beyond the scope of this Article, although the author intends to address it subsequently. The question of whether the statutory preclusions occupy the field and preempt the common law preclusions is a complex one, only now beginning to be addressed. See *supra* note 18. The theme and variations in the statutory preclusions have not been recognized by commentators and may indicate a congressional intent to occupy the field to a greater extent than recognized by them.

<sup>301</sup> *Laidlaw*, 890 F. Supp. at 485 n.7. Indeed, the court asked the parties to brief the issue, raising two intriguing questions: Why did the court ask the parties to brief the issue when the defendant had not plead *res judicata* as a defense under FED. R. CIV. P. 8(c), and why did defendant argue the state order it had gone to considerable trouble to get didn’t support *res judicata*?

<sup>302</sup> The Senate CAA and CWA Reports both commented that if courts found government enforcement adequate, they could suspend, dismiss or consolidate the citizen suit, evidently referring to stays, abstention, *res judicata*, and the other common law preclusions. S. REP. NO. 91-1196, at 37 (1970), reprinted in 1 CAA LEGISLATIVE HISTORY, at 401, 437 (1974); S. REP. NO. 92-414, at 80 (1971), reprinted in 1972 U.S.C.C.A.N. 3668, 3746.

<sup>303</sup> See *Laidlaw*, 890 F. Supp. at 491–98.

Few courts have addressed whether the present tense of “is . . . prosecuting” means the preclusion no longer operates once a prosecution ends. Perhaps citizen plaintiffs have not made the argument, either because they did not think of it or because they did not want to raise it, fearing *res judicata* or issue preclusion defenses would follow.

Assuming that “is diligently prosecuting” requires an ongoing government prosecution to bar a citizen suit, what is an “ongoing prosecution”? The obvious answer is that an ongoing prosecution is an action commenced by filing a complaint and not yet concluded by a dispositive ruling, decision on the merits, or court-entered consent decree (or, under some statutes, courts’ administrative analogues) and not on appeal. The difficult question is whether an action that has been concluded by an order is still ongoing when the order contains a schedule requiring the defendant to perform actions in the future. If the court has issued an injunction or approved a negotiated consent decree requiring compliance in accordance with a schedule, it is tempting to say the action is still pending and the citizen is barred from suing if the prosecutor is diligently monitoring compliance with the order and seeking to enforce it when the defendant fails to do so. Indeed, many,<sup>304</sup> but not all,<sup>305</sup> courts considering the matter have so held. The minority view, however, has more merit. Monitoring compliance with a decree is not action in court. When the prosecutor seeks the court’s help to enforce the decree, he really is enforcing against a violation of the court’s order in a contempt proceeding, not against a violation of the statute in an enforcement action; that prosecution has been completed.<sup>306</sup> Indeed, Congress recognized the distinction by authorizing citizen enforcement against violations of both the statute and orders enforcing the statute.<sup>307</sup> The issue becomes considerably murkier when the order is adminis-

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<sup>304</sup> For instance, when a twenty-page consent decree established, in detail, work to be performed and standards to be met by the work, the state agency’s monitoring of compliance with the work schedule was held to be continuing and diligent prosecution in *City of Heath v. Ashland Oil Co.*, 834 F. Supp. 971 (S.D. Ohio 1993). See also *Cmty. of Cambridge Env’tl. Health and Cmty. Dev. Group v. City of Cambridge*, 115 F. Supp. 2d 550 (D. Md. 2000) (late compliance of consent decree held diligent prosecution under CWA § 309(g), 33 U.S.C. § 1319(g)).

<sup>305</sup> See *PIRG of N.J., Inc. v. Witco Chem. Corp.*, 1990 WL 66178 (D.N.J.) (holding that state participation in committee overseeing implementation of remedial action by defendant under a stipulation ending administrative enforcement was not diligent prosecution under CWA § 309(g), 33 U.S.C. § 1319(g)); *SPIRG of N.J., Inc. v. Georgia-Pacific, Corp.*, 615 F. Supp. 1419 (D.N.J. 1985) (holding that post-consent decree administrative surveillance does not constitute action in court that would bar a citizen suit); *Love v. N.Y. Dept. of Env’tl. Conservation*, 529 F. Supp. 832 (S.D.N.Y. 1981).

<sup>306</sup> See *Conn. Fund for the Env’t v. L & W Indus., Inc.*, 631 F. Supp. 1289 (D. Conn. 1986) (commenting that modification of a consent decree was not evidence of diligent prosecution).

<sup>307</sup> The citizen suit provisions generally authorize suit against violation of the statute or an order enforcing the statute. CWA, 33 U.S.C. § 1365(a)(1)(B) (2000), for instance, authorizes suit against violation of a standard or limitation under the statute or “an order issued by [EPA or the state] with respect to such a standard or limitation.” RCRA, 42 U.S.C. § 6972(a)(1)(A) (2000), authorizes citizen suits against violation of an “order which has be-

trative rather than judicial, and was reached by agreement rather than as a result of administrative process. The typical pattern of administrative action in which the issue arises is the issuance of an administrative compliance order by consent, followed by several extensions of the compliance date at the request of the violator, all without any administrative adjudication. As “prosecuting” denotes an ongoing adjudication, this pattern of administrative behavior does not fit it. The authorization of citizens to enforce agency orders complicates this issue further.<sup>308</sup>

## 2. What Is Diligent Prosecution?

The determination of whether prosecution is diligent, i.e., whether it represents a “steady, earnest and energetic application and effort,”<sup>309</sup> is largely a factual inquiry, hence one generally not considered on a motion to dismiss.<sup>310</sup> But the standard is one of federal law.<sup>311</sup> As discussed above, the use of the present tense “is diligently prosecuting” suggests that a prosecution must be ongoing, rather than completed, in order to bar a citizen suit. Courts often fail to distinguish between prosecution that is ongoing, prosecution that is seeking compliance with an order requiring future action, and prosecution that has been completely resolved. As a result, their decisions are often muddied with regard to whether they are analyzing expediency of process or effectiveness of results.<sup>312</sup>

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come effective” under RCRA, which has been held to authorize citizen enforcement of administrative and judicial orders. *See* O’Leary v. Moyer’s Landfill, Inc., 677 F. Supp. 807, 815 n.5 (E.D. Pa. 1988). *But see* Culbertson v. Coats American, Inc., 913 F. Supp. 1572, 1582–83 (N.D. Ga. 1995) (holding, without explanation, that CWA § 309(g), 33 U.S.C. § 1319(g), bars citizens from enforcing against violations of administrative compliance orders).

<sup>308</sup> *See, e.g.*, CWA, 33 U.S.C. § 1365(f) (2000).

<sup>309</sup> *See supra* note 283.

<sup>310</sup> Bare allegation of a lack of diligent prosecution by the plaintiff will survive a motion to dismiss. The defendant, however, usually will develop facts establishing diligent prosecution for a determination in either a motion for summary judgment or at trial. *See, e.g.*, Hudson Riverkeeper Fund, Inc. v. Harbor at Hastings Assocs., 917 F. Supp. 251, 256 (S.D.N.Y. 1996); Glazer v. Am. Ecology Envtl. Servs. Corp., 894 F. Supp. 1029, 1037 (E.D. Tex. 1995); Fallowfield Dev. Corp. v. Strunk, 1990 WL 52745, at \*14 (E.D. Pa. 1990).

<sup>311</sup> *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 890 F. Supp. 470, 486 n.8 (D.S.C. 1995).

<sup>312</sup> A recent decision collecting and summarizing much of the decisional law on what is “diligent” prosecution exemplifies this:

Prosecutions under the CWA and CAA are heavily presumed “diligent.” This presumption arises from a variety of policy considerations: deference to state (and federal) decision-making and enforcement authority, protection of litigants’ interest in the finality of their cases, preservation of the incentives that polluters might have to settle charges with state or federal authorities, and recognition of the limited and interstitial role that citizen suits occupy in the overall enforcement regime. Thus citizens mere unhappiness with an enforcement action (or its settlement terms) does not authorize them to bring a separate lawsuit.

But neither are prosecutions ipso facto “diligent.” Indeed, the same courts that

*a. In Continuing Prosecutions*

Only one decision has considered in any detail the diligence of an ongoing prosecution of a civil action.<sup>313</sup> This paucity of decisions probably reflects the fact that most government enforcement actions are administrative rather than judicial,<sup>314</sup> and that most judicial actions are settled rather than litigated on the merits. The decision contains only the barest outline of two continuing government actions, one of which had been pending for two years before the plaintiffs filed their citizen suit. To determine whether prosecution was diligent, the court examined the docket of the government enforcement case. The state had obtained an interlocutory order in the action and moved for contempt when the defendants did not comply with it. The defendants then filed for bankruptcy, complicating the government's action. As reported, it does not appear that the government was moving either swiftly or with unusually glacial speed. In holding that the prosecution was diligent, the court commented, "[a] rocket docket New York does not have, but the Congress must have been aware that state court actions, throughout the nation, are often a slower paced version of justice than that to which federal district courts aspire."<sup>315</sup>

Only one other decision considers diligent prosecution in a government action still pending when the citizen suit was filed, but it adds nothing to the analysis.<sup>316</sup> The real question here is whether the government is moving steadily, with reasonable speed, energy, effectiveness and profession-

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profess deference toward state and federal enforcement decisions have nevertheless decided for themselves whether the claims at issue were diligently prosecuted . . . .

The cases speak of various indicia of diligence. These include whether the government required (or at least sought) compliance with the specific standard, limitation, or order invoked by the citizen suit; whether the government was monitoring the polluter's activities or otherwise enforcing the permits at issue after settlement with the polluter and up to the time of the citizen suit; the possibility that the citizen-alleged violations will continue notwithstanding the polluter's settlement with the government; and the severity of any penalties compared to (a) the polluter's economic benefits in not complying with the law or (b) the penalties imposed for similar violations in the state.

Citizens Legal Env'tl. Action Network v. Premium Std. Farms, Inc., 2000 WL 220464, at \*12-\*13 (W.D. Mo.) (internal citations omitted).

While this summary is useful, it does not begin to ask whether there is a difference between diligence analyses for ongoing and concluded prosecutions. Moreover, it wrongfully assumes that issues relating to other parts of the preclusion provisions are diligence issues. For instance, whether the action or remedy pursued by the government was one capable of requiring compliance is a related, but separate issue.

<sup>313</sup> *Hudson Riverkeeper Fund*, 917 F. Supp. at 251.

<sup>314</sup> See *supra* note 68 and accompanying text.

<sup>315</sup> *Hudson Riverkeeper Fund*, 917 F. Supp. at 256.

<sup>316</sup> In *Conn. Fund for the Env't v. Contract Plating Co.*, 631 F. Supp. 1291, 1293-94 (D. Conn. 1986), the government action was pending in state court when the citizen suit was filed and was settled thereafter. The court examined the settlement to make its diligent prosecution determination.

alism to secure compliance, a question that courts are in a uniquely experienced position to determine. The court's examination of the docket in the chief case is an appropriate and objective means of making that determination. A state court examining the federal decisions concluded that they interpreted "is diligently prosecuting" to mean "the degree to which the government remained involved in the case after commencing the action rather than its motives or resolution of all the problems at a particular site."<sup>317</sup>

*b. In Completed Prosecutions and Continuing Enforcement of Orders*

Most decisions considering the diligence of prosecutions do so in the context of completed prosecutions or the continuing enforcement of orders. They rarely examine the energy and effort the prosecutors put into such actions, but instead examine the results that the prosecutors achieved. Perhaps these courts are cognizant that the diligent prosecution bar does not apply to concluded prosecutions and are anticipating the argument that a common law or other statutory bar to a citizen suit may apply, holding that Congress's intent was that no bar applies to a settled prosecution that does not assure compliance with the statute being enforced.

Many courts err by applying deference to the prosecutors' decisions in guises not suggested by the wording of the preclusion provisions: by requiring the plaintiff adequately to plead lack of diligent prosecution in his complaint;<sup>318</sup> placing the burden on plaintiffs to prove that government action is not diligent;<sup>319</sup> proclaiming the burden to be a heavy one;<sup>320</sup> giving great deference to prosecutorial decisions;<sup>321</sup> creating a presumption of diligence;<sup>322</sup> noting that compromise is expected in settling

<sup>317</sup> *State v. Indiana Waste Sys., Inc.*, 603 N.E.2d 181, 189 (Ind. App. 1992) (interpreting "does not diligently pursue" in the state's citizen suit provision, IND. CODE § C13-6-1-1).

<sup>318</sup> *See, e.g., City of Heath v. Ashland Oil Co.*, 834 F. Supp. 971, 981-82 (S.D. Ohio 1993).

<sup>319</sup> *See, e.g., Cmty. of Cambridge Env'tl. Health and Cmty. Dev. Group v. City of Cambridge*, 115 F. Supp. 2d 550, 554 (D. Md. 2000) (interpreting CWA, 33 U.S.C. § 1319(g)); *Williams Pipe Line Co. v. Bayer Corp.*, 964 F. Supp. 1300, 1334 (S.D. Iowa 1997) (interpreting CWA, 33 U.S.C. § 1319(g)); *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 890 F. Supp. 470, 487 (D.S.C. 1995); *Conn. Coastal Fishermen's Ass'n v. Remington Arms Co.*, 777 F. Supp. 173, 183 (D. Conn. 1991); *Contract Plating Co.*, 631 F. Supp. at 1293. *Contra, Merry v. Westinghouse Elec. Corp.*, 697 F. Supp. 180, 182 (M.D. Pa. 1988).

<sup>320</sup> *See, e.g., Laidlaw*, 890 F. Supp. at 487.

<sup>321</sup> *See, e.g., Supporters to Oppose Pollution, Inc. v. Heritage Group*, 973 F.2d 1320, 1324 (7th Cir. 1992); *N. & S. Rivers Watershed Ass'n, Inc. v. Town of Scituate*, 949 F.2d 552, 555-56 (1st Cir. 1991); *Atl. States Legal Found., Inc. v. Hamelin*, 182 F. Supp. 2d 235, 247 (N.D.N.Y. 2001); *Cambridge Env'tl. Health and Cmty. Dev. Group*, 115 F. Supp. 2d at 554; *Ark. Wildlife Fed'n v. ICI Americas Inc.*, 842 F. Supp. 1140, 1147 (E.D. Ark. 1993); *Bayer Corp.*, 964 F. Supp. at 1324; *Laidlaw*, 890 F. Supp. at 487; *Orange Env't, Inc. v. County of Orange*, 860 F. Supp. 1003, 1017 (S.D.N.Y. 1994) ("[T]he standard for evaluating the diligence of the state in enforcing its action is a low one which requires due deference to the state's plan of attack . . ."); *Conn. Coastal Fishermen's Ass'n*, 777 F. Supp. at 185.

<sup>322</sup> *See, e.g., Cambridge Env'tl. Health and Cmty. Dev. Group*, 115 F. Supp. 2d at 554;

cases;<sup>323</sup> and reiterating that citizen enforcement is secondary to government enforcement.<sup>324</sup> Indeed, one court commented that the presumption of diligence was so strong that it “will only rarely be a significant factor” in citizen suit decisions.<sup>325</sup> Even courts that find government prosecution not to have been diligent often begin their analysis with such homilies.<sup>326</sup> On none of the other issues discussed in this Article do the courts express nearly as much deference to government enforcers as they do on the diligence of the government’s prosecution. While some degree of deference is due to prosecutorial decisions, blind deference ignores the fact that Congress authorized citizen suits precisely because government enforcers were not always diligent<sup>327</sup> and Congress intended courts to hear citizen suits where government enforcement was not “adequately” prosecuted to require compliance.<sup>328</sup> As one court observed, “[c]omplete deference to agency enforcement strategy, adopted and implemented internally and beyond public control, requires a degree of faith in bureaucratic energy and effectiveness that would be alien to common experience.”<sup>329</sup> By specifying that prosecution must be diligent to bar a citizen suit, Congress invited citizens to question the energy and effort of government enforcement, and directed courts to do so as well.

It should be noted that it is not federal and state prosecutors who are arguing in these cases 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. Indeed, it is the violators whom the government allowed to escape without timely compliance or payment of a penalty that removed the economic advantages from the violations. Of course, it is in the violators’

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*Contract Plating*, 631 F. Supp. at 1293 (finding a presumption of diligence “absent 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.”).

<sup>323</sup> See, e.g., *Ark. Wildlife Fed’n v. ICI Americas, Inc.*, 29 F.3d 376, 380 (8th Cir. 1994) (“It would be unreasonable and inappropriate to find failure to diligently prosecute simply because . . . a compromise was reached.”); *Supporters to Oppose Pollution*, 973 F.2d at 1322 (stating that the notice and delay provision requires “a would-be champion to try negotiation before litigation,” an odd comment, since the notice and delay provision does not require the citizen to negotiate, only to let the government have the first chance to sue).

<sup>324</sup> See, e.g., *Supporters to Oppose Pollution*, 973 F.2d at 1324.

<sup>325</sup> *Contract Plating*, 631 F. Supp. at 1293.

<sup>326</sup> See, e.g., *Culbertson v. Coats American, Inc.*, 913 F. Supp. 1572, 1578–79 (N.D. Ga. 1995); *Laidlaw*, 890 F. Supp. at 486–87.

<sup>327</sup> Congressional skepticism of the diligence of government enforcement is not confined to the environmental arena. Similar concerns prompted it to enact a citizen suit provision as part of the Hazardous Liquid Pipeline Safety Act, Pub. L. No. 96-129, 93 Stat. 1003 (1979) (now codified at 49 U.S.C. §§ 60101–60128 (2000)). For an example of a citizen suit augmenting the lackluster federal enforcement of this statute, see *Williams Pipe Line Co. v. City of Mounds View, Minn.*, 651 F. Supp. 551 (D. Minn. 1987).

<sup>328</sup> See *supra* note 121 and accompanying text.

<sup>329</sup> *Gardeski v. Colonial Sand & Stone Co.*, 501 F. Supp. 1159, 1168 (1980).

self-interest to argue that the most lenient enforcer should prevail, and it is instructive that industry favors enforcement by states.<sup>330</sup>

The facts in *Laidlaw* suggest why violators favor enforcement by states. The defendant had long been in violation of its permit, particularly for discharges of mercury. After six years, the state began an administrative enforcement action.<sup>331</sup> Once the citizen plaintiffs served notice of their intention to sue, the defendant asked the state to file a court action instead of proceeding with its administrative action, for the purpose of barring the citizen suit. When the state said that it had no interest in doing so, the defendant offered the state the largest penalty it had ever collected for an environmental violation, drafted a complaint and a consent decree, walked them through the state offices to obtain the required signatures, filed the documents on the sixtieth day after the citizen notice and paid the filing fee.<sup>332</sup> The state had only filed two judicial actions against violators of the CWA, both at the request of the violators, presumably for the same reason.<sup>333</sup> The consent decree did not require the defendant to comply with its CWA permit and assessed a civil penalty that, although large for the state, was considerably less than the economic benefit the defendant had enjoyed from its non-compliance.<sup>334</sup> The defendant engineered the state court action for no reason other than to bar the citizen suit, apparently assuming correctly that the state would deal with it more leniently than the federal court would in a citizen suit. This pattern is not new, but was begun in the 1980s in deliberate efforts to thwart citizen suits.<sup>335</sup> If

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<sup>330</sup> Industry spokesmen before a House subcommittee hearing on amendments to the CWA, including the administrative penalty authority that became CWA § 309(g), testified that EPA had no business enforcing against violations of the CWA in states with approved CWA permit programs. A spokesperson for the Chemical Manufacturers' Association stated, "CMA urges that the Act be amended to give the states the sole authority to enforce state issued NPDES permits." *Possible Amendments to the Federal Water Pollution Control Act: Hearings Before the Subcomm. on Water Res. of the House Comm. on Pub. Works and Transp.*, 97th Cong. 966 (1982) (statement of Monte Throdahl, Sr. V.P. of Monsanto Chem. Co.). He further stated that "EPA should not be allowed to bring an enforcement action for a permit violation occurring in states administering approved programs. States that have assumed exclusive responsibility for implementation of NPDES program should be given sole enforcement responsibility." *Id.* at 987. A spokesperson for the American Paper Institute testified that EPA penalty actions could result in "undercutting state NPDES agency enforcement efforts. There is no useful purpose to be served by EPA initiating a separate enforcement action from that already undertaken by a state permitting agency." *Id.* at 939 (statement of Peter E. Wrist, V.P. for Forest Products, Mead Corp.). Not surprisingly, both opposed enactment of CWA § 309(g), as did all other industry spokespeople testifying.

<sup>331</sup> See *Laidlaw*, 890 F. Supp. at 475–76.

<sup>332</sup> *Id.* at 478.

<sup>333</sup> *Id.*

<sup>334</sup> *Id.* at 479–82.

<sup>335</sup> See *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 890 F. Supp. 470 (D.S.C. 1995), in which the recipient of a citizen suit notice letter solicited a lawsuit from the state, drafted the complaint and consent decree, walked the papers through the state agency, filed the complaint and consent decree, and paid the filing fee, all in an effort to bar the citizen suit. See also *Atl. States Legal Found., Inc. v. Universal Tool & Stamping Co.*, 735 F. Supp. 1404 (N.D. Ind. 1990), for much the same story. In *Conn. Fund for the*

such violator-invited enforcement ever results in appropriate enforcement, it is only by accident. If diligence is measured by the state's "steady, earnest, energetic application and effort,"<sup>336</sup> there is not diligent prosecution here, where the state expended no effort at all.

Of the courts examining the diligence of government enforcement, a scant majority have found it to be diligent, primarily in reliance on the presumptions discussed above.<sup>337</sup> Others have found it not to be diligent, based in whole or in part on a variety of factors, including: the government actions were nothing other than compliance extensions;<sup>338</sup> the settlement did not require compliance;<sup>339</sup> the penalty was not sufficient to deter or recover the economic benefit of non-compliance;<sup>340</sup> the state was merely "monitoring the situation";<sup>341</sup> procedural irregularities were suspect;<sup>342</sup> and the government

Env't v. Contract Plating Co., 631 F. Supp. 1291 (D. Conn. 1986), a defendant was able to avoid a citizen suit for injunctive relief by payment of a \$3,500 penalty to the state. *See also* Hodas, *supra* note 36, at 1647-51.

<sup>336</sup> *See supra* note 283.

<sup>337</sup> *See* Supporters to Oppose Pollution, Inc. v. Heritage Group, 973 F.2d 1320 (7th Cir. 1992); N. & S. Rivers Watershed Ass'n, Inc. v. Town of Scituate, 949 F.2d 552 (1st Cir. 1991); Comfort Lake Ass'n v. Dressel Contracting, 138 F.3d 351 (8th Cir. 1998); Hudson Riverkeeper Fund, Inc. v. Harbor at Hastings Assocs., 917 F. Supp. 251 (S.D.N.Y. 1996); Orange Env't, Inc. v. County of Orange, 860 F. Supp. 1003, 1015-18 (S.D.N.Y. 1994); Ark. Wildlife Fed'n v. ICI Americas Inc., 842 F. Supp. 1140 (E.D. Ark. 1993); City of Heath v. Ashland Oil Co., 834 F. Supp. 971 (S.D. Ohio 1993); Conn. Coastal Fishermen's Ass'n v. Remington Arms Co., 777 F. Supp. 173, (D. Conn. 1991); Conn. Fund for the Env't v. Contract Plating Co., 631 F. Supp. 1291 (D. Conn. 1986); Gardeski v. Colonial Sand & Stone Co., 501 F. Supp. 1159, 1166 (S.D.N.Y. 1980) (holding that original consent order was diligent, but subsequent enforcement of the order was not); Cmty. of Cambridge Env'tl. Health and Cmty. Dev. Group v. City of Cambridge, 115 F. Supp. 2d 550 (D. Md. 2000); Williams Pipe Line Co. v. Bayer Corp., 964 F. Supp. 1300 (S.D. Iowa 1997).

<sup>338</sup> *See* Jones v. City of Lakeland, 224 F.3d 518 (6th Cir. 2000) (*en banc*); Dague v. City of Burlington, 935 F.2d 1343, 1353 (2d Cir. 1991); Culbertson v. Coats American, Inc., 913 F. Supp. 1572 (N.D. Ga. 1995).

<sup>339</sup> *See* Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc., 890 F. Supp. 470 (D.S.C. 1995); Atl. States Legal Found., Inc. v. Universal Tool & Stamping Co., 735 F. Supp. 1404 (N.D. Ind. 1990).

<sup>340</sup> *See* City of Lakeland, 224 F.3d at 522-23; Altamaha Riverkeepers v. City of Cochran, 162 F. Supp. 2d 1368, 1373 n.5 (M.D. Ga. 2001) (holding \$5,000 penalty for continuing violation insufficient to block citizen suit under CWA § 309(g), 33 U.S.C. § 1319(g), saying that "such leniency hardly qualifies as 'diligent prosecution'"); Frilling v. Village of Anna, 924 F. Supp. 821 (S.D. Ohio 1996) (holding that \$50,000 penalty was not justified as adequate, but ruling on other grounds); *Laidlaw*, 890 F. Supp. at 470 (holding \$100,000 penalty not enough to recover economic benefit); *Universal Tool*, 735 F. Supp. at 1404 (holding "lenient" penalty of \$10,000 insufficient for hundreds of violations).

<sup>341</sup> *See* N.Y. Coastal Fishermen's Ass'n v. N.Y. City Dept. of Sanitation, 772 F. Supp. 162, 168 (S.D. N.Y. 1991) ("It is inconsistent . . . for DOS to argue that we should credit DEC's diligence while DOS obviously did not feel compelled to comply with DEC's alleged demands."); N. Cal. River Watch v. Sonoma County Water Agency, 1998 WL 886645, at \*3 (N.D. Cal.).

<sup>342</sup> *See* *Laidlaw*, 890 F. Supp. at 470 (Although defendant's actions did not amount to collusion, they did weigh against diligent prosecution.). *See also* Pirmig Pub. Interest Lobby v. Dow Chem. Co., 1996 WL 903838 (W.D. Mich.); *Universal Tool*, 735 F. Supp. at 1416 (stating that defendant walked the consent decree through the state's offices in a day for signature, a "highly unusual" procedure, indicating the state's "willingness to bend its procedures on [defendant's] behalf.>").

procedures did not allow intervention by interested citizens.<sup>343</sup> Courts often reach diametrically opposite conclusions based on virtually the same facts. For instance, courts consider protracted sagas of administrative enforcement to be diligent or not, based more on the degrees of deference they are willing to give to enforcement agencies than on the speed with which the agencies moved.<sup>344</sup> Where one court has characterized state enforcement actions as acts of “a pen pal, not . . . a prosecutor,”<sup>345</sup> another characterized similarly paced state enforcement as “reasoned cooperative efforts.”<sup>346</sup> Indeed, different panels of the same court of appeals have had starkly different views on the same state actions. One panel called the enforcement “inadequate,” calling ten years an “inordinately long period of administrative enforcement” and saying that the state had “extended and waived . . . compliance deadlines of three, possibly four, of its sweet-heart consent orders.”<sup>347</sup> The other panel felt that the state had merely extended deadlines “in response to practical difficulties,” making clear attempts to “remedy the problem.”<sup>348</sup> In addition, some courts have not been troubled by trivial penalties having no deterrent value.<sup>349</sup>

Courts that preclude citizen suits out of deference to state prosecution simply are ignoring whether the state is diligently prosecuting or has

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<sup>343</sup> See generally *Frilling*, 924 F. Supp. at 821; *Laidlaw*, 890 F. Supp. at 470; *Gardeski v. Colonial Sand & Stone Co.*, 501 F. Supp. 1159 (S.D.N.Y. 1980).

<sup>344</sup> *Contrast Culbertson v. Coats American, Inc.*, 913 F. Supp. 1572, 1579 (N.D. Ga. 1995) (CWA, § 309(g)) (holding that state’s actions were mere “extensions of compliance deadlines”); *N.Y. Coastal Fishermen’s Ass’n*, 772 F. Supp. at 162 (CWA, § 309(g)) (holding that five years of successive state administrative orders yielding few results was not diligent prosecution); *Love v. N.Y. Dept. of Env’tl. Conservation*, 529 F. Supp. 832 (S.D.N.Y. 1981) (No diligent prosecution where violations continued after state ordered defendant to cease violation and state took no steps to enforce its order); and *Gardeski*, 501 F. Supp. at 1159 (two years of ineffective follow-up to consent order not diligent prosecution); with *Ark. Wildlife Fed’n v. ICI Americas Inc.*, 842 F. Supp. 1140 (E.D. Ark. 1993); (CWA, § 309(g)) (stating that a series of consent administrative orders extending date of compliance and assessing small civil penalties were diligent prosecution), and *Jones v. City of Lakeland*, 175 F.3d 410, 413–14 (6th Cir. 1999), *rev’d en banc*, 224 F.3d at 518 (same).

<sup>345</sup> *N.Y. Coastal Fishermen’s Ass’n*, 772 F. Supp. at 168.

<sup>346</sup> *Ark. Wildlife Fed’n*, 842 F. Supp. at 1149. See also *Conn. Fund for the Env’t v. Contract Plating Co.*, 631 F. Supp. 1291 (D. Conn. 1986).

<sup>347</sup> *City of Lakeland*, 224 F.3d at 522.

<sup>348</sup> *City of Lakeland*, 175 F.3d at 414.

<sup>349</sup> See *Ark. Wildlife Fed’n*, 842 F. Supp. at 1142–43, *aff’d* 29 F.3d 376 (8th Cir. 1994) (assessing \$1,000, with additional \$500 penalties in each of three amendments extending the compliance date, waiving \$50,000 and \$120,000 due in stipulated penalties for violations of consent orders); *Cnty. of Cambridge Env’tl. Health and Cmty. Dev. Group v. City of Cambridge*, 115 F. Supp. 2d 550, 556 (D. Md. 2000) (CWA, § 309(g)) (assessing \$1,500, noting that although the penalty amount was “minimal,” “economic benefit analysis . . . has limited relevance when applied to the municipality”); *Contract Plating*, 631 F. Supp. at 1292–94 (assessing \$3,500 for 71 admitted violations and no injunction to comply). With regard to the contention in *Cambridge Env’tl. Health and Cmty. Dev. Group* that significant penalties are inappropriate against cities, see *Catskill Mountains Chapter of Trout Unltd. v. New York City*, 244 F. Supp. 2d 41 (N.D.N.Y. 2003) (assessing a \$5.75 million penalty against the City for an interbasin transfer of waste from one river to a more pristine river without a CWA permit).

diligently prosecuted an action to achieve compliance. If the diligent prosecution bar applies to concluded prosecutions, the question is not how much deference courts should give to enforcement agencies, but whether the enforcement agencies diligently prosecuted the concluded action to seek compliance. When the state enforcement agency has issued an order that does not require compliance, has assessed a penalty that is insufficient to deter continuing violations, or has engaged in a series of actions to enforce an order that have not resulted in compliance over a protracted period of time, it cannot be said that the state diligently sought compliance. If the prosecutor pursues a case to a decision on the merits, a judge or jury will make the ultimate decision. All that can be asked of the prosecutor in that case is that she present her case to the decision-maker with diligence, i.e., moving steadily, with reasonable speed, energy, effectiveness and professionalism to secure compliance. Even if she prosecutes the case with diligence, the third party decision makers may not require strict compliance.<sup>350</sup> But if the prosecutor settles the case, she is the decision-maker. Her actions in negotiating and agreeing to the settlement are then capable of a more exacting diligence analysis. If she agrees to a settlement that does not achieve compliance or agrees to a penalty that is too small to deter violations, her agreement hardly can be an action diligently pursuing compliance. Thus when a prosecution is ongoing, the prosecutor's pleadings and discovery actions reveal whether she is diligently prosecuting to require compliance, thereby ending the violations of which the citizen complains. But when the prosecution ends in a settlement, we can and should look to the prosecutor's action agreeing to the terms of the settlement to determine if she prosecuted the case diligently to require compliance.

This evaluation of the government's settlement is an exercise with which federal court judges are familiar in another guise: reviewing consent decrees to determine whether to enter them. In that exercise courts look both at the negotiation process and to the results of the process. As to the process, they ask whether the negotiation was arm's length and fair.<sup>351</sup> As to the results, they ask if they are reasonable and fair.<sup>352</sup> In the case of a

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<sup>350</sup> As Judge Easterbrook commented in *Supporters to Oppose Pollution, Inc. v. Heritage Group*, 973 F.2d 1320, 1324 (7th Cir. 1992), when the prosecution ends in a judgment after a trial on the merits, a citizen suit is

appropriate only when the agency loses its suit and the private litigant insists that the agency had not tried hard enough. RCRA permits a follow-on private suit if the public suit was not prosecuted diligently. But if the agency prevails in all respects, that is the end; § 6972(b)(1)(B) does not authorize a collateral attack on the agency's strategy or tactics.

<sup>351</sup> See *Stotts v. Memphis Fire Dept.*, 679 F.2d 541, 51 (6th Cir. 1982); *United States v. Hooker Chems. & Plastics Corp.*, 540 F. Supp. 1067 (C.D.N.Y. 1982); *United States v. Ketchikan Pulp Co.*, 430 F. Supp. 83, 85-86 (D. Alaska 1977). See also *infra* cases cited in notes 352 & 353.

<sup>352</sup> See *Sierra Club v. Elec. Controls Design, Inc.*, 909 F.2d 1350, 1355 (9th Cir. 1990);

decree resolving a statutory enforcement action, they ask whether the decree “adequately protects the public interest and is in accord with the dictates of Congress.”<sup>353</sup> The diligence review accords considerable deference to the prosecutor in how her settlement achieves compliance, much as an appeals court accords considerable deference to how a trial court’s injunction requires compliance in cases enforcing against statutory violations. But just as the trial court may not issue an injunction for less than compliance,<sup>354</sup> so too the prosecutor may not settle for less than compliance.<sup>355</sup>

Some courts have asked whether a diligent prosecution review of the government’s settlement is an unpermitted collateral attack on the underlying settlement;<sup>356</sup> it is not.<sup>357</sup> A diligent prosecution review of the government’s settlement in a citizen suit does not threaten to overturn the settlement, since the court’s findings regarding the settlement do not affect the settlement. The only question is whether a citizen suit may go forward. If the settlement did not require compliance with the statute in a reasonable time and manner or payment of a penalty sufficient to deter continuing violations, the prosecutor did not enter into an agreement for compliance and a court should not have entered it under the established standard of review. The citizen then should be free to undertake an action seeking compliance.

Courts often include in the diligent prosecution analysis the question of whether the settlement was a collusive one, presuming the government would not take part in such a settlement. Although collusive settlements do not represent diligent prosecution and therefore should not bar citizen suits, non-collusive settlements are not necessarily diligently prosecuted.

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Citizens for a Better Env’t v. Gorsuch, 718 F.2d 1117, 1126 (D.C. Cir. 1983); *Stotts*, 679 F.2d at 552–54; *United States v. City of Alexandria*, 614 F.2d 1358, 61 (5th Cir. 1980); *United States v. Telluride Co.*, 849 F. Supp. 1400 (D. Colo. 1994); *Sierra Club v. Coca-Cola Corp.*, 673 F. Supp. 1555, 1556 (M.D. Fla. 1987); *Ketchikan*, 430 F. Supp. at 84–85. For a more recent decision reviewing and applying these standards, see *United States v. District of Columbia*, 933 F. Supp. 42 (D.D.C. 1996).

<sup>353</sup> *Gorsuch*, 718 F.2d at 1117 (D.C. Cir. 1983). See also *United States v. City of Miami*, 664 F.2d 435, 441 (5th Cir. 1981); *United States v. BP Exploration & Oil Co.*, 167 F. Supp. 2d 1045, 1049 (N.D. Ind. 2001); *Coca-Cola*, 673 F. Supp. at 1556; *United States v. Georgia-Pacific Corp.*, 960 F. Supp. 298, 299 (N.D. Ga. 1996); *United States v. Seymour Recycling Corp.*, 554 F. Supp. 1334, 1337 (C.D. Ind. 1982); *Ketchikan*, 430 F. Supp. at 86.

<sup>354</sup> *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982).

<sup>355</sup> See generally Andrew B. Loewenstein, Note, *Judicial Review and the Limits of Prosecutorial Discretion*, 38 AM. CRIM. L. REV. 351 (2001), (arguing that while separation of powers doctrine generally limits judicial review of prosecutorial discretion, this does not apply when Congress establishes a statutory standard governing prosecutorial conduct). In the citizen suit provision, Congress established a standard for when government action precludes citizen suits and courts should apply the congressional standard.

<sup>356</sup> *Comfort Lake Ass’n v. Dressel Contracting*, 138 F.3d 351, 355 (8th Cir. 1998) at 356, and *Ark. Wildlife Fed’n v. ICI Americas, Inc.*, 29 F.3d 376, 382 (8th Cir. 1994).

<sup>357</sup> A collateral attack on an EPA enforcement action would take the form of an action seeking judicial review of a final agency administrative action, using the arbitrary, capricious, and abuse of discretion standard of review from the Administrative Procedure Act, 5 U.S.C. § 706 (2000). Such an action would seek to set aside or remand the agency action.

While none of the settlements discussed in the decisions appear collusive, several of them do not appear to have been at arm's length, an inquiry courts make when reviewing a consent decree. Although the lack of an arm's-length negotiation may be insufficient to decide the government action was not diligently prosecuted (after all, the violator might find it in his interests to capitulate fully at any time), it should prompt a heightened inquiry into the settlement's fairness, reasonableness, faithfulness to the public interest, and faithfulness to the statute.

Here the analysis turns to whether the prosecutor was diligent in entering the particular settlement, and this question is an inquiry into what the prosecutor was willing to settle for, rather than a collateral attack on the settlement. The inquiry is whether the results were fair, reasonable, and faithful to the public interest and to the statute being enforced.<sup>358</sup> This inquiry is paramount in settlements of actions enforcing statutes. If the results were insufficient, the settlement still stands and the state still gets what it thought sufficient, but the citizen is free to seek results more faithful to the statute being enforced.

Courts at times also include in the diligent prosecution analysis the question of whether the underlying proceeding afforded citizens full rights of participation.<sup>359</sup> Such participation turns on the details of procedural law, however, and not the energy of the prosecutor and, therefore, is not part of diligence. Moreover, while CWA § 309(g) requires citizen participation for the government action to bar a citizen suit, the citizen suit preclusions do not.<sup>360</sup> But the question is pertinent in another respect. Citizen

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<sup>358</sup> See *supra* note 352 and accompanying text.

<sup>359</sup> See, e.g., *Frilling v. Village of Anna*, 924 F. Supp. 821, 840–42 (S.D. Ohio 1996). The court correctly noted that to have EPA approve a state program for issuing permits under the CWA, EPA regulations require the state to have procedures for citizen participation in enforcement, one option for which is intervention in state enforcement actions. The other option is a set of three specific measures, including agreement by the state not to oppose the permissive intervention by citizens as authorized by state law. The second option, however, does not require that the state authorize permissive intervention. EPA, State Water Program Requirements for Enforcement, 40 CFR § 123.27(d) (2004). *But see* NRDC v. EPA, 859 F.2d 156 (D.C. Cir. 1988) (stating that EPA told the court that it interpreted the regulation to require state permission to intervene). In any event, neither the CWA nor EPA's regulations provide that states must authorize intervention by citizens before state actions may bar citizen suits. And if a state's law does not conform to 40 CFR § 123.27(d), the CWA provides a remedy to citizens; an action for withdrawal of EPA's approval of the state program. 42 U.S.C. § 1342(c) (2000); see *Save the Bay, Inc. v. Administrator*, 556 F.2d 1282 (5th Cir. 1977) (rejecting a citizen suit against EPA to require it to withdraw approval of a state program, and suggesting that the proper procedure was for the citizens to petition EPA to withdraw approval and seek judicial review of EPA's action if it refused to do so).

In a converse situation, the court in *United States v. Encycle/Texas, Inc.*, 1999 WL 33446875 (S.D. Tex.), held that citizens had no right to intervene in an EPA enforcement action under the CWA and RCRA to oppose a proposed consent decree, because they did not establish that EPA failed to diligently prosecute the case. The decision was wrong, however, because the citizen suit sections bar citizen suits if EPA is diligently prosecuting an action, but provide for citizen intervention in the same diligently pursued actions that bar their suits.

<sup>360</sup> The citizen suit provisions authorize citizens to intervene in EPA enforcement actions

participation in enforcement encourages transparency, assuring that the government conducts its enforcement business in an arms-length manner.<sup>361</sup> If there has been no citizen participation in the underlying government action or settlement negotiations, or if the government has refused such participation or the government's procedures do not accord citizen full rights of participation, the settlement has not been or could not have been held up to public scrutiny to assure that it is fair, just, and faithful to the public interest and to the statute being enforced. This lack of earlier public scrutiny suggests that courts should give heightened scrutiny to settlements entered into without public participation.

#### *E. What Citizen Suits May a Government Action Bar?*

The major issue here is whether a government action bars a citizen suit only for the common violations that the two actions seek to abate. For the government action to bar a citizen suit, the government action must seek "to require compliance with *the* standard, limitation, or order" (emphasis added).<sup>362</sup> "[T]he standard, limitation, or order" to which this section refers is the standard, limitation or order the citizen alleges is violated, for it is the only prior use of the three nouns in the section.<sup>363</sup> On its face, a government action bars citizen suits only for violations they seek to enforce in common. This interpretation is supported by the plain meaning and *expressio unius* canons of statutory construction;<sup>364</sup> by specifying that the government action precludes a citizen suit only for the violations of the standard, limitation or order that they both allege and seek to abate, the

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in court. *See, e.g.*, CWA, 33 U.S.C. § 1365(b)(1)(B) (2000). They do not authorize citizens to intervene in state actions. Indeed, "under general principles of federalism and state sovereignty, Congress likely would have no authority directly to provide citizens the right to intervene in state-court enforcement actions." *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 890 F. Supp. 470, 487 n.10 (D.S.C. 1995). But Congress could provide that only state actions in which citizens can intervene may preclude a citizen suit under federal law. Indeed, it has done so in the CWA: administrative penalty assessments by EPA under CWA § 309(g) or by a state under a state provision "comparable" to that subsection may bar a citizen suit for penalties. 33 U.S.C. § 1319(g)(6)(A)(ii) (2000). Because § 309(g)(4) requires public notice of proposed penalty assessments and authorizes citizen intervention in EPA assessment proceedings, state provisions must also require public notice and authorize citizen intervention to be "comparable" to § 309(g). 33 U.S.C. § 1319(g)(4) (2000). *See, e.g.*, *NRDC v. Vygen Corp.*, 803 F. Supp. 97, 101 (N.D. Ohio 1992).

Absent a specific requirement for a state to provide for citizen intervention before state actions may bar citizen suits, it is difficult to understand how such a requirement can be justified on the basis of diligent prosecution. It has nothing to do with the energy and effectiveness of the state in prosecuting the suit. It does, of course, have a good deal to do with the transparency of the state's process, which is an important goal of citizen participation. The lack of such process may well justify giving special scrutiny to a state settlement, but the lack of intervention alone cannot signify a lack of diligent prosecution, except under CWA § 309(g).

<sup>361</sup> *See supra* note 109.

<sup>362</sup> CAA, 42 U.S.C. § 7604(b)(1)(B) (2000).

<sup>363</sup> 42 U.S.C. § 7604(a)(1) (2000).

<sup>364</sup> *See* ESKRIDGE *supra* note 29, at 323.

provision implies that the government action does not preclude a citizen suit against other violations. That result is consistent with the policy of the provision; the notice and the delay period were intended to enable the government to have an opportunity to enforce against the violations of the standard, limitation or order alleged by the citizen, unencumbered by a citizen suit. Where the government has enforced against some, but not all of such violations alleged by the citizen, it has foregone its opportunity to foreclose the citizen from enforcing against the violations the government chose to ignore. Most, but not all courts considering the issue have so held.<sup>365</sup>

A similar issue arises when the defendant in a citizen suit under one statute argues that a government action under another statute bars the citizen suit. Such government actions generally are not brought to require compliance with the same standards the citizen is enforcing against and should not bar the citizen suit,<sup>366</sup> although there are decisions to the contrary.<sup>367</sup> Another variant is whether a citizen suit may go forward when both the

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<sup>365</sup> See *Cnty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy*, 2001 WL 1704240, at \*6-\*7 (E.D. Wash. 2001); *Berry v. Farmland Industries, Inc.*, 114 F. Supp. 2d 1150, 1155-58 (D. Kan. 2000); *Citizens Legal Env'tl Action Network v. Premium Std. Farms, Inc.*, 2000 WL 220464 (W.D. Mo. 2000); *Frilling*, 924 F. Supp. at 836 (holding that citizen suits are "barred only if the State commences a civil action to require compliance with the same standard . . . referenced in the plaintiff's 60-day notice.") (emphasis in original); *Atl. States Legal Found., Inc. v. Montgomery County N. Reduction Plant*, 1996 WL 1670982, at \*5-\*6 (S.D. Ohio) (holding that state air pollution enforcement action is not a bar to CWA citizen suit); *Glazer v. Am. Ecology Env'tl. Servs. Corp.*, 894 F. Supp. 1029, 1036-37 (E.D. Tex. 1995); *Ark. Wildlife Fed'n v. ICI Americas Inc.*, 842 F. Supp. 1140, 1144 (E.D. Ark. 1993) (finding opposite in the specific case but assuming that each violation not charged by state would be subject to enforcement); *Hudson River Fishermen's Assn. v. County of Westchester*, 686 F. Supp. 1044, 1052-53 (S.D.N.Y. 1988); *PIRG of N.J., Inc. v. Witco Chem. Corp.*, 1990 WL 66178 at \*4 (D.N.J.) (holding that defendant must establish state action for "identical claims" a citizen suit alleges); *Md. Waste Coalition v. SCM Corp.*, 616 F. Supp. 1474, 1484 (D. Md. 1985) (holding that CAA § 304, 42 U.S.C. § 7604, bars a citizen suit where a previously filed government enforcement action seeks compliance "with the same standards at the same emission sources," although the two actions were based on violations on different dates); *Love v. N.Y. Dept. of Env'tl. Conservation*, 529 F. Supp. 832, 843-44 (S.D.N.Y. 1981). *Contra Atl. States Legal Found., Inc. v. Tyson Foods, Inc.*, 682 F. Supp. 1186, 1187 (N.D. Ala. 1988) (holding that administrative order requiring future action covered prospective violations under CWA § 309(g), 33 U.S.C. § 1319(g)); *Conn. Fund for the Env't v. Contract Plating Co.*, 631 F. Supp. 1291, 1293-94 (D. Conn. 1986).

<sup>366</sup> See *Briggs & Stratton Corp. v. Concrete Sales & Servs.*, 20 F. Supp. 2d 1356, 1373-74 (M.D. Ga. 1998); *Neighbors for a Toxic Free Community v. Vulcan Materials Co.*, 964 F. Supp. 1448, 1451-52 (D. Colo. 1997) (holding that EPA CERCLA action does not bar a RCRA citizens suit); *Murray v. Bath Iron Works Corp.*, 867 F. Supp. 33 (D. Me. 1994) (holding that state suit to enforce its hazardous waste law does not bar CWA citizen suit); *Hudson River Fishermen's Ass'n*, 686 F. Supp. at 1051-53 (holding that federal enforcement of Refuse Act consent decree requiring proper operation and closure of landfill did not require compliance with CWA prohibition of addition of leachate through point source to navigable water without a permit).

<sup>367</sup> See generally *United States v. Gurley*, 43 F.3d 1188 (8th Cir. 1994); *Hudson Riverkeeper Fund, Inc. v. Harbor at Hastings Assocs.*, 917 F. Supp. 251 (S.D.N.Y. 1996); *Sierra Club v. Colo. Refining Co.*, 852 F. Supp. 1476 (D. Colo. 1994).

citizen suit and the government action seek to enforce the same requirement, but the actions allege violations of the requirement at different times. Courts generally hold that the citizen suit may proceed on continuing violations not enforced against by the government action,<sup>368</sup> although that does not follow from the statutory language that speaks of the statutory requirements violated, rather than the occasions on which they were violated.<sup>369</sup>

To determine which violations a government enforcement action bars from a subsequent citizen suit, a comparison of the citizen suit sixty-day notice and complaint with the complaint in the government action is required.<sup>370</sup> Of course, as discussed above,<sup>371</sup> where the government's action has concluded, there is no continuing government prosecution to bar a citizen suit. Courts that disregard this aspect of the bar must determine the scope of the bar by considering the violations dealt with by the consent decree. This determination is complicated when the government has settled its action and the violations cited in its complaint are not the same as the violations cited in the consent agreement or order.<sup>372</sup> Where the consent decree orders compliance with requirements or penalizes violations not alleged in the government's complaint, the general doctrine that the claims adjudicated in a consent decree rather than the allegations of the underlying complaint define the extent of the adjudication presents few problems.<sup>373</sup> But when the consent order contains a release that goes well beyond the violations cited in the complaint, without redressing the additional violations, the doctrine could bar suits against violations never enforced against, contrary to the plain meaning and policy of the provision. Under these circumstances, most courts have limited the citizen suit bar to the violations cited in the government's complaint, although on different theories. Some courts hold that no enforcement action had been commenced against violations not cited in the complaint and that a gen-

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<sup>368</sup> See *Chesapeake Bay Found., Inc. v. Bethlehem Steel Corp.*, 652 F. Supp. 620 (D. Md. 1987); *Md. Waste Coalition*, 616 F. Supp. at 1474; *Tyson Foods*, 682 F. Supp. at 1186. See also *Love*, 529 F. Supp. at 832. But see *Atl. States Legal Found., Inc. v. Eastman Kodak Co.*, 933 F.2d 124, 127 (2d Cir. 1991) (reading *Gwaltney* to bar citizen suits for penalties the "government elected to forego."). The *Kodak* court clearly misread *Gwaltney*, which held only that citizens could not sue for wholly past violations. The *Gwaltney* court, in turn, used an ill-conceived example of the government foregoing penalties in exchange for the violator installing controls beyond those required by the statute, see *infra* text accompanying notes 432–438.

<sup>369</sup> For example, no citizen may commence suit if the government "has commenced and is diligently prosecuting a civil action . . . to require compliance with the standard, limitations, or order." CAA, 42 U.S.C. § 7604(b)(1)(B) (2000) (emphasis added).

<sup>370</sup> See *Contract Plating*, 631 F. Supp. at 1293.

<sup>371</sup> See *infra* Part II.D.1.

<sup>372</sup> Of course, as discussed in Part II.D.1, if a government action has been settled in a consent decree, it is no longer being prosecuted and, under a plain reading of the provisions, no longer bars a citizen suit.

<sup>373</sup> See *City of Heath v. Ashland Oil Co.*, 834 F. Supp. 971 (S.D. Ohio 1993); *PIRG of N.J., Inc. v. Witco Chem. Corp.*, 1990 WL 66178 at \*4 (D.N.J.); *SPIRG of N.J., Inc. v. Georgia-Pacific, Corp.*, 615 F. Supp. 1419, 1432 (D.N.J. 1985).

eral release in the consent order cannot bar an action that was never commenced.<sup>374</sup> Others hold that violations cited in the complaint and within the terms of a general release in the consent decree, but not redressed in the consent order, were not subject to an action to require compliance and therefore are not barred from citizens suits.<sup>375</sup> A few courts have applied the bar broadly with little regard to whether the government action sought to or did require compliance with particular violations.<sup>376</sup> This minority holding is not true to the wording<sup>377</sup> and congressional intent that the bars apply only where government actions seek compliance. Clearly, orders that do not require compliance with requirements or penalize violations thereof, but instead release them from enforcement, do not seek compliance.

A few courts interpret the consent order as a contract, seeking the answer to what is barred within the four corners of the document or the intent of the parties.<sup>378</sup> Others more properly hold that, although consent

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<sup>374</sup> Where a government consent decree recited that it resolved “all matters arising out of facts alleged or which could have been alleged,” the court held that a successive citizen suit could continue against violations not asserted in the government’s complaint, for the government had not “commenced” an action for violations not mentioned in its complaint. *Glazer v. Am. Ecology Envtl. Servs. Corp.*, 894 F. Supp. 1029, 1036 (E.D. Tex. 1995). Where a government consent decree contained a general release, the court in *Citizens Legal Envtl. Action Network v. Premium Std. Farms, Inc.*, 2000 WL 220464 (W.D. Mo. 2000), limited the citizen suit bar to violations addressed in the complaint, holding that the state simply had not enforced against other violations.

<sup>375</sup> In the reverse situation, where the state complaint addressed violations of six effluent limitations on different pollutants, but the consent order only addressed two, the court in *Frilling*, 924 F. Supp. at 837, held that the bar applied only to violations of the two limitations, for the inclusion of the other four in the complaint was a “mere formality” and the state action “as a practical . . . matter” was not brought to require compliance with them. The court reached this conclusion, in part, because the complaint and the consent order were filed simultaneously. *Id.*

<sup>376</sup> *See* *Knee Deep Cattle Co. v. Bindana Inv. Co.*, 904 F. Supp. 1177, 1184 (D. Or. 1995), *rev’d* 94 F.3d 514 (9th Cir. 1996) (holding that limiting the bar to violations enforced in the government action would “impede the goal of the statute and go against case law and policy which denies duplicative litigation, and supports agency discretion”); *Sierra Club v. Colo. Refining Co.*, 852 F. Supp. 1476, 1481–83 (D. Colo. 1994) (holding that RCRA § 3008(h), 42 U.S.C. § 6928(h), order to study contamination and develop remediation plan bars CWA citizen suit for unpermitted discharge); *Saboe v. Oregon*, 819 F. Supp. 914, 918 (D. Or. 1993) (“[C]itizens suits are not appropriate simply because the plaintiff has more claims than were resolved by a prior government enforcement action.”); *Ark. Wildlife Fed’n v. ICI Americas Inc.*, 842 F. Supp. 1140, 1144 (E.D. Ark. 1993) (holding that a consent order with a release for “all violations occurring up to and including the date of this Order” barred a citizen suit for those violations even though they were not addressed in the order).

<sup>377</sup> *See, e.g.*, CAA, 42 U.S.C. § 7603(b)(1)(B) (2000).

<sup>378</sup> *See* *Berry v. Farmland Industries, Inc.*, 114 F. Supp. 2d 1150 (D. Kan. 2000) (holding that, where an order provided a release for all violations known to EPA, and later recited what violations were known to EPA, the bar was limited to the violations recited). *See also* *Sinclair Oil Corp. v. Scherer*, 7 F.3d 191, 196 (10th Cir. 1993) (holding that “the instrument must be construed as it is written,” quoting *U.S. v. Armour & Co.*, 402 U.S. 673, 682 (1971)). *Sinclair Oil Corp.* was followed by *Neighbors for a Toxic Free Community v. Vulcan Materials Co.*, 964 F. Supp. 1448, 1451–52 (D. Colo. 1997), in holding that a release in a consent decree for claims raised in a complaint alleging RCRA and CERCLA reporting violations did not bar a citizen suit for EPCRA reporting violations. *See also*

orders might preclude suits if interpreted as contracts, this is the wrong inquiry; they are not contracts. Although consent decrees have contractual aspects, they ultimately are court orders.<sup>379</sup> While the contractual aspects of a consent decree may bind the contracting government enforcer not to enforce further against the violator, whether the decree also bars citizens from enforcing further against the violator depends on whether the government has diligently prosecuted against the violations the citizen seeks to enforce.<sup>380</sup> None of these decisions examined in any depth the nature of consent decrees and the entering court's duty in reviewing them prior to entry. The well-established doctrine regarding such nature and duty, however, strongly supports the conclusion that consent decrees should not be interpreted solely as contracts, at least at the federal level.<sup>381</sup>

The issue recurs in specific contexts under RCRA. 42 U.S.C. § 6972 (2000), authorizes actions to enforce the RCRA regulatory program and also to abate imminent and substantial endangerments arising from solid and hazardous waste. Defendants often seek to bar citizen suits to abate endangerments because the government has taken an action against violations of the RCRA regulatory program. Although 42 U.S.C. § 6972(b)(1)(B) (2000) bars citizen suits against violations of the RCRA regulatory program if the government has already commenced an action against such violations, 42 U.S.C. § 6972(b)(2)(B) & (C) (2000) do not bar citizen suits to abate endangerments because of such actions.<sup>382</sup>

RCRA § 7002(b)(2)(B)(iv), 42 U.S.C. § 6972(b)(2)(B)(iv) (2000), bars a citizen suit to abate an imminent and substantial endangerment if EPA has ordered or obtained a court order requiring responsible parties to remediate a contaminated site and they are proceeding to do so. But RCRA § 7002(b)(2)(B) adds that the prohibition is effective “only as to the

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*Georgia-Pacific*, 615 F. Supp. at 1432 (interpreting the scope of the consent decree's coverage on the basis of the decree itself, EPA's complaint, and an internal EPA memorandum).

<sup>379</sup> *Sinclair Oil Corp.*, 7 F.3d at 193.

<sup>380</sup> *Citizens Legal Envtl. Action Network v. Premium Std. Farms, Inc.*, 2000 WL 220464, at \*13 (W.D. Mo.), considered the effect of a very broad release in a consent decree on violations not addressed in the complaint. It held that while the release (extending to violations arising “out of facts known to the State . . . at the time of execution of this Consent Judgment”) might preclude the state from enforcement against violations not addressed in the complaint as a matter of contract law, it was not diligent prosecution against those violations to preclude citizen suits, indeed it was not prosecution of them at all.

<sup>381</sup> Consent decrees are generally held to be by nature both contracts and judicial orders. Courts review them to determine if they were: negotiated at arms' length; are fair, reasonable and equitable; do not violate law or public policy; and, in suits enforcing a statute, were consistent with the goals of Congress. See *Sierra Club v. Coca-Cola Corp.*, 673 F. Supp. 1555, 1557 (M.D. Fla. 1987); *United States v. Hooker Chems. & Plastics Corp.*, 540 F. Supp. 1067, 1080 (C.D.N.Y. 1982); and *United States v. Ketchikan Pulp Co.*, 430 F. Supp. 83 (D. Alaska 1977). States, however, apply state law for entry of consent decrees in state courts, and state law may be different than federal law. In Indiana, for instance, courts enter consent decrees absent fraud or lack of consent. *State v. Indiana Waste Sys., Inc.*, 603 N.E.2d 181, 186 (Ind. App. 1992).

<sup>382</sup> See *N. Cal. River Watch v. Humboldt Petroleum, Inc.*, 2000 WL 1639524, at \*1 (N.D. Cal.). See *supra* Part II.B.1.b.

scope and duration” of the order. Attempts by defendants to apply the § 7002(b)(2)(B)(iv) bar broadly have been unsuccessful; rather, courts have applied the bar in accordance with its plain meaning.<sup>383</sup> “[T]he ‘scope and duration’ clause manifests Congress’s desire to permit citizen suits to be brought to remedy imminent and substantial dangers which are not being addressed by existing” government actions.<sup>384</sup> A citizen suit may be beyond the scope and duration of a CERCLA order if the citizen suit concerns contamination (1) of a different area, (2) by a different pollutant, or (3) relating back to claims made before the order.<sup>385</sup> Of course, citizen suits within the scope and duration of an EPA remedial order are barred.<sup>386</sup>

#### F. Conclusions from Examination of the Preclusion Bar

Defendants have raised five legal issues and a dozen sub-issues to challenge citizen suits on the basis of the government action bar. Part II has examined all of these issues and has concluded that Congress anticipated and addressed them all, except for one: the meaning of “diligently prosecuting.” The plain meaning of the provisions answers the other issues, usually in favor of citizen plaintiffs. The theme and variations nature of the preclusion device Congress used in the different provisions of the statutes underscores the application of plain meaning. Congress deliberately varied the three elements of the device to express its intent on how it applies in a particular provision. To ignore its words is to ignore its intent. Most courts have interpreted the provisions on all these other issues in accordance with their plain meaning. But some courts have not, favoring a misguided deference to prosecutorial discretion to adherence

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<sup>383</sup> See *Organic Chem. Site PRP Group v. Total Petroleum, Inc.*, 58 F. Supp. 2d 755, 764 (W.D. Mich. 1999) (EPA administrative order to remediate contaminated groundwater does not bar citizen suit to remediate contaminated soil); *A-C Reorg. Trust v. E. I. Du Pont de Nemours & Co.*, 968 F. Supp. 423, 430 (E.D. Wisc. 1997) (EPA order under CERCLA to remediate surface does not bar citizen suit for groundwater remediation); *Acme Printing Ink Co. v. Menard, Inc.*, 881 F. Supp. 1237, 1245 (E.D. Wisc. 1995); *Merry v. Westinghouse Elec. Corp.*, 697 F. Supp. 180, 182 (M.D. Pa. 1988); *Coburn v. Sun Chem. Corp.*, 1988 WL 120739, at \*11 (E.D. Pa.), *reconsideration denied*, 198 WL 83518 (E.D. Pa.) (EPA CERCLA order to clean up drinking water supply does not bar citizen suit for surface remediation) (citing specific legislative history); *Fishel v. Westinghouse Elec. Corp.*, 617 F. Supp. 1531, 1539 (M.D. Pa. 1985) (holding that EPA order addressing surface contamination does not bar citizen suit addressing drinking water contamination).

<sup>384</sup> *Acme Printing Ink*, 881 F. Supp. at 1245 (bar applies when dangers addressed by citizen suit are within scope of EPA order, even though defendants in citizen suit are not parties to whom EPA order was issued). See also *A-C Reorg. Trust*, 968 F. Supp. at 431 (administrative order for surface contamination remediation does not bar citizen suit for subsurface contamination remediation; administrative order for arsenic remediation does not bar citizen suit for remediation of other hazardous wastes); *Coburn*, 1988 WL 120739, at \*12 (administrative order for groundwater remediation does not bar citizen suit for surface remediation).

<sup>385</sup> See *A-C Reorg. Trust*, 968 F. Supp. at 430.

<sup>386</sup> See *Keystone Coke Co. v. Pasquale*, 1998 WL 341927, at \*2 (E.D. Pa.).

to the statutes enacted by Congress. Their interpretations do violence to the wording and history of the provisions and should be disregarded.

Although the meaning of diligent prosecution is not as clear as the meaning of the other questioned words in the provisions, it is modified by the congressional declaration that a government action must be one for compliance to bar a citizen suit. Despite Congress's clear direction, the courts have fractured when determining whether the government is diligently prosecuting an action, with a scant majority asking if the government action was aimed at and effective in securing compliance, and a large minority seeking only to defer to prosecutorial discretion regardless of whether the government sought or obtained compliance.

The relative agreement of courts on the other issues and fundamental disagreement on the "diligently prosecuting" issue is not surprising. The diligent prosecution issue is the least susceptible to resolution on a plain meaning basis, as it requires looking a few words ahead in the provision to the "compliance" language. It is also an issue on which prosecutorial discretion is central.<sup>387</sup> Courts mainly concerned with deference to prosecutorial discretion thus find it easier to favor previous government action on the "diligently prosecuting" issue rather than the other issues. Of course, prosecutorial discretion is not really an issue here because citizen plaintiffs are not seeking judicial review of government action or non-action. Indeed, the attacks on citizen suits as interfering with prosecutorial discretion are not being raised by prosecutors, but by violators. Part III examines why some courts are so motivated by deference to prosecutorial discretion that they blatantly disregard the words of the statute.

### III. DOCTRINAL SCHISM IN INTERPRETING CITIZEN SUITS PROVISIONS AND THEIR PRECLUSIONS

#### *A. Plain Meaning Versus Deference to Prosecutorial Decisions*

Much of the litigation over these issues arises not from lack of congressional clarity, but from the desire of defendants to reach results at odds with congressional language and intent. Judges ignoring the plain meaning of the provisions do so from a desire to protect the government's (usually the state's) prosecutorial functions and discretion from interference by successive citizen suits. Significantly, prosecutors do not urge courts to defer to their discretion or contend that successive citizen suits interfere with the exercise of their discretion. Indeed, when the prosecutors

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<sup>387</sup> Choice of remedy and agreement to a negotiated settlement are important aspects of the prosecutorial discretion involved in the "diligently prosecuting" issue. Just as important to prosecutorial discretion is the decision not to initiate an enforcement action. The clear language of the citizen suit provisions authorizing citizen suits in the absence of government action, however, has forestalled most courts from deference to government decisions not to enforce.

are involved in these disputes, they normally argue in favor of citizen enforcement.<sup>388</sup> That violators are the vocal champions of the prosecutor's prerogatives<sup>389</sup> is more than ironic; it poses the question of why violators champion government prosecutors over citizen enforcers. The apparent answer is that they expect the government, particularly the state, to be a more lenient enforcer than citizens. Indeed, attorneys representing violators candidly admit as much.<sup>390</sup>

An examination of the arguments that citizen suits interfere and conflict with the exercise of prosecutorial discretion suggests that they are overblown. Prosecutorial discretion revolves primarily around three decisions: what violations to prosecute; what enforcement mechanism to use; and what remedies and sanctions to seek or settle on. These are largely prioritization and resource allocation decisions, for agencies do not have enough resources to enforce against all violations or to pursue to trial all of the violations they prosecute. Citizen enforcers, of course, augment limited government enforcement resources, providing more enforcement than if the government enforcers were left to their own devices. This function of citizen suits enhances overall enforcement rather than interfering with government enforcement.

Violators argue that when a citizen gives notice to the agency that it intends to enforce against a particular violation, the agency is forced to spend its resources enforcing against that violation, regardless of whether it is a high or low priority for the agency.<sup>391</sup> But the filing of a citizen suit notice does not require the agency to enforce against that violation. If the violation is a low priority for the agency, it can and should spend its re-

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<sup>388</sup> See, e.g., *Ashoff v. City of Ukiah*, 130 F.3d 409, 411 n.2 (9th Cir. 1997) (stating that EPA argued that RCRA Subtitle IV open dumping regulations were enforceable by citizens despite EPA approval of state plan); *Citizens for a Better Env't-Cal. v. Union Oil Co. of Cal.*, 83 F.3d 1111, 1118 (9th Cir. 1996) (stating that EPA agreed with citizens that only state penalty assessment orders could bar citizen suits under CWA § 309(g), 33 U.S.C. § 1319(g)); *N. & S. Rivers Watershed Ass'n, Inc. v. Town of Scituate*, 949 F.2d 552, 556 n.8 (1st Cir. 1991) (stating that EPA argued that only states with approved CWA permit programs can issue orders that may bar citizen suits); *SPIRG of N.J., Inc. v. Fritzsche, Dodge & Olcott, Inc.*, 759 F.2d 1131, 1135 n.3 (3d Cir. 1983) (stating that EPA, New Jersey and New York argued that EPA CWA § 309(a), 33 U.S.C. § 1319(a) compliance order was not an action in court); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 890 F. Supp. 470, 474 (D.S.C. 1995) (stating that EPA brief "generally supported" citizen enforcer's positions). Similarly, EPA officials have testified before congressional committees in support of citizen suits. See, e.g., *Pending Clean Water Act Legislation: Hearings Before the Subcomm. on Env't and Nat. Res. Of the House Comm. on Merch. Marine and Fisheries*, 103d Cong. 212-13 (1994) (statement of Steven A. Herman, Assistant Administrator for Enforcement, EPA); *The Water Quality Act of 1994, and Issues Related to Clean Water Act Reauthorization: Hearings on H.R. 3948 Before the Subcomm. on Water Res. and Env't of the House Comm. on Pub. Works and Transp.*, 103d Cong. 290 (1994) (statement of Carol M. Browner, Administrator, EPA).

<sup>389</sup> See *supra* note 330.

<sup>390</sup> See Macfarlane & Terry, *supra* note 144, at 25 ("From the viewpoint of the sources, agency enforcement is often preferable to citizen suit enforcement.").

<sup>391</sup> See Snook, *supra* note 129, at 1, 10.

sources on higher priority violations and allow, as Congress intended, citizens to augment agency resources by enforcing against violations the agency otherwise would not address. If the violation is a high priority for the agency, it can and should proceed with its enforcement, but if it does, its own priorities, not the citizen suit, dictate the agency's use of its resources.<sup>392</sup>

Violators also argue that the notice of a citizen suit forces the agency to use judicial rather than administrative enforcement mechanisms, needlessly wasting its resources.<sup>393</sup> If the agency's goal is to bar a citizen suit, under some statutes it must commence and diligently prosecute a civil action. But if its goal is compliance, it may proceed with whatever remedy it believes is appropriate to achieve that objective. The citizen suit does not stop the agency from proceeding with an administrative order, either before or after a citizen files suit in court. Indeed, if the agency frames an administrative compliance order with an appropriate remedy, the court is likely to adopt it or give its terms considerable weight. Of course, if the agency order does not require compliance, the court should disregard it, for the court must order compliance.<sup>394</sup> If the court assesses a penalty in a citizen suit, that does not preclude the agency from assessing a penalty.

Many of the issues regarding the statutory preclusions identified and discussed above are straightforward, answered by the wording and structure of the statutes, and engender little controversy in judicial interpretations. An action brought by the DOJ on behalf of EPA may bar a citizen suit. Municipalities are not states for the purpose of state enforcement actions that may bar citizen suits. When the statutory preclusions identify particular government actions as barring citizen suits, they are the only government actions for which the preclusions bar citizen suits. EPA and citizens commence enforcement actions by filing complaints.

Two of the issues appear straightforward but are often either overlooked or ignored: (1) are preclusive government actions limited to actions seeking compliance, and (2) are preclusive government actions limited to ongoing government actions? The plain meaning and *expressio unius* canons of interpretation, reinforced by the theme and variations nature of the preclusions make it clear that preclusive government actions are limited to ongoing actions seeking compliance. Because there is little case law on these issues, citizen plaintiffs may be unaware of their importance. Courts that are unfriendly to citizen suits are content to ignore them.

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<sup>392</sup> Indeed, after EPA receives notice of a citizen suit, it rarely requests that the DOJ file an action because it does not reorder its enforcement priorities as a result of such a notice and generally supports citizen enforcement. Haag, *supra* note 8.

<sup>393</sup> See Snook, *supra* note 129, at 1, 7; Dickinson, *supra* note 144, at 1572.

<sup>394</sup> Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982) (holding that, when a trial court finds that defendants violate environmental statutes, the court must require compliance, although it has considerable discretion how to achieve that end).

Other issues have engendered controversy in judicial interpretation. What is diligent enforcement? Will a government action against some violations bar a citizen suit on other violations? On these issues judicial interpretations vary widely. It is not unusual for courts to conclude that the government has or has not diligently prosecuted an action on virtually the same facts. Courts that find diligent prosecution often frame their analyses in terms of deference to prosecutorial discretion. At times this may be a disguise for hostility to the notion of citizen enforcement or for advancing states' rights, as most of the purportedly barring actions are state actions.

Courts have held that many government actions have been diligently prosecuted, and therefore bar citizen suits, even though the actions had been concluded or did not require compliance.<sup>395</sup> When courts hold that such actions bar citizen suits, they entirely ignore the fact that Congress limited the bar against citizen suits to actions that the government "*is diligently prosecuting . . . to require compliance.*" Acknowledging these two limitations would hamper these courts in reaching their desired level of deference to prosecutorial discretion. These decisions ground their holdings on the Court's comments in *Gwaltney's* holding that citizen suits supplement rather than supplant government enforcement.<sup>396</sup> Underlying the attitudes of these courts and of the Court in *Gwaltney* is the deep-rooted deference courts routinely give to the prosecutorial discretion of the executive branch, finding it difficult to reconcile the citizens' authority to seek judicial remedies for a violation with the prosecutor's discretion not to enforce against the violator or violation or to use administrative rather than judicial enforcement remedies.<sup>397</sup>

Judicial deference to prosecutorial discretion arises from the doctrine that actions committed to agency discretion are not subject to judicial review, for there is no law to apply in such review.<sup>398</sup> Of course, citizen suits do not ask courts for judicial review of agency actions or to overturn them. Citizen suits merely ask courts to find that the agency's actions are not adequate to bar citizen suits. And there is law to apply to whether the government actions are adequate to bar citizen suits; the law enunciated in the citizen suit preclusions (particularly that the actions are for compliance), augmented by the standards of review the courts have developed to determine whether to enter consent decrees enforcing federal statutes.

The doctrine that actions committed to agency discretion are not subject to judicial review gathers particular strength when applied to decisions on

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<sup>395</sup> See *supra* discussion and cases cited in Part II.D.2.b.

<sup>396</sup> Virtually every post-*Gwaltney* preclusion decision cited in this Part One begins its analysis with a citation to *Gwaltney*, although that decision did not consider the preclusion provision in the citizen suit sections. Other commentators have noted this. See Maples, *supra* note 144, at 204–05; Dickinson, *supra* note 144, at 1554; and Snook, *supra* note 129, at 6.

<sup>397</sup> See, e.g., *N. & S. Rivers Watershed Ass'n, Inc. v. Town of Scituate*, 949 F.2d 552, 556 (1st Cir. 1991). See also *supra* discussion Part II.D.2.b and decisions cited there.

<sup>398</sup> *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971).

whether and/or how to prosecute. The Court in *Heckler v. Chaney*<sup>399</sup> recounted that it had “recognized on several occasions over many years that an agency’s decision not to prosecute or enforce, whether through civil or criminal processes, is a decision generally committed to an agency’s absolute discretion.” There the Court considered a challenge to the decision of the Federal Food and Drug Administration not to enforce against an alleged violation of the Federal Food, Drug and Cosmetic Act.<sup>400</sup> The Court began with the presumption of the Administrative Procedure Act that final agency actions are subject to judicial review.<sup>401</sup> But it noted the exception to this presumption when “agency action is committed to agency discretion by law,”<sup>402</sup> and held that “an agency’s decision not to take enforcement action should be presumed immune from judicial review” under that exception.<sup>403</sup> It found agency decisions not to enforce particularly unsuitable for judicial review.

The reasons for this general unsuitability are many. First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency’s overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.<sup>404</sup>

The Court cautioned that agency decisions not to enforce were not always immune from judicial review. “[T]he decision is only presumptively unreviewable; the presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers.”<sup>405</sup>

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<sup>399</sup> 470 U.S. 821, 831 (1985).

<sup>400</sup> 5 U.S.C. §§ 501–706 (2000). The complaint was filed by convicts on death row seeking to require the FDA to prevent states from lethal injection by drugs that had not been approved for that purpose by the FDA.

<sup>401</sup> 5 U.S.C. § 702 (2000).

<sup>402</sup> 5 U.S.C. § 701(a)(2) (2000).

<sup>403</sup> 470 U.S. at 832. *But see* Justice Marshall’s concurrence for a spirited disagreement with the Court’s presumption of non-reviewability of decisions not to enforce. *Id.* at 840–55.

<sup>404</sup> *Id.* at 831–32.

<sup>405</sup> *Id.* at 832–33.

The justification for enforcement discretion enunciated by the Court in *Chaney* applies with equal force to enforcement under the pollution control statutes. Environmental agencies, like the Federal Food and Drug Administration cannot address all violations because their resources are limited, and they must therefore order enforcement priorities in accordance with their overall policies.

Plaintiffs in some citizen suits have challenged EPA's enforcement discretion directly, seeking judicial orders to require EPA to exercise an allegedly mandatory duty to bring enforcement actions against violators.<sup>406</sup> Every court of appeals considering such a suit has held that EPA's enforcement decisions are discretionary, not mandatory, and that, following *Chaney*, EPA decisions not to enforce are immune from judicial review.<sup>407</sup>

Of course, citizen suits against violators do not seek judicial review of the government's enforcement decisions. They do not seek orders requiring EPA to enforce or requiring it to use enforcement resources in a manner contrary to its considered judgment. Citizen suits seek only to enforce against the violator. Rather than demanding that EPA expend its resources on particular violators, on particular violations, or in a particular way, citizen enforcers take on the task, enabling EPA to use its resources as it chooses. Thus the traditional reasons for judicial deference to prosecutorial decisions not to enforce, articulated in *Chaney*, are inapplicable to citizen suits against violators. Violators may argue that citizen suits intrude on agency decisions to favor violators by not enforcing against them or by enforcing against them too leniently. If so, that is an intrusion Congress specifically intended when enacting the citizen suit provisions.

*B. The Pernicious Effect of Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*

The tradition of judicial deference to prosecutorial decisions is strong enough to cause some courts to react negatively when citizens indirectly question the government's enforcement decisions by seeking judicial remedies for a violation that the government decided not to enforce against, chose to pursue with an administrative remedy, or settled on terms less favorable to the environment than deemed appropriate by the citizens.<sup>408</sup> Some of the Court's dicta in *Gwaltney*, for example, that citizen

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<sup>406</sup> See, e.g., *K. W. Thompson Tool Co. v. United States*, 836 F.2d 721 (1st Cir. 1988).

<sup>407</sup> See, e.g., *id.* at 279; *DuBois v. Thomas*, 820 F.2d 943, 947-48 (8th Cir. 1987); *Harmon Cove Condominium Ass'n v. Marsh*, 815 F.2d 949, 955 (3d Cir. 1987); *City of Seabrook v. Costle*, 659 F.2d 1371, 1374 (5th Cir. 1981); *State Water Control Bd. v. Train*, 559 F.2d 921, 927 (4th Cir. 1977); and *Sierra Club v. Train*, 557 F.2d 485, 489 (5th Cir. 1977). See also SHELDON M. NOVICK, *THE LAW OF ENVIRONMENTAL PROTECTION* § 9.4 (West 2003).

<sup>408</sup> Even courts that allow citizen suits to proceed in the face of a government action often begin their analysis with professions of deference to prosecutorial discretion. See *supra* note 326.

suits supplement rather than supplant government enforcement, encouraged this negative reaction toward citizen suits.<sup>409</sup> The holding in *Gwaltney*, however, stands for the narrow legal proposition that CWA § 505 and citizen suit provisions worded like it authorize suit only for violations that are continuing or are reasonably certain to recur.<sup>410</sup> The Court's primary reason for this holding was the plain English reading of the statute, authorizing citizens to sue those who were alleged "to be in violation" of the statute.<sup>411</sup> By using the present tense, the Court reasoned, Congress intended to authorize citizen suits for continuing violations and to preclude citizen suits for wholly past violations.<sup>412</sup> This plain meaning interpretation of the provisions, including their verbal tenses, of course, underlies many of the interpretations of the citizen suit preclusion device suggested in this Article.

The Court bolstered its primary argument in *Gwaltney* with the observation that the purpose of requiring prior notice to the violator was to allow it to avoid citizen suits by coming into compliance.<sup>413</sup> If citizens could sue for wholly past violations, prior notice would be meaningless, since the violator could not avoid suit by coming into compliance. While this argument appears logical, it ignores reality. When a citizen alleges both present and past violations, the notice serves exactly the purpose proposed by the Court. Even when a citizen alleges only past violations, the violator benefits from the notice in several ways. For instance, it may try to avoid suit by convincing the citizen enforcer that the violator acted in good faith, that the violations were not serious and caused no harm, that the violator is in the process of complying, and that a citizen suit will serve no purpose. If the violator fails to persuade the citizen not to sue, the violator also may commence settlement negotiations to bring about a quick resolution, sparing itself and the courts the burden of prolonged litigation. And it should be remembered that prior notice to the violator is not required for some violations.<sup>414</sup> The Court's secondary argument also ignores legislative intent. The legislative history amply demonstrates that the purpose of the prior notice provision is to allow the government an opportunity to exercise its enforcement authority, not to allow the violator to avoid suit by quick compliance.<sup>415</sup> If the Court had stopped with its secondary argument, although that analysis was flawed, its plain meaning primary analysis would have been persuasive and sufficient. Its holding

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<sup>409</sup> See *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987).

<sup>410</sup> *Id.* at 52.

<sup>411</sup> 33 U.S.C. § 1365(a)(1) (2000).

<sup>412</sup> See *Gwaltney*, 484 U.S. at 56–59.

<sup>413</sup> *Id.* at 59–60.

<sup>414</sup> See *supra* note 92.

<sup>415</sup> See *supra* notes 110–113, 116 and accompanying text.

would have somewhat narrowed the scope of citizen enforcement, but it would not have cast a pall over citizen suits in other contexts.<sup>416</sup>

Not content with its primary and secondary arguments, however, the Court developed a questionable tertiary argument that has had broad negative impact on citizen suits. The crux of this argument is that citizen suits are of subordinate importance in the enforcement scheme; they are meant only “to supplement rather than to supplant governmental action.”<sup>417</sup> Thus the citizen suit provisions should be interpreted not to change “the nature of the citizen’s role from interstitial to potentially intrusive.”<sup>418</sup> The wording of the Court’s peroration is puzzling. “To supplement” means “to add to.”<sup>419</sup> “To supplant” means “to take the place of.”<sup>420</sup> Of course, citizen suits add to government enforcement when citizens act in the absence of government enforcement or when they act to strengthen weak government enforcement. Citizen suits do not replace government enforcement unless citizen suits bar subsequent government action and nothing in the statutes or case law suggests they do.<sup>421</sup> The citizen suit provisions do not change the role of citizen enforcers from “interstitial” to “intrusive,” the provisions give citizens a role in enforcement where they had none before.<sup>422</sup> If it is intrusive for citizens to second-guess government decisions not to enforce, that is exactly what Congress intended by enacting the provisions. By specifying in the provision that the government could bar a citizen suit against particular violations by commencing and diligently prosecuting a compliance action, Congress made it clear that the government could not bar a citizen suit by taking no action against the violations.

The Court’s statement that allowing citizens to enforce against wholly past violations will supplant rather than supplement government enforce-

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<sup>416</sup> Because violations generally must be ongoing or likely to recur to justify the issuance of an injunction, the primary effect of the ruling was on suits maintainable for civil penalties.

<sup>417</sup> *Gwaltney*, 484 U.S. at 60.

<sup>418</sup> *Id.* at 61.

<sup>419</sup> WEBSTER’S SEVENTH NEW COLLEGIATE DICTIONARY 884 (1999).

<sup>420</sup> *Id.*

<sup>421</sup> Indeed, the scant case law on the issue suggests that citizen suits do not bar government enforcement. See *People v. Acme Fill Corp.*, 1997 WL 685254, at \*3 (N.D. Cal. 1997) (holding that settlement of citizen suit has no *res judicata* effect of subsequent state enforcement action).

<sup>422</sup> Prior to the enactment of citizen suit authorities, citizens attempted to bring *qui tam* actions to enforce against violations of the Refuse Act, 33 U.S.C. § 407 (2000), a predecessor of the CWA. All such attempts were rejected. See *Jacklovich v. Interlake, Inc.*, 458 F.2d 923, 927 (7th Cir. 1972); *Conn. Action Now, Inc. v. Roberts Plating Co.*, 457 F.2d 81, 90 (2d Cir. 1972); *Gerbing v. ITT Rayonier, Inc.*, 332 F. Supp. 309 (M.D. Fla. 1971); *Mitchell v. Tenneco Chemicals, Inc.*, 332 F. Supp. 1031, 1033 (D.S.C. 1971); *Lavagnino v. Porto-Mix Concrete, Inc.*, 330 F. Supp. 323, 325 (D. Colo. 1971); *Bass Anglers Sportsman Soc’y of America v. Scholze Tannery, Inc.*, 329 F. Supp. 339 (E.D. Tenn. 1971); *Enquist v. Quaker Oats Co.*, 327 F. Supp. 347, 349 (D. Neb. 1971); *U.S. ex rel. Mattson v. Northwest Paper Co.*, 327 F. Supp. 87 (D. Minn. 1971); *Reuss v. Moss-American, Inc.*, 323 F. Supp. 848, 850 (D. Wisc. 1971); and *Durning v. ITT Rayonier, Inc.*, 325 F. Supp. 446, 447 (W.D. Wash. 1970). See also Bucy, *supra* note 102, at 44 (article on *qui tam* actions).

ment is simply a non sequitur. Citizen suits do not supplant government actions any more for enforcement against past violations than they do for enforcement against present violations. If the Court's tertiary argument is puzzling, the support for its argument is more so: a misreading and mischaracterization of legislative history, an illogical deduction from the mischaracterized legislative history, and an illogical example.<sup>423</sup>

The Court quoted the Senate Report accompanying the enactment of the CWA in support of its conclusion that citizen suits were of a subordinate nature. "The Senate Report noted, that '[t]he Committee intends the great volume of enforcement actions [to] be brought by the State,' and that citizen suits are *proper only* 'if the Federal, State, and local agencies fail to exercise their enforcement responsibilities.'"<sup>424</sup> The quoted language appears in a discussion of EPA's enforcement authority in CWA § 309<sup>425</sup> not in a discussion of the CWA's citizen suit provision in § 505.<sup>426</sup> Read in its entirety, the meaning of the Senate Report language is quite different than the meaning the Court gives it:

The Committee . . . notes that the [enforcement] authority of the Federal Government should be used judiciously by the Administrator in those cases deserve [sic] Federal action because of their national character, scope, or seriousness. The Committee intends the great volume of enforcement actions be brought by the State. It is clear that the Administrator is not to establish an enforcement bureaucracy but rather to reserve his authority for the cases of paramount interest.

It should be noted that if the Federal, State, and local agencies fail to exercise their enforcement responsibility, the public is provided the right to seek vigorous enforcement action under the citizen suit provisions of section 505.<sup>427</sup>

The Report language focuses on EPA enforcement, not citizen enforcement. It suggests an expectation that federal enforcement will be restrained, but that citizen enforcement will be available if government enforcement is too restrained. It conveys no notion that citizen enforcement is subordinate to government enforcement. Indeed, it contains neither the language nor the implication that citizen suits are "*proper only*" under the stated circumstances the Court asserts.

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<sup>423</sup> See *infra* discussion accompanying notes 432–440.

<sup>424</sup> *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987) (emphasis added).

<sup>425</sup> 33 U.S.C. § 1319 (2000).

<sup>426</sup> 33 U.S.C. § 1365; S. REP. NO. 92-414, at 64 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3730.

<sup>427</sup> *Id.*

Based entirely on its out of context quote from the Senate Report, the Court concluded that “[p]ermitting citizen suits for wholly past violations of the Act could undermine the supplementary role envisioned for the citizen suit.”<sup>428</sup> If citizen suits are supplementary, their supplementary nature does not suggest that they are more appropriate against continuing violations than against wholly past violations, and the Court suggests no such reason.

If the Court’s concern, as it later hints, is that citizen suits can interfere with the government’s enforcement action, surely the potential for such interference is greater for enforcement against continuing violations than for enforcement against wholly past violations. Ideally, the government will place a priority on abatement of continuing violations, making the potential for citizen interference more likely in such cases. More importantly, where both suits are for wholly past violations, both enforcers will be seeking only penalties. If the citizens are successful in recovering penalties after the government has already done so, the additional penalties do not interfere with government’s action. Indeed, the Treasury is doubly enriched.<sup>429</sup> And the violators will not be inappropriately penalized, for the statutes direct courts to assess penalties considering several factors, including “such . . . matters as justice may require.”<sup>430</sup> Surely, the amount of penalties already paid for a violation is such a matter.<sup>431</sup> But where continuing violations are at issue, both enforcers will be seeking abatement injunctions and penalties. There is more potential for citizens to interfere with the government’s action for injunctive relief than for penalties.

The example the Court develops to illustrate its concerns and conclusion is equally illogical. It posits a situation in which a violator agrees with EPA to install unusually expensive and advanced control equipment that not only will bring the violator into compliance but will result in its achieving pollution control well beyond that required by law. In return for undertaking pollution control beyond that required by law, EPA limits its enforcement action to an administrative compliance order, agreeing not to seek penalties. The Court concluded that “[i]f citizens could file suit, months

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<sup>428</sup> *Gwaltney*, 484 U.S. at 60.

<sup>429</sup> The Miscellaneous Receipts Act, 31 U.S.C. § 3302(c)(1) (2000), requires that penalties assessed in citizen suit cases be deposited in the U.S. Treasury. *Friends of the Earth v. Archer Daniels Midland Co.*, 1990 U.S. Dist. LEXIS 9152, at \*7 n.3 (“The penalties imposed would be deposited as miscellaneous receipts in the treasury and not be recovered by the citizen bringing the suit.”). *See also* H.R. REP. NO. 92-911, at 133 (1972), *reprinted in* 1 CWA LEGISLATIVE HISTORY, at 753, 820 (1973).

<sup>430</sup> *See, e.g.*, CWA, 33 U.S.C. § 1319(d) (2000). Although this penalty factor is found in the EPA enforcement section, the citizen suit section authorizes courts in citizen suits to assess penalties under it. 33 U.S.C. § 1365(a) (2000).

<sup>431</sup> *See* PIRG of N.J., Inc. v. Hercules, Inc., 830 F. Supp. 1525, 1538–41 (D.N.J. 1993), *rev’d in part on other grounds*, 50 F.3d 1239 (3d Cir. 1995), in which plaintiffs argued the court should take into account penalties the defendant paid to the government when assessing penalties in the citizen suit.

or years later, in order to seek the civil penalties that the Administrator chose to forgo, then the Administrator's discretion to enforce the Act in the public interest would be curtailed considerably.<sup>432</sup> There are at least six problems with the Court's deductions from this hypothetical.

First, by enacting the citizen suit provision, Congress curtailed the agency's ability to assure a violator that it would not be enforced against.<sup>433</sup> The question is whether it curtailed it sufficiently to allow citizen enforcement in the situation posited by the Court.

Second, the Court's hypothetical is a red herring: none of the more than 125 decisions cited in Part One involve a situation similar to the one posited by the Court.<sup>434</sup>

Third, if the defendant achieved more than the required pollution reduction by spending more than required for mere compliance, it in essence both achieved compliance and paid a penalty to the extent of its extra, otherwise unrequired expenditure. The court could take that extra expenditure into account as a penalty and another matter "as justice may require,"<sup>435</sup> to reduce what otherwise would be an appropriate penalty.

Fourth, the citizen's interference with the government's agreement not to impose penalties is the same, whether the citizen suit and the government's agreement is directed at continuing violations or at wholly past violations. Why would the government's discretion be curtailed more if citizens could file suit years later in the case of wholly past violations rather than weeks later in the case of continuing violations? The example is of no use in justifying why citizens should be able to enforce against continuing but not against wholly past violations.

Fifth, suppose the hypothetical order and agreement were to forego penalties in return for the violator coming into compliance at glacial speed by using an outmoded, cheap, and unreliable control technology. In that case, the government's action may have abated pollution in the short term, but it provided neither general nor specific deterrence for continued compliance. Would it not be in the public interest for citizens to seek penal-

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<sup>432</sup> *Gwaltney*, 484 U.S. at 61.

<sup>433</sup> It left EPA free to decide not to enforce against a particular violation. But it did not leave EPA free to decide, in the absence of its own enforcement in court, that no one else could enforce against that violation.

<sup>434</sup> The hypothetical is somewhat similar to the concept of "supplemental enforcement projects" ("SEPs"), environmental improvement projects beyond any requirement of law, which EPA may agree to accept in lieu of some part of the appropriate penalty. EPA does so, however, only in consent decrees. See *EPA Supplemental Enforcement Projects Policy* (Apr. 10, 1998), ENVTL L. REP. I Admin. Mat. (Envtl. L. Inst.) 35703.

<sup>435</sup> The statutes typically include "such other matters as justice may require" as the last factor that courts are to consider in determining the amount of a penalty to assess. See, e.g., CWA, 33 U.S.C. § 1319(d) (2000). Courts recognize they have the ability in assessing penalties to take into account penalties already paid for the same violations. In *Hercules*, 830 F. Supp. at 1538–40, defendant sought dismissal of a citizen action seeking duplicative penalties for the same violations. The plaintiff argued it was entitled to maintain its action despite the earlier state penalties but assumed the court would take them into account when it reached its own penalty assessment. *Id.* at 1538. The court agreed. *Id.* at 1539–40.

ties to assure such deterrence? How would a citizen suit for penalties undo the compliance achieved by the government action? Or suppose the hypothetical order did not require compliance and imposed no penalties? Because the EPA order in the Court's example required the violator to comply, the example cannot be read to justify deference to a government action that does not require compliance. To do so would be to misapply the example, as well as to disregard the wording of the bar element<sup>436</sup> and the policy of the statutes.

Sixth, allowing citizen suits to seek penalties in the Court's hypothetical would not discourage violators from entering into settlements with EPA for the many reasons discussed above.<sup>437</sup> Citizens do not often sue to enforce against violations subject to a settlement with EPA. Few of the cited cases involve such a suit, and none do so in the situation posited by the Court. In any event, if EPA wants to insulate the violator from a citizen suit, Congress provided a mechanism for doing so: an action in open court in which citizens could intervene, rather than in a consent administrative order negotiated in private.<sup>438</sup> There is, of course, a large difference between an administrative order on consent and a consent decree. The consent decree must be reviewed and approved by the court as comporting with the statute being enforced and citizens may intervene and oppose its entry. The administrative order on consent is not subject to public notice, judicial approval, or citizen intervention. In short, the consent decree is subject to transparency, the consent administrative order is not. The transparency afforded by citizen participation in enforcement was one of the purposes Congress had in authorizing citizen suits.

Although the Court's tertiary argument in *Gwaltney* was unnecessary, ill-conceived, and illogical, some courts have cited it in deciding almost every legal issue under the citizen suit provisions narrowly to restrict citizen suit authority,<sup>439</sup> even when such interpretations ignore the primary interpretive tool used by the Court in *Gwaltney*, the plain English reading of the present tense.<sup>440</sup> These courts viewed citizen enforce-

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<sup>436</sup> See, e.g., CAA, 42 U.S.C. § 7604(b)(1)(B) (2000), barring a citizen suit if the government "is diligently prosecuting a civil action . . . to require compliance" (emphasis added).

<sup>437</sup> See discussion *supra* accompanying notes 145–146.

<sup>438</sup> Embodying such agreements in judicial consent decrees is more transparent and protective of the public interest than embodying them in consent administrative orders. Independent judges must approve consent decrees, reviewing them for consistency with the statute being enforced and with the public interest. See *United States v. Ketchikan Pulp Co.*, 430 F. Supp. 83, 85–86 (D. Alaska 1977). Moreover, the DOJ provides public notice of proposed consent decrees enforcing environmental laws, soliciting public comment. It makes the comments available to the judge and reserves the right to withdraw its consent to a decree based on the public comments. DOJ, Consent Judgment in Actions to Enjoin Discharges of Pollutants, 28 CFR § 50.7 (2004).

<sup>439</sup> Post-*Gwaltney* decisions unfavorable to citizen plaintiffs invariably cite, quote, and rely on *Gwaltney*. See, e.g., *N. & S. Rivers Watershed Ass'n, Inc. v. Town of Scituate*, 949 F.2d 552, 555–58 (1st Cir. 1991).

<sup>440</sup> See *Scituate*, 949 F.2d at 555–58, the most egregious example of disregarding the plain English of the statute. Among other things, the decision held that violators against

ment as undercutting the prosecutor's decisions not to enforce, to use enforcement remedies other than judicial, or to settle on unfavorable terms. Their view that prosecutorial discretion should preclude enforcement action by others is quite different from the rationale the Court set forth in *Chaney* as the justification for prosecutorial discretion. There it viewed the imperative as the prosecutor's need to maximize enforcement through targeted use of his scarce enforcement resources.<sup>441</sup> Citizen suits, of course, do not intrude on that imperative at all; indeed, they extend the prosecutor's resources.

The Court reinforced its negative message toward citizen suits in *Gwaltney* by a series of rulings limiting the standing of citizens to bring such suits.<sup>442</sup> The Court repudiated much of this repressive standing doctrine<sup>443</sup> that may help to reverse the perception that the Court has a generally negative view of citizen suits. The Court's positive view of citizen suits in *Laidlaw* may reduce the divide between citizen-friendly courts and prosecutor friendly courts, a divide that is evident throughout much of citizen suit jurisprudence.

No court considering statutory preclusion issues has recognized that the preclusion before it was part of the theme and variations pattern of preclusions on both EPA and citizen enforcement in all of the environmental statutes. When that is recognized, it becomes abundantly clear that Congress determined how much deference it intended be given to the prosecutorial discretion of the first prosecutor to enforce and articulated that intention in the constants and variations in the preclusions. It constructed a spectrum of preclusions on EPA enforcement, with weaker ones applying to statutes or programs in which Congress intended states to have no role in implementing. It constructed a different spectrum of preclusions on citizen enforcement, with the weaker ones applying to violations involving hazardous materials.<sup>444</sup> The preclusions on citizen enforcement are usually, but not always, stronger than preclusions on EPA enforcement. When courts understand this pattern, it should be easier for them to apply the preclusions that Congress intended rather than fanciful constructs in some judges' eyes.

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whom a § 309(g) penalty has been assessed are not subject to actions seeking injunctions for compliance, despite the fact that CWA § 309(g) provides only that persons against whom § 309(g) administrative penalties have been assessed "shall not be subject of a civil penalty action." 33 U.S.C. § 1319(g)(6)(A) (2000).

<sup>441</sup> See *Heckler v. Chaney*, 470 U.S. 821, 831–32 (1985).

<sup>442</sup> See, e.g., *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); and *Lujan v. Nat'l Wildlife Fed.*, 497 U.S. 871 (1990).

<sup>443</sup> *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000).

<sup>444</sup> This makes it easier for citizens to abate the most dangerous violations, those involving releases of health-threatening pollutants.

#### IV. CONCLUSION: UNIFIED INTERPRETATION OF PRECLUSIONS IN CITIZEN SUIT PROVISIONS

Congress enacted broad authority for citizen suits to promote compliance with environmental laws and to provide for citizen participation in environmental protection. It believed citizen suit authority would promote compliance by encouraging more plentiful and more effective government enforcement and by providing default citizen enforcers if the government failed to enforce or to enforce effectively. Congress qualified this broad authority to limit disruption or conflict from successive actions, and limit undue harassment of defendants. One element of the device was the diligent prosecution bar. The purposes of the authority and the qualification to it are not altogether complimentary, but are the result of compromise. Thus different parts of the citizen suit provisions cannot be interpreted through the lens of a single legislative purpose. Congressional intent is better understood by recognizing that Congress compromised this amalgam of purposes and qualifications in the particular ways it worded and limited the provisions. While the best indicia of congressional intent is normally the words it uses in statutes, it is particularly true when a provision, such as the citizen suit provision, is the result of compromising multiple divergent goals. That conclusion is reinforced by the theme and variations nature of the preclusion device, a device that Congress repeated in the EPA and citizen suit provisions of the statutes, but repeated with variations in each of its elements to express different balances between its purposes and qualifications. The citizen suit provisions, then, are best interpreted by reference to their plain English meanings.

Most courts have used a plain English meaning interpretation of most issues arising under the provisions, with straightforward and compatible results. A minority of courts have reached tortured and aberrant results by disregarding the plain meaning of the provisions and instead interpreting them to defer as much as possible to the government's enforcement discretion. This elevates a qualification of the citizen suit provisions over the purpose of the provisions, a perverse result. These interpretations and their results are not true to, and indeed do violence to, the wording and history of the provisions, and should be disregarded. That violators, not prosecutors, are the vocal advocates of deference to prosecutorial decisions, underlines the perverse nature of the minority interpretation.

A plain English interpretation of the typical diligent prosecution bar prevents citizens from filing a citizen suit complaint for a particular violation if, and only if, (1) prior to the time the citizen has filed her complaint, (2) the government has commenced (3) an enforcement action specified in the provision (4) by filing a complaint in the forum specified in the provision; (5) the government action is still pending and (6) is being diligently prosecuted; (7) and the government action addresses violations

of the same requirements the citizen plaintiff alleged were violated (8) in a manner capable of and calculated to require compliance.

If the forum specified in the provision is a court, the court must be an Article III court or its state equivalent. An action is still pending if it has not been resolved by a dispositive motion, a trial on the merits, or a consent decree entered by the court. Diligent prosecution means the government is prosecuting the action with reasonable speed, energy, resources, determination, and effectiveness calculated to achieve compliance. An action is capable of and calculated to require compliance if it seeks an injunction requiring compliance or penalties in an amount sufficient to deter violation, e.g., in an amount larger than necessary to recover the economic benefit the violator has secured by non-compliance.

This interpretation flows directly from the words used by Congress in the EPA enforcement and citizen suit provisions, including the verbal tenses it used in the provisions. The interpretation assures a vibrant use of citizen suits to secure compliance with the pollution control statutes. It also preserves the unfettered ability of government enforcers to prosecute any violator, and to do so free of whatever complications citizen suits may cause, as long as the prosecutor moves with reasonable dispatch to secure compliance, uses the enforcement tools that Congress determined were sufficient to do so, and seeks compliance.