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## Theme and Variations in Statutory Preclusions Against Successive Environmental Enforcement Actions by EPA and Citizens, Part Two: Statutory Preclusions on EPA Enforcement

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

## PART TWO: STATUTORY PRECLUSIONS ON EPA ENFORCEMENT

*Jeffrey G. Miller\**

*This is the second half of a two-part Article focusing on preclusions against successive enforcement of the environmental statutes. Part One of the Article, printed in Volume 28 of this Journal, examined preclusions against citizen suits and argued that because of the theme-and-variations nature of the preclusion language, that language should be read in accordance with its plain meaning. Part Two, published in this issue, studies the restrictions on enforcement actions by the EPA and reaches the same conclusion.*

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## INTRODUCTION

In drafting environmental statutes, Congress sought to ensure effective environmental protection by authorizing the Environmental Protection Agency (“EPA”), states, and citizens to enforce against violations of the federal environmental statutes. Foreseeing that successive actions by multiple enforcers could cause disruption, Congress devised a three-element preclusion device governing when successive actions are authorized or barred. Congress developed variations for each of the three elements, giving itself a flexible device to fine-tune the degrees to which successive actions by different enforcers were allowed under each statute.

The preclusion devices which Congress placed in the citizen suit provisions of the statutes were relatively uniform, reflecting Congress’s intention that government be the primary enforcer. On the other hand, Congress placed widely varying versions of the preclusion device in the EPA enforcement provisions of the statutes, reflecting the different balances between federal and state implementation it intended under each of the statutes. This Article examines EPA enforcement preclusions.

The variations Congress used in each version of the preclusion device it placed in the enforcement provisions of the statutes indicate precisely when EPA or a citizen may or may not proceed with a successive action. In spite of clear Congressional intent, some courts have ignored the wording of the preclusion devices and bypassed the normal canons of statutory construction. Instead, courts have interpreted the device to protect choices made by the first enforcer, usually the state, thereby unacceptably substituting a judicial policy choice for a policy choice already made by Congress. Worse, from the perspective of environmental law, however, they encourage violators of environmental statutes to invite actions by weak

enforcers for the purpose of insulating their violations from effective enforcement. This enables polluters to exploit weak enforcers, with the blessing of the federal courts, and to undermine the integrity of the environmental statutes. This Article urges courts to interpret the preclusion devices as enacted by Congress, observing the proper roles of the judicial and legislative branches, and preserving the integrity of the environmental statutes.

America's environmental statutes, and specifically their enforcement provisions, were enacted against a backdrop of failures to effectively address environmental harm. Rampant industrial growth during the beginning of the twentieth century set the stage for several decades of environmental trauma at its end. The federal government augmented the developing trauma by largely abstaining from pollution control regulation for much of the century. Once the federal government did act, it addressed pollution control only on a fragmented, state-led basis, with little federal intervention or enforcement. When the public finally demanded action with massive demonstrations on the first Earth Day,<sup>1</sup> Congress reacted by enacting comprehensive environmental protection legislation during the 1970s.<sup>2</sup> The legislation replaced earlier state-dominated pollution control programs with federal programs, and replaced earlier weak and cumbersome federal enforcement authorities with strong and streamlined ones.<sup>3</sup> For the most part, Congress did not oust states from the pollution control field, but created programs with roles for both federal and state regulators, typically allowing for both state and federal enforcement. Not trusting even two sets of government regulators to comprehensively enforce these programs, Congress also authorized private citizens to enforce the same requirements, incorporating the "citizen suit" provisions in these statutes.<sup>4</sup>

When Congress created federal and citizen enforcement authorities in addition to existing state enforcement authorities, it recognized the potential for duplicative and conflicting successive enforcement against the same violations. It was willing to tolerate that possibility in order to assure more comprehensive compliance with pollution control laws through more frequent enforcement, but sought to lessen and manage successive enforcement by creating a flexible, notice, delay, and bar preclusion device, and by placing variations of that device in the federal and citizen enforcement provisions of the statutes. This two-part Article examines the legal issues raised in applying and interpreting that preclusion device.

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<sup>1</sup> Jeffrey G. Miller, *Theme and Variations in Statutory Preclusions Against Successive Environmental Enforcement Actions by EPA and Citizens, Part One: Statutory Bars in Citizen Suit Provisions*, 28 HARV. ENVTL. L. REV. 401, 408 (2004).

<sup>2</sup> For a list of the statutes covered, see *infra* note 13 and accompanying text.

<sup>3</sup> Miller, *supra* note 1, at 407-08.

<sup>4</sup> *Id.* at 408-09.

Part One examined the issues under the citizen suit provisions,<sup>5</sup> and Part Two examines them under the federal enforcement provisions.

Part One concluded that the plain meaning of the preclusion device addresses and answers the issues defendants have raised under it, often favoring successive enforcement actions. It found, however, that some courts disregard the plain meaning, interpreting the device to implement their policy choice to preserve the enforcement discretion of the first government enforcer, rather than interpreting it to implement the congressional policy choice to gain greater compliance through the actions of multiple enforcers. The legislative history of the provisions contains no hint that Congress was concerned with preserving the discretion of the first government enforcer. Indeed, that aberrant interpretation deprives the citizen suit provisions of much of their force. The interpretation also derogates congressional intent expressed in the plain meaning of the device and elsewhere. Part One developed the thesis that the theme and variation nature of the device underscored its plain meaning by emphasizing that Congress made deliberate word choices when drafting the device, with its variations throughout the statutes. Congress used the words it chose in each variation to specifically enunciate the extent to which it intended to preclude successive enforcement under the enforcement provision at issue. Significantly, the device limits successive enforcement, but does not preclude it altogether. Indeed, the very presence of the citizen suit provisions indicates that at the very least Congress did not intend to preserve the policy choice of governmental enforcers not to enforce. Finally, Part One noted that the many reported citizen suit decisions evidenced little real disruption of government actions by the citizen suits.

Part Two examines the preclusion device and its variations used in the EPA enforcement provisions of the same statutes. The plain meaning of these devices addresses and answers the issues defendants have raised under them, often favoring successive enforcement actions. Nevertheless, as with the citizen suit provisions, some courts interpret the device to implement their policy choice to preserve the discretion of earlier state enforcers. The legislative history of the provisions contains no indication that Congress was concerned with preserving the discretion of state enforcers. These interpretations to the contrary undermine the integrity of the federal statutes and the environmental requirements they establish, thereby encouraging violators to invite lax state enforcement not requiring compliance with the federal requirements in order to foreclose any enforcer thereafter from seeking such compliance. Moreover, these interpretations are possible only by ignoring the variations in the provisions and the additional emphasis they place on the plain meaning of the provisions.

Recognizing the existence and implications of the theme and variation nature of the preclusion device avoids the evisceration of the federal

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<sup>5</sup> Miller, *supra* note 1.

statutes by emphasizing the primacy of the plain meaning interpretation. Congress used the device in one variation or another at least sixteen times in the citizen and EPA enforcement provisions of the nine environmental statutes considered here. Congress's pervasive use of the preclusion device strongly implies that when Congress intended to preclude or limit subsequent enforcement by EPA, Congress did so by placing the preclusion device or one of its variations in the EPA enforcement provision. While the preclusion devices in the citizen suit provisions are quite similar, the preclusion devices in the EPA enforcement provisions are varied. Congress used at least five variations of the preclusion device in two or more of the statutes' EPA enforcement provisions.<sup>6</sup> The significant variations in the device that Congress used in the EPA enforcement provisions is further evidence that Congress chose the wording of the devices carefully, intending that courts interpret them to effectuate the words Congress employed.

The relative strengths of the restrictions Congress placed on successive EPA enforcement in different statutes mirror the degrees to which Congress envisioned state implementation of the statutes, progressing from no preclusion where Congress provided for exclusive federal implementation, to a presumption of preclusion where Congress expected state implementation. Despite the sometimes virtually identical nature of the preclusion devices in the EPA and citizen suit provisions, they serve somewhat different purposes. The device in the citizen suit provisions manages conflict and disruption from successive enforcement. The device in the EPA enforcement provisions reflects the balances between federal and state implementation in different statutes. Despite the somewhat different purposes of the devices in the two sets of enforcement provisions, they are all variations of the same device. This is underscored by subsection 309(g) of the Clean Water Act ("CWA"), in which Congress used the device in the statute's EPA enforcement provision to bar both EPA and citizen subsequent enforcement under specific circumstances.<sup>7</sup>

Statutes providing for both federal and state implementation usually require EPA to approve a state program meeting statutory minimum criteria and substitute the state program for the federal program once EPA approves the state program. Defendants sometimes argue that these state approval provisions infer that EPA cannot enforce in states with approved programs, or at least cannot do so if the state already has taken an enforcement action.<sup>8</sup> The role of the preclusion device as the regulator of EPA

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<sup>6</sup> See *infra* notes 35–39 and accompanying text.

<sup>7</sup> 33 U.S.C. §§ 1251–1387 (2000).

<sup>8</sup> See *infra* Parts III.B.–C. Relying on this theory, one court of appeals has held that when a state with an approved Resource Conservation and Recovery Act ("RCRA") hazardous waste management program has taken an enforcement action, EPA is precluded from "overfiling." *Harmon Industries, Inc. v. Browner*, 191 F.3d 894 (8th Cir. 1999). The court also held that EPA was precluded from doing so by *res judicata*. *Id.* The opinion is flawed in many ways. See discussion *infra* Part III.C. The flaws follow in part from the court's failure to recognize the pattern of preclusions established by Congress in the envi-

enforcement under statutes authorizing state implementation is emphasized by the fact that Congress knew how not to grant EPA enforcement authority in states with approved programs. In view of this explicit, comprehensive, and nuanced cross-statutory pattern, it is unlikely that Congress intended to infer a preclusion on EPA or citizen enforcement from other provisions containing no notice, delay, and bar device. The statutes should not be interpreted to depart from this well-established pattern, absent clear and unambiguous language.<sup>9</sup>

While there are many reported decisions on the preclusion device in the citizen suit provisions, there are few reported decisions on preclusions in the EPA enforcement provisions. This disparity arises from a variety of factors. First, the preclusions on EPA enforcement are, for the most part, less restrictive than preclusions on citizen suits, providing fewer possibilities for credible efforts by defendants to raise them. Second, EPA exercises self-restraint in filing successive actions, providing few opportunities to litigate the issues.<sup>10</sup> Third, defendants may accord greater legitimacy to EPA actions than to citizen actions and may be more willing to settle enforcement actions with EPA than with citizens without litigating legal issues.<sup>11</sup> Even though there are a small number of judicial interpretations of the device in the EPA enforcement provisions, this case law may be augmented by the many judicial interpretations of the device in the citizen suit provisions. Because Congress used the same device in both sets of provisions, precedents under one set are valid under the other set, unless variations in the devices are sufficiently different.<sup>12</sup>

Part One examined the virtually identical preclusion devices in the citizen suit provisions of the statutes as if they were the same device,

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ronmental statutes, including RCRA. See Miller, *supra* note 1, at 412; *infra* notes 45–48.

<sup>9</sup> Congress did place one preclusion on CWA section 505 citizen suits outside of section 505, in subsection 309(g). 33 U.S.C. § 1319(g) (2000). It is noteworthy, however, that subsection 309(g) is in the EPA enforcement provision, subsection 505(a) contains a cross-reference to subsection 309(g), and subsection 309(g) contains an explicit preclusion that follows the theme and variations pattern examined here.

<sup>10</sup> ENVIRONMENTAL PROTECTION AGENCY, REVISED POLICY FRAMEWORK FOR STATE/EPA ENFORCEMENT AGREEMENTS, 18–20, 24–25 (Aug. 1986), available at <http://www.epa.gov/Compliance/resources/policies/planning/state/enforce-agree-mem.pdf> (last visited Dec. 5, 2004) (on file with the Harvard Environmental Law Review).

<sup>11</sup> Jonathan H. Adler, *Stand or Deliver: Citizen Suits, Standing, and Environmental Protection*, 12 DUKE ENVTL. L. & POL'Y F. 39 (2001); Ross Macfarlane & Lori Terry, *Citizen Suits: Impacts on Permitting and Agency Enforcement*, NAT. RESOURCES & ENV'T, Spring 1997, at 20. Although the environmental defense bar does not articulate this explicitly, it can be inferred from both its generally negative attitude toward citizen suits and from its far greater propensity to contest citizen enforcement than EPA enforcement. For example, there are far more reported citizen suit decisions cited in Part One than reported EPA enforcement decisions cited here. The disparity is remarkable because the numbers of civil enforcement actions brought by EPA and citizens are roughly comparable and the total number of enforcement actions brought by EPA far exceeds those brought by citizens. See Miller, *supra* note 1, at 415 n.68, 419–20.

<sup>12</sup> A precedent interpreting one variation of an element in the device, however, might not be useful in interpreting another variation of that element.



analyzing their common legal issues with little or no distinction between how they should be decided under different statutes. Because the preclusions on EPA enforcement are more varied than preclusions on the citizen suits, the format of Part Two differs. Part I.A examines the preclusion devices in the EPA enforcement provisions of all the statutes and identifies their common variations. Part II examines the legal issues raised in each of the common variations. Part III examines asserted limitations on EPA and citizen enforcement not articulated in the enforcement provisions, but inferred by some courts from the state program approval provisions. Part IV revisits the doctrinal split identified in Part One between courts interpreting the preclusion device in accordance with its plain meaning, usually favoring successive enforcement, and those interpreting it to favor prosecutorial discretion, usually disfavoring successive enforcement. The final Part suggests integrated interpretation of the preclusion devices in EPA and citizen enforcement provisions.

Parts One and Two as a whole emphasize the importance of recognizing the theme and variations in the preclusion devices Congress developed to manage successive enforcement by both EPA and citizens. Two principles emerge from that recognition. First, when Congress intended to limit successive enforcement by EPA or citizens, it used the preclusion device to do so. This counsels that preclusions should not be inferred from other provisions. Second, Congress employed considerable variations in the device, particularly in limiting successive enforcement by EPA. This counsels that the wording Congress used in a particular version of the device precisely articulates congressional intent for how far that device limits successive enforcement.

Courts ignoring these principles not only disregard plain wording and congressional intent, they undermine the integrity of the federal environmental statutes. The facts underlying the reported decisions in Parts One and Two indicate that EPA and citizens almost never initiate successive enforcement when an earlier enforcement action resulted in compliance or a penalty large enough to deter violations. They also indicate that earlier, ineffective enforcement actions prompting such “overfiling” are usually state enforcement actions. Interpretations that restrict successive enforcement in favor of state prosecutorial discretion can insulate sources from compliance with federal law. The proliferation of such decisions offers violators the opportunity to shield themselves from compliance with federal law by soliciting actions from less than zealous state enforcers and agreeing to state consent orders that require less than full compliance. Taken to its logical conclusion, this could lead to systematic, judicially sanctioned evisceration of federal environmental statutory standards and protections. Congress did not intend this result when it enacted strong federal enforcement provisions with limited preclusions on successive enforcement.

Courts should interpret these preclusion devices as Congress wrote them, through the lens of mainline canons of statutory construction, rather than to protect the choices of the first enforcers. Congress has already determined with precision, by the variation of the device that it used in each enforcement provision, when a subsequent enforcer may bring an action or is barred from bringing one. This is a legitimate legislative policy choice: balancing (1) environmental protection through effective enforcement by multiple enforcers against (2) the possibility that successive enforcement action may cause disruption and disturb choices made by the initial prosecutors. Where congressional intent is clear, as it is in the preclusion devices, courts should honor it.

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

The Article examines federal environmental statutes administered by EPA.<sup>13</sup> The wording of the preclusions in each of these statutes is informed by concerns about allocating the proper authority to various potential enforcers. This Part will examine the general intent and wording of the statutes to prepare for the in-depth analysis of specific provisions that follows.

### A. Impacts of Federalism

Each of the environmental statutes follows one of two general federalist strategies. The first gives EPA authority to implement and enforce statutory programs, with little or no role for states.<sup>14</sup> The second provides roles for both EPA and states in implementing and enforcing statutory programs.<sup>15</sup> Statutes establishing multiple regulatory programs may employ both strategies for different purposes.<sup>16</sup> While statutes adopting the

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<sup>13</sup> The Article examines the Clean Air Act ("CAA"), 42 U.S.C. §§ 7401–7671q (2000); CWA, 33 U.S.C. §§ 1251–1387 (2000); RCRA, 42 U.S.C. §§ 6901–6992k (2000); the Surface Mining Control and Reclamation Act ("SMCRA"), 40 U.S.C. §§ 1201–1328 (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. §§ 2601–2691 (2000); the Safe Drinking Water Act ("SDWA"), 42 U.S.C. §§ 300f–300j-25 (2000); the Marine Protection, Resources 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>14</sup> TSCA, CERCLA, MPRSA, FIFRA (registration of pesticides, FIFRA § 3, 7 U.S.C. § 136a), and CAA (regulation of emissions from motor vehicles, CAA §§ 202–208, 42 U.S.C. §§ 7521–7542 (2000)).

<sup>15</sup> CAA (except for regulation of emissions from motor vehicles, CAA §§ 202–208, 42 U.S.C. §§ 7521–7542), CWA, RCRA, FIFRA (pesticide use regulation, FIFRA § 26, 7 U.S.C. § 136a), and SDWA.

<sup>16</sup> The CAA, for instance, adopts the first strategy for its program regulating emissions from motor vehicles and the second strategy for regulating emissions from other sources.

first strategy authorize exclusive EPA implementation and enforcement, they provide different accommodations with states. Some preempt state regulation,<sup>17</sup> while some explicitly allow parallel state programs and authorize EPA to accomplish its mission by contracting with states.<sup>18</sup>

Congress adopted the second strategy for most of the major environmental programs. Beginning with the CAA, Congress modeled complicated "cooperative federalism" constructs as the bedrock of its environmental programs. It envisioned that state laws, approved by EPA and meeting federal requirements, would be the cores of the statutes. At the core of the CAA, for instance, are EPA-approved state implementation plans designed to achieve federal air quality standards for each regulated pollutant.<sup>19</sup> As long as a state submits a plan meeting the statutory requirements, EPA must approve it and has no authority to develop its own plan, and the core of the CAA requirements becomes state law. On the other hand, if the state fails to submit an approvable plan, EPA must itself promulgate an implementation plan for the state. At the core of the CWA<sup>20</sup> and RCRA<sup>21</sup> are EPA-approved state permit programs. The CWA and RCRA require EPA to promulgate and implement a permit program in federal regulations, but also require EPA to approve state permit programs meeting the federal criteria. Once EPA approves a state permit program, EPA ceases to issue permits in the state and thereafter states issue permits under state law.<sup>22</sup> Congress subsequently amended the CAA

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<sup>17</sup> CAA § 209, 42 U.S.C. § 7543 (2000) (preempting standards for emissions from automobiles with some exceptions).

<sup>18</sup> FIFRA §§ 23(a), 24(a), 7 U.S.C. §§ 136u(a), 136v(a) (2000).

<sup>19</sup> CAA § 110, 42 U.S.C. § 7410 (2000). Under the CAA, Congress intended states to develop implementation plans to achieve federally promulgated ambient air quality standards, and authorized EPA to develop such plans only if a state failed to submit an approvable plan to EPA. State implementation plans consist of state statutes and regulations imposing emissions limitations on air pollution sources and mechanisms to administer and enforce the limitations. Assuming that a state develops an approvable implementation plan, there will never be a federally developed plan to be violated.

<sup>20</sup> CWA §§ 301(a), 402, 33 U.S.C. §§ 1311(a), 1342 (2000). Under the CWA, Congress intended states to submit permit programs to EPA for approval. Permits, whether issued by EPA or a state with an approved permit program, at a minimum must apply federally promulgated technology-based standards relevant to the particular pollution source, and federally approved state water quality standards designed to provide for the types of uses the state designated as appropriate to the particular water body. Congress authorized EPA to issue permits in the absence of an approved state program but commanded EPA to cease issuing permits in a state once it had approved the state's program. Assuming that a state submits an approvable program before EPA issues a permit to a source, there will never be a federally issued permit to be violated.

<sup>21</sup> RCRA §§ 3005–3006, 42 U.S.C. §§ 6925–6926 (2000). RCRA establishes a permit program for entities that treat, store or dispose of hazardous waste. It also establishes regulatory programs for generators and transporters of hazardous waste that are not implemented through permits. All of these programs may be administered and enforced by EPA or by states with approved programs. Whether EPA or states with approved programs issue the permits, they must contain the minimum standards promulgated by EPA.

<sup>22</sup> Under both statutes, however, EPA may approve partial state programs, covering some but not all permits or some but not all federal requirements. In such cases, EPA remains the permit issuer for the unapproved portion of the program. CWA § 402(n), 33

to add a permit program modeled in large part on the CWA and RCRA permit programs.<sup>23</sup> All three statutes authorize EPA to exercise oversight authority on the implementation and enforcement of plans and programs approved by states.<sup>24</sup> At the same time, these core cooperative federal programs do not stand alone. The CAA, CWA and RCRA establish other major regulatory programs and provisions unrelated to the core programs. Some of these other programs and provisions contemplate pure federal implementation,<sup>25</sup> while others contemplate state implementation.<sup>26</sup> Analyzing the preclusions on EPA enforcement requires examining them in the context of the federal/state relationships in the programs that they enforce.

Differences in the federalist balance between EPA and states in implementing the statutes are not reflected in the types of enforcement sanctions and remedies that Congress provided to EPA and citizen enforcers. They are reflected, however, in the statutory preclusions Congress placed on EPA's exercise of those authorities. Congress developed a three-element notice, delay and bar preclusion device that it could change by varying one or more of the three elements to reflect the particular balance between the potential enforcers it intended in each statute. It generally placed no preclusion on EPA enforcement in programs where it gave EPA authority to implement and enforce, with little or no role for states. But it placed a wide variety of preclusions on EPA enforcement in programs where it gave EPA shared implementation authority with states. The variety in the preclusions reflects the different balances Congress struck between its goal of protecting the environment through strong federal authorities and its desire for state implementation of environmental programs. The care that Congress took to place a version of the preclusion device appropriate for a particular statute in its enforcement provisions underscores the importance of interpreting the device as Congress wrote it.

The preclusions may vary in any or all of their elements: (1) who they require the potential enforcer to notify of its intention to enforce;

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U.S.C. § 1342(n) (2000); RCRA § 3006(g), 42 U.S.C. § 6926(g) (2000); *see also* CAA § 502(i), 42 U.S.C. § 7661a(i) (2000).

<sup>23</sup> CAA §§ 501–505, 42 U.S.C. §§ 7661–7661d (2000).

<sup>24</sup> For instance, the CWA requires states to send copies of proposed permits to EPA for review and authorizes EPA to both veto state permits not conforming to federal requirements and issue permits in their place. EPA also may assume primary enforcement responsibility in the state if it demonstrates the state's systemic failure to enforce, may enforce against violations in a state with an approved program, and may revoke its approval of the state's program if it fails to conform to federal requirements. CWA §§ 309(a), 402(c)–(d), 33 U.S.C. §§ 1319(a), 1342(c)–(d) (2000).

<sup>25</sup> For instance, the CAA establishes a program for regulating motor vehicle emissions at the manufacturing stage, implemented almost exclusively by EPA, and the CWA establishes an oil spill program implemented almost exclusively by EPA and the Coast Guard. CAA §§ 202–219, 42 U.S.C. §§ 7521–7554 (2000); CWA § 311, 33 U.S.C. § 1321 (2000).

<sup>26</sup> For instance, RCRA establishes a program for regulating disposal of non-hazardous solid waste for which EPA establishes the standards, but for which states are almost exclusively responsible for implementing. RCRA §§ 4001–4009(a), 42 U.S.C. §§ 6941–6949(a) (2000).

(2) how long after notice they delay the potential enforcer from commencing its enforcement action; and (3) the extent to which they bar the potential successive enforcer from commencing its action. They may require the potential enforcer to notify all, some, or none of the violator, EPA, and the state in which the violation occurs. They may require the potential enforcer to delay commencement of its enforcement action for periods up to ninety days or not at all. They may or may not bar the potential enforcer from commencing particular actions if another enforcer has already commenced an action and is diligently prosecuting it. Congress intended the many possible combinations of these variables to provide a nuanced device, with a wide spectrum of effects on successive enforcement.

### B. EPA Enforcement Provisions

The statutes provide EPA an arsenal of enforcement remedies and sanctions, ranging from notices of violation<sup>27</sup> to criminal incarceration and fines.<sup>28</sup> Some provide augmented incarceration and fines for violations that the defendant knew placed persons in peril of life or limb.<sup>29</sup> The number and variety of these remedies allow EPA considerable latitude to determine the appropriate enforcement remedy for a particular violation.

States have similar arsenals of enforcement remedies in their statutes. In practice, however, EPA and states conduct most enforcement by issuing administrative orders. Approximately ninety percent of EPA enforcement actions and ninety-five percent of state actions are administrative.<sup>30</sup>

The citizen suit provisions are very similar and share a common origin in the CAA. Courts often interpret the citizen suit provisions in a particular statute by reference to the wording, legislative history and precedent under the provisions of other statutes. On the other hand, the EPA enforcement provisions sometimes appear less similar. Courts seldom interpret them by reference to wording, legislative history and precedent under EPA enforcement provisions in other statutes. However, the similarities and dissimilarities in the preclusion devices are critical to their proper interpretation. Some of the differences between the EPA enforcement provi-

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<sup>27</sup> *E.g.*, CAA § 113(a)(1), 42 U.S.C. § 7413(a)(1) (2000).

<sup>28</sup> *E.g.*, CAA § 113(c), 42 U.S.C. § 7413(c). In between these ends of the spectrum are administrative orders to assess penalties, *e.g.*, CWA § 309(g), 33 U.S.C. § 1319(g) (2000), require compliance, *e.g.*, CWA § 309(a)(1), (a)(3), 33 U.S.C. § 1319(a)(1), (a)(3), revoke permits, *e.g.*, RCRA § 3008(a)(3), 42 U.S.C. § 6928(a)(3) (2000), stop sales, *e.g.*, FIFRA § 13(a), 7 U.S.C. § 136k(a) (2000), recall products, *e.g.*, CAA § 207(c), 42 U.S.C. § 7541(c) (2000), seize goods, *e.g.*, FIFRA § 13(b), 7 U.S.C. § 136k(b), and prohibit federal grants or contracts to violating facilities, *e.g.*, CWA § 508, 33 U.S.C. § 1368 (2000); and civil judicial actions to assess penalties, *e.g.*, CWA § 309(d), 33 U.S.C. § 1319(d) (2000), enjoin compliance, *e.g.*, CWA § 309(b), 33 U.S.C. § 1319(b), ban new connections to sewers, CWA § 402(h), 33 U.S.C. § 1342(h) (2000), and abate imminent and substantial endangerments, *e.g.*, CWA § 504, 33 U.S.C. § 1364 (2000).

<sup>29</sup> *See infra* note 34.

<sup>30</sup> *See* Miller, *supra* note 1, at 415 n.68.

sions in different statutes reflect the different strategies adopted by Congress for those statutes. Statutes regulating environmental dangers from the use of products, for instance, provide for product recall and forfeiture provisions<sup>31</sup> not found or needed in statutes regulating dangers from pollution and waste disposal. Other differences reflect peculiar circumstances in the evolutions of the statutes and their EPA enforcement provisions.<sup>32</sup> However, close examination of the provisions reveals their common remedies are very similar and share the same origins. This is true both of basic provisions initially included in the statutes beginning with the CAA,<sup>33</sup> including administrative orders, injunctions, and criminal provisions, and of more sophisticated provisions added later.<sup>34</sup> These similar EPA enforcement provisions can be interpreted by reference to the wording, legislative history and precedents under comparable provisions in other statutes, just as citizen suit provisions are interpreted by cross-statutory reference. This is particularly true of the preclusion devices in the EPA enforcement provisions, for they are manifestations of the theme and variations sounding in the EPA and citizen enforcement provisions of all of the statutes.

### *1. Statutory Bars on EPA Enforcement*

While Congress intended the preclusions in the citizen suit provisions to prevent unwarranted disruption in government enforcement, it intended the preclusions in EPA enforcement provisions to reflect the relative strength of EPA authority in the balance Congress struck between federal and state implementation of the program being enforced. Nonetheless, when Congress placed preclusions against EPA enforcement, it used variations of the same three-part notice, delay, and bar preclusion it

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<sup>31</sup> FIFRA, regulating pesticides and similar products, authorizes EPA to stop the sale and use, seize and regulate the manufacture, use, importation and exportation of products violating the statute. FIFRA §§ 13, 17, 7 U.S.C. §§ 136k, 136o (2000). TSCA, regulating the manufacture and sale of chemicals, authorizes EPA to seize offending chemicals, to require their manufacturer to warn its customers and the general public of, and to replace, defective chemicals, and to regulate the importation and exportation of chemicals. TSCA §§ 11–12, 17, 15 U.S.C. §§ 2610–2611, 2616 (2000). Subchapter II of the CAA, regulating automobile emissions, authorizes EPA to order the recall and repair of vehicles not conforming to air pollution requirements and requires manufacturers to warrant to their customers that their vehicles conform to those requirements. CAA § 207, 42 U.S.C. § 7541 (2000).

<sup>32</sup> CAA section 119, for instance, authorized protracted phase-out orders for copper smelters in accommodation to an economically hard-pressed industry, typically the sole significant employer in towns where they operated. 42 U.S.C. § 7419 (2000).

<sup>33</sup> See CAA § 113(a)–(d), 42 U.S.C. § 7413(a)–(d) (2000).

<sup>34</sup> For example, the knowing endangerment criminal provision was added successively to RCRA, the CWA and the CAA, using virtually the same language. See Pub. L. No. 98-616, § 232(b), 98 Stat. 3221, 3257 (1984) (codified at 42 U.S.C. § 6928) (RCRA); Pub. L. No. 100-4, § 312, 101 Stat. 7, 43–44 (1987) (codified at 33 U.S.C. § 1319(c)(3)) (CWA); Pub. L. No. 101-549, § 701, 104 Stat. 2399, 2676 (1990) (codified at 42 U.S.C. § 7413(c)(5)) (CAA).

used in the citizen suit provisions. It created at least five categories in the device precluding EPA enforcement. These preclusions range from more restrictive than preclusions in the citizen suits provisions to much weaker than citizen enforcement preclusions. A few EPA enforcement provisions, in fact, contain no preclusion device. From the strongest to the weakest, they: (1) bar EPA from taking some enforcement actions against a violation if EPA or the state has taken specific enforcement actions against the violation;<sup>35</sup> (2) require EPA to give the state thirty days prior notice before EPA takes an enforcement action against a violation in the state, and bar EPA enforcement if the state takes "appropriate enforcement action" against the violation;<sup>36</sup> (3) require EPA to give the state notice before EPA takes an enforcement action against a violation in the state;<sup>37</sup> (4) require EPA to notify the state after EPA takes enforcement action against a violation in the state;<sup>38</sup> and (5) impose no preclusion on EPA enforcement.<sup>39</sup>

## 2. Legislative History

The EPA enforcement provisions have proven to be quite dynamic, as Congress has strengthened them from time to time. Though these amendments have introduced idiosyncrasies into the provisions, the structures, basic authorities (administrative compliance orders, civil penalties, injunctions, and criminal sanctions), and basic preclusions can still be traced to the first of these statutes, the CAA.<sup>40</sup> For these common elements, the legislative history of the CAA provisions is useful and precedents from one statute can be useful in interpreting others. This is often true beyond the basic common elements as well, for the newer embellishments found in many of the statutes were developed for one statute and copied into others.<sup>41</sup> With some exceptions, however, there is little legislative history regard-

<sup>35</sup> CWA §§ 309(g)(6)(A), 311(b)(6)(E), 33 U.S.C. §§ 1319(g)(6)(A), 1321(b)(6)(E) (2000); SDWA § 1423(c)(5), 42 U.S.C. § 300h-2(c)(5) (2000).

<sup>36</sup> FIFRA § 27(a), 7 U.S.C. § 136w-2(a) (2000); CWA § 309(a)(1), 33 U.S.C. § 1319(a)(1) (2000); SDWA §§ 1414(a)(1)(B), 1423(a)(1), 42 U.S.C. §§ 300g-3(a)(1)(B), 300h-2(a)(1) (2000).

<sup>37</sup> RCRA § 3008(a)(1)–(2), 42 U.S.C. § 6928(a)(1)–(2) (2000); CAA § 113(a)(1), 42 U.S.C. § 7413(a)(1) (2000).

<sup>38</sup> CWA §§ 309(a)(4)–(5), 404(s)(3), 33 U.S.C. §§ 1319(a)(4)–(5), 1344(s)(3) (2000); CAA § 113(a)(3)–(4), 42 U.S.C. § 7413(a)(4) (2000).

<sup>39</sup> FIFRA § 14, 7 U.S.C. § 136l (2000); TSCA §§ 16, 207, 15 U.S.C. §§ 2615, 2647 (2000); MPRSA § 105, 33 U.S.C. § 1415 (2000); EPCRA § 325, 42 U.S.C. § 11045 (2000).

<sup>40</sup> The Committee report accompanying the Senate CWA bill acknowledged that its enforcement provisions were based on those of the CAA and the Refuse Act (an 1899 statute prohibiting the deposit of refuse into navigable rivers). S. REP. NO. 92-414, at 64 (1972), *reprinted in A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972*, at 1482 (1973) [hereinafter "CWA LEGISLATIVE HISTORY"]. The Committee report accompanying the Senate RCRA bill acknowledged that its enforcement provisions were based on those of the CAA and CWA. S. REP. NO. 94-988, at 17 (1976).

<sup>41</sup> See *supra* note 34.

ing the preclusions, although some legislative history regarding the balance between EPA and states in enforcement bears on their interpretation.

The Committee report accompanying the Senate CAA bill in 1970 explained that, by providing new federal enforcement authorities, Congress did “not intend to diminish either the authority or the responsibility of State and local governments” in the enforcement arena. Although the new enforcement authorities provided “the necessary tools to act swiftly to abate violations,” the federal government “should not interfere with effective State action.” The federal enforcer “would be authorized to issue . . . an order when [it] determined that a State had not satisfactorily administered its enforcement authority.”<sup>42</sup> These expectations are consistent with the congressional findings that “air pollution prevention . . . and air pollution control at its source is the primary responsibility of States and local governments.”<sup>43</sup> The implied primacy of state administration and enforcement, however, is hyperbole. Congress authorized only EPA to establish emission standards for new motor vehicles and contemplated that it would have sole responsibility to enforce them. It authorized only EPA to establish emission standards from new sources and for hazardous pollutants, and contemplated that it would have primary responsibility for enforcing them. And even the above-quoted report language asserts that EPA should not interfere with *effective* state enforcement and acknowledges EPA is free to interfere with *unsatisfactory* state enforcement. But this report is not reflected in the EPA enforcement provisions that Congress enacted. It does not limit EPA’s enforcement authority to cases in which the state has not taken satisfactory actions. Indeed, it authorizes EPA to bring an enforcement action without regard to whether the state has enforced, satisfactorily or not.<sup>44</sup>

Two years later, congressional trumpeting of state enforcement responsibility grew even stronger in the legislative history of the CWA. The Committee report accompanying the House CWA bill stated that the

Committee expects that the Administrator will rely to the maximum extent possible upon the enforcement actions of the individual States. The Committee in providing for Federal enforcement does not intend to replace enforcement by the States. The provisions of section 309 are supplemental to those of the States and are available to the Administrator in those cases where . . . State . . . enforcement agencies will not or cannot act expeditiously and vigorously to enforce the requirement of this Act. The

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<sup>42</sup> S. REP. NO. 91-1196, at 21–22 (1970), *reprinted in* 1 A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1970, at 421–22 (1974) [hereinafter “CAA LEGISLATIVE HISTORY”].

<sup>43</sup> CAA § 101(a)(3), 42 U.S.C. § 7401(a)(3) (2000).

<sup>44</sup> CAA § 113(a), 42 U.S.C. § 7413(a) (2000).



Committee clearly intends that the greater proportion of enforcement actions be brought by the States.<sup>45</sup>

The Committee report accompanying the Senate CWA bill stated similar expectations:

In any regulatory program involving Federal and State participation is (sic) the allocation or division of enforcement responsibilities is difficult . . . .

Against the background of the Clean Air Act and the Refuse Act the Committee concluded that the enforcement presence of the Federal government shall be concurrent with the enforcement powers of the States. The Committee does not intend this jurisdiction of the Federal government to supplant state enforcement. Rather the Committee intends that the enforcement power of the Federal government is available in cases where States . . . are not acting expeditiously and vigorously to enforce control requirements.

Under the Refuse Act the Federal government is not constrained in any way from acting against violators. The Committee continues that authority in this Act.

The Committee . . . notes that the 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.<sup>46</sup>

Again, deference to state enforcement in these statements is exaggerated. The enacted enforcement provision did not contain the suggested limitations. Indeed, the statute envisions EPA as a permit issuer in states with no approved programs and it makes little sense to view non-participating states as the primary enforcers of federally issued permits. To the extent that Congress modeled the CWA enforcement provisions on the Refuse Act,<sup>47</sup> it modeled them on a statute contemplating no state role in

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<sup>45</sup> H. REP. NO. 92-911, at 115 (1972), *reprinted in* CWA LEGISLATIVE HISTORY, *supra* note 40, at 802 (1973).

<sup>46</sup> S. REP. NO. 92-414, at 73-74 (1971), *reprinted in* 2 CWA LEGISLATIVE HISTORY, *supra* note 40, at 1481-82. The Committee repeated much of the same language in its report accompanying its RCRA bill. S. REP. NO. 94-988, at 17 (1976).

<sup>47</sup> 33 U.S.C. §§ 407, 411 (2000).

enforcement. Indeed, the Committee report acknowledged the CWA enforcement authorities, like those in the Refuse Act, were “not constrained in any way.”<sup>48</sup> And its statement that EPA is not to establish an enforcement bureaucracy is puzzling, since EPA had a preexisting enforcement bureaucracy that operated EPA’s part of the Refuse Act permitting program. Congress was well aware of this for it provided a budget for those operations and heard testimony from EPA enforcement officials supporting the enactment of the CWA.<sup>49</sup>

Despite its overblown championing of the state role in enforcement, the legislative history suggests that Congress intended the preclusion devices to ease friction between federal and state enforcers. It does not, however, illuminate how the provisions should be interpreted.

### 3. *An Anomaly: Limited Federal Enforcement Authority*

RCRA’s program for regulating non-hazardous solid waste is a stark contrast to the dominant statutory pattern of strong federal enforcement authority tempered by a sliding scale of preclusions on EPA enforcement when the state has already taken an enforcement action. It reflects Congress’s intent not to displace state responsibility for solid waste management. It also demonstrates that Congress knows *how* to deny EPA enforcement authority or to drastically curtail it when that is its intent, which undercuts arguments that Congress obliquely implied restrictions on EPA enforcement authority in non-enforcement provisions.

In RCRA section 3008, Congress granted EPA broad authority to enforce against violations of “this subchapter,” i.e., subchapter III, regulating hazardous waste treatment, storage and disposal.<sup>50</sup> Subchapter III does not regulate the disposal of non-hazardous solid waste. That is accomplished in Subchapter IV, which adopts a model from an earlier era. It contemplates that states will develop and implement plans for non-hazardous solid waste [hereinafter “solid waste”] disposal to protect the environment and encourage resource conservation by recycling.<sup>51</sup> Subchapter IV confines the federal role largely to providing financial and technical assistance and promulgating standards for safe disposal.<sup>52</sup> As enacted in 1976, RCRA required EPA to promulgate criteria for “sanitary

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<sup>48</sup> S. REP. NO. 92-414, at 64 (1971), *reprinted in* 2 CWA LEGISLATIVE HISTORY, *supra* note 40, at 1482.

<sup>49</sup> *See, e.g., Hearings on H.R. 11896 Before the House Comm. On Public Works*, 92d Cong. 336, 338 (1972) (testimony of John Quarles, EPA General Counsel and Assistant Administrator for Enforcement, discussing the enforcement and permitting programs under the Refuse Act and projected under the to-be-enacted CWA), *reprinted in* 2 CWA LEGISLATIVE HISTORY, *supra* note 40, at 1234, 1236.

<sup>50</sup> 42 U.S.C. § 6928 (2000).

<sup>51</sup> RCRA § 4001, 42 U.S.C. § 6941 (2000).

<sup>52</sup> RCRA §§ 4002–4004, 4007–4008, 42 U.S.C. §§ 6942–6944, 6947–6948 (2000).

landfills.”<sup>53</sup> It declared that solid waste disposal facilities not meeting the sanitary landfill criteria were “open dumps,” and made the further operation of open dumps illegal.<sup>54</sup> It also used grant money to encourage states to submit to EPA control programs, closing open dumps and regulating sanitary landfills, for approval as meeting federal standards.<sup>55</sup> Unlike in other statutes, Congress did not authorize EPA to develop a regulatory program in states failing to submit approvable programs, nor did it authorize EPA to enforce against open dumps to require them to meet sanitary landfill standards. Curiously, however, it did authorize citizens to enforce against open dumps.<sup>56</sup>

Congress soon prompted amendment of RCRA because several developments demonstrated that municipal landfills were not benign, but were the ultimate disposal sites for considerable amounts of hazardous waste. First, approximately twenty percent of the sites listed for remediation on CERCLA’s National Priority List were operating or defunct municipal landfills.<sup>57</sup> Second, generators of small quantities of hazardous waste were allowed to avoid the RCRA Subchapter III regulatory net if they disposed of that waste in state-licensed municipal landfills.<sup>58</sup> Third, municipal waste itself had a hazardous waste component from households and commercial establishments.<sup>59</sup> Finally, leachate from municipal landfills, even those without a significant industrial waste component, can be very like leachate from hazardous waste landfills.<sup>60</sup> These factors prompted Congress to amend Subchapter IV in 1984, upgrading controls on solid waste disposal facilities receiving wastes from small quantity generators.<sup>61</sup> As part of the upgrade, Congress authorized EPA to enforce against disposal facilities not meeting the federal standards, but only in states without approved programs.<sup>62</sup> RCRA does grant EPA authority to abate imminent and substantial endangerments, including endangerment from solid waste, and does not limit that authority to endangerment caused by violations of the statute or EPA’s regulations.<sup>63</sup> The RCRA amendments continued to favor citizens, however, giving them authority to enforce

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<sup>53</sup> RCRA § 4004, 42 U.S.C. § 6944.

<sup>54</sup> RCRA § 4005, 42 U.S.C. § 6945 (2000).

<sup>55</sup> RCRA § 4006, 42 U.S.C. § 6946 (2000).

<sup>56</sup> RCRA subsection 7002(a)(1) authorizes citizens to enforce against any violation of a requirement or standard that “has become effective pursuant to this chapter.” 42 U.S.C. § 6972(a)(1) (2000). The “chapter” referred to is all of RCRA, including both Subchapters III and IV. If there was any doubt, Congress specifically provided in section 4005(a) that the prohibition against operating an open dump was enforceable under section 7002. 42 U.S.C. § 6945(a) (2000).

<sup>57</sup> 40 C.F.R. Pt. 300, App. B (2004).

<sup>58</sup> RCRA § 3001(d)(5), 42 U.S.C. § 6921(d)(5) (2000).

<sup>59</sup> See Solid Waste Disposal Facility Criteria, 56 Fed. Reg. 50978, 50982–83 (Oct. 9, 1991) (to be codified at 40 C.F.R. pts. 257–258).

<sup>60</sup> *Id.*

<sup>61</sup> RCRA § 4010(c), 42 U.S.C. § 6949a(c) (2000).

<sup>62</sup> RCRA § 4005(c)(2)(A), 42 U.S.C. § 6945(c)(2)(A) (2000).

<sup>63</sup> RCRA § 7003, 42 U.S.C. § 6973 (2000).

against solid waste disposal facilities not meeting the federal standards, regardless of whether they were located in states with approved programs or whether they posed an endangerment.<sup>64</sup>

The author is aware of no reported decisions on EPA enforcement under these provisions. On the other hand, there are numerous reported decisions on citizen enforcement of them.<sup>65</sup> The juxtaposition of limited EPA enforcement authority and unlimited citizen enforcement authority is curious and unique. It is illustrative of the lengths to which Congress will go to adjust the balance between federal and state enforcers.

### C. Citizen Enforcement Provisions and Their Preclusions

An understanding of the preclusion mechanism in citizen suits is important for understanding preclusions against EPA enforcement, since both share the three element notice, delay and bar structure. Indeed, they both resonate the theme and variation nature of this preclusion structure. The citizen suit provisions of the various environmental statutes are modeled on CAA section 304.<sup>66</sup> Indeed, the citizen suit provisions in the different statutes are so nearly alike that courts commonly interpret one of them by comparing and contrasting its wording with the wording of others and by using legislative history and precedent from the others.<sup>67</sup> CAA section 304 contains a three-element statutory preclusion in a form followed closely by the citizen suit provisions in the other statutes. It provides generally that

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<sup>64</sup> See *supra* note 56.

<sup>65</sup> See, e.g., *Dague v. City of Burlington*, 935 F.2d 1343 (2d Cir. 1991), *rev'd on other grounds*, 505 U.S. 557 (1992).

<sup>66</sup> 42 U.S.C. § 7604 (2000). Both the House and Senate CWA Reports acknowledge this. CWA section 505 is "modeled on the provision enacted in the Clean Air Act Amendments of 1970." S. REP. NO. 92-414, at 79 (1971), *reprinted in* 2 CWA LEGISLATIVE HISTORY, *supra* note 40, at 1497. 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* 1 CWA LEGISLATIVE HISTORY, *supra* note 40, at 820. Indeed, they are so alike that the Senate Report on the citizen suit provision in the CWA follows the Senate Report on the citizen suit provision in the CAA almost paragraph by paragraph and word for word. See S. REP. NO. 91-1196, at 36-39 (1972), *reprinted in* 1 CAA LEGISLATIVE HISTORY, *supra* note 42, at 436-39; S. REP. NO. 92-414, at 79-82 (1972), *reprinted in* 2 CWA LEGISLATIVE HISTORY, *supra* note 40, at 1497-1500. This is particularly significant because the provision in the CAA originated in the Senate bill, with no counterpart in the House bill. CONF. REP. NO. 91-1783, at 55, *reprinted in* 1970 U.S.C.C.A.N. 5374, 5388.

<sup>67</sup> See *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 57 (1987) (comparing wording of CWA section 505 to citizen suit provisions of several other statutes); *Hallstrom v. Tillamook County*, 844 F.2d 598, 599-600 (9th Cir. 1987), *aff'd*, 493 U.S. 20 (1989); *Friends of the Earth v. Consol. Rail Corp.*, 768 F.2d 57, 63 (2d Cir. 1985) (using the CAA citizen suit provision legislative history to interpret CWA citizen suit provision); *Natural Res. Def. Council v. Train*, 510 F.2d 692, 702 n.55 (D.C. Cir. 1975) (using the CAA citizen suit provision legislative history used to interpret CWA citizen suit provision); *Vernon Village, Inc. v. Gottier*, 755 F. Supp. 1142 (D. Conn. 1990) (interpreting SDWA citizen suit provision); *Roe v. Wert*, 706 F. Supp. 788, 791-92 (W.D. Okla. 1989); *Student Pub. Interest Group of N.J., Inc. v. Fritzsche, Dodge & Olcott, Inc.*, 579 F. Supp. 1528, 1533-34 n.8 (D.N.J. 1984), *aff'd*, 759 F.2d 1131 (3d Cir. 1983).

No action may be commenced . . .

. . . prior to 60 days after the 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 [that the citizen seeks to enforce]. . . .<sup>68</sup>

Under the notice and delay elements, citizens must give the government the first opportunity to sue in court.<sup>69</sup> Under the bar element, citizens may not sue if the government has taken and is diligently prosecuting that opportunity. If the preclusive government action is filed in federal court, however, a citizen may intervene as a matter of right.<sup>70</sup> The citizen suit provisions in the other statutes share these features; indeed, the “has commenced and is diligently prosecuting” language in the bar element is identical in most of them.<sup>71</sup> There are only three differences among the bar elements. First, the citizen suit provisions of the statutes that do not envision a state role in implementation do not bar a citizen suit because of a state action.<sup>72</sup> Second, several of the citizen suit provisions bar citizen suits when EPA has commenced, and is diligently prosecuting, a civil or criminal action.<sup>73</sup> Finally, other citizen suit provisions bar citizen suits when EPA has commenced assessing an administrative penalty,<sup>74</sup> or has commenced and is diligently prosecuting the assessment of an adminis-

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<sup>68</sup> CAA § 304(b)(1), 42 U.S.C. § 7604(b)(1).

<sup>69</sup> A few variants 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. Most of the statutes require a sixty-day delay after notice before a citizen may file suit against a violating polluter. On the other hand, many of the statutes do not require a delay period before citizens may sue for particular violations, often associated with hazardous substances, although prior notice must still be given. RCRA section 7002(b)(2)(A), for instance, normally requires citizens to give EPA a ninety-day delay before they may file a suit to abate an imminent and substantial endangerment, but requires only prior notice with no delay period for citizens filing complaints alleging violations of Subchapter III (regulating the treatment, storage and disposal of hazardous waste). 42 U.S.C. § 6972(b)(2)(A) (2000). *See also* CWA § 505(b), 33 U.S.C. § 1365(b); CAA § 304(b), 42 U.S.C. § 7604(b) (2000) (providing for differential notice requirements).

<sup>70</sup> CAA § 304(b)(1)(B), 42 U.S.C. § 7604(b)(1)(B).

<sup>71</sup> Except as noted in the text below, it is identical in CWA section 505(b)(1)(B), RCRA section 7002(b)(1)(B), SDWA section 1449(b)(1)(B), TSCA section 20(b)(1)(B), and EPCRA section 326(b)(1)(B). 33 U.S.C. § 1365(b)(1)(B) (CWA); 42 U.S.C. § 6972(b)(1)(B) (RCRA); 42 U.S.C. § 300j-8(b)(1)(B) (2000) (SDWA); 15 U.S.C. § 2619(b)(1)(B) (2000) (TSCA); 42 U.S.C. § 11046(e) (2000) (EPCRA).

<sup>72</sup> TSCA § 20(b), 15 U.S.C. § 2619(b); MPRSA § 105(g)(2), 33 U.S.C. § 1415(g)(2) (2000); EPCRA § 326(e), 42 U.S.C. § 11046(e).

<sup>73</sup> CWA § 505(b)(1)(B), 33 U.S.C. § 1365(b)(1)(B); MPRSA § 105(g)(1)(D), 33 U.S.C. § 1415(g)(1)(D); RCRA § 7002(b)(1)(B), 42 U.S.C. § 6972(b)(1)(B).

<sup>74</sup> MPRSA § 105(g)(2)(C), 33 U.S.C. § 1415(g)(2)(C).

trative penalty.<sup>75</sup> Some of the provisions contain other limitations on citizen suits not germane to this inquiry.

Some related aspects of the citizen suit provisions are also relevant to this analysis. First, while the provisions bar citizen suits if the federal or state government has commenced, and is diligently prosecuting, an action, most allow citizens to intervene as of right in government actions filed in federal courts.<sup>76</sup> Second, they allow the federal government (but not the state) to intervene as a matter of right in any citizen suit.<sup>77</sup> Finally, the CAA and CWA require citizens to give the federal government (but not the state) notice of a proposed settlement of the citizen suit and allow the federal government to comment on it.<sup>78</sup>

Although there are variations in the three-element preclusion device in the citizen suit provisions, there are fewer and they are far less varied than the preclusion device in EPA enforcement provisions. This reflects the somewhat different purposes the devices serve in the two sets of provisions. In the citizen suit provisions the devices serve to manage duplicative litigation by successive enforcers, a purpose that does not vary much from one statute to another. In EPA enforcement provisions the devices serve to modulate the federalist balance between EPA and states, a balance that varies considerably from one statute to another.

## II. INTERPRETING THE PRECLUSIONS IN EPA ENFORCEMENT PROVISIONS TO IMPLEMENT THEIR PLAIN MEANINGS

Analysis of Congress's intent in promulgating the enforcement preclusions demonstrates that, except where such interpretation renders the preclusions absurd or contradictory, those preclusions should be interpreted according to their plain meaning. This Part will examine the specific preclusions against EPA enforcement in light of this conclusion. This Part

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<sup>75</sup> TSCA § 20(b)(1)(B), 16 U.S.C. § 2619(b)(1)(B); EPCRA § 326(e), 42 U.S.C. § 11046(e). 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. CWA § 309(g), 33 U.S.C. § 1319(g) (2000). Although it differs from the more common bars in several respects, it raises many of the same or similar issues. Because it bars EPA as well as citizen enforcement, however, Part Two addresses it, although Part One frequently referenced it where appropriate.

<sup>76</sup> Most allow "any citizen" or "any person" to intervene. *See* CWA § 505(b)(1)(B), 33 U.S.C. § 1365(b)(1)(B); SDWA § 1449(b)(1)(B), 42 U.S.C. § 300j-8(b)(1)(B); RCRA § 7002(b)(1), 42 U.S.C. § 6972(b)(1); CAA § 304(b)(1)(B), 42 U.S.C. § 7604(b)(1)(B) (2000). EPCRA section 326(h)(2) qualifies those who may intervene, and TSCA subsection 20(b)(1)(B) allows only those parties to intervene who gave notice of citizen suit before the government filed suit. 16 U.S.C. § 2619(b)(1)(B); 42 U.S.C. § 11046(h)(2).

<sup>77</sup> TSCA § 20(c)(1), 16 U.S.C. § 2619(c)(1); SMCRA § 520(c)(2), 30 U.S.C. § 1270(c)(2) (2000); CWA § 505(c)(2), 33 U.S.C. § 1365(c)(2); MPRSA § 105(g)(3)(B), 33 U.S.C. § 1415(g)(3)(B); SDWA § 1449(c), 42 U.S.C. § 300j-8(c); RCRA § 7002(d), 42 U.S.C. § 6972(d); CAA § 304(c)(2), 42 U.S.C. § 7604(c)(2); EPCRA § 326(h)(1), 42 U.S.C. § 11046(h)(1).

<sup>78</sup> CAA § 304(c)(2), 42 U.S.C. § 7604(c)(2); CWA § 505(c)(3), 33 U.S.C. § 1365(c)(3).

discusses the legal issues that arise under each type of preclusion, beginning with the most stringent and proceeding in order of decreasing power.

### A. CWA Subsection 309(g) and Its Kin

The strongest preclusion against EPA enforcement is found in the CWA and the SDWA. In each case, the preclusion applies to enforcement subsequent to an administrative penalty assessment by either EPA or a state with an approved program under a cooperative federalism arrangement. Both the SDWA, in the enforcement provision for its underground injection program,<sup>79</sup> and the CWA, in its general enforcement and oil spill provisions,<sup>80</sup> authorize EPA to assess administrative penalties.<sup>81</sup> The provisions preclude subsequent EPA and citizen actions against violations for which: (1) EPA has commenced and is diligently pursuing an administrative penalty action or (2) has finally assessed an administrative penalty. The CWA's enforcement provision precludes both EPA and citizens from taking other penalty actions against violations for which the state has taken similar action under comparable state law.<sup>82</sup> The CWA provision precludes only successive penalty actions and its second prong applies only if the violator has paid the penalty.<sup>83</sup> The SDWA provision omits this preclusion against EPA action, probably because the SDWA already precludes EPA enforcement if the state has taken "appropriate enforcement action."<sup>84</sup> CWA subsection 309(g) is unique in that its preclusion device contains a bar on both EPA and citizen enforcement. Defendants have invoked the subsection 309(g) bar in many citizen suits, but in few EPA enforcement actions. Because of a dearth of opinions under the comparable provisions in CWA section 311 and SDWA, this Article focuses on the preclusion device as it is used in CWA subsection 309(g), but its conclusions are applicable to the use of the device in the SDWA.

#### 1. Introduction: The Provision and Its Preclusions

In 1987, Congress amended the CWA enforcement section to add administrative assessment of civil penalties to EPA's enforcement arsenal.<sup>85</sup> It intended this authority to address relatively minor violations in a sort of traffic ticket fashion. Whereas subsection 309(d) authorizes courts to assess penalties up to \$25,000 a day for each violation, with no limit on

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<sup>79</sup> SDWA § 1423(c)(5), 42 U.S.C. § 300h-2(c)(5) (2000).

<sup>80</sup> CWA §§ 309(g), 311(b)(6)(E), 33 U.S.C. §§ 1319(g), 1311(b)(6)(E) (2000).

<sup>81</sup> Other statutes authorize EPA to assess penalties, but they do not incorporate the preclusion device in those authorities. *E.g.*, CAA § 113(d), 42 U.S.C. § 7413(d) (2000).

<sup>82</sup> CWA § 309(g)(6), 33 U.S.C. § 1319(g)(6).

<sup>83</sup> CWA § 309(g)(6)(B), 33 U.S.C. § 1319(g)(6)(B).

<sup>84</sup> *See infra* Part III.B.

<sup>85</sup> Pub. L. No. 100-4, § 314, 101 Stat. 7, 46-49 (1987).

total penalties assessed, subsection 309(g) authorizes EPA to assess penalties only to a total of \$25,000, using informal administrative procedures, or \$125,000, using formal administrative procedures.<sup>86</sup> Both administrative penalty processes, however, require EPA first to consult with the state in which the violation occurs, give the violator notice allowing it thirty days to request a hearing, and give public notice and opportunity for participation in the assessment procedures.<sup>87</sup> The provision also allows interested parties the opportunity to appeal EPA's ultimate assessments and to request that the court assess greater penalties than EPA if EPA abused its discretion in assessing too low a penalty.<sup>88</sup> To prevent the assessment of duplicative penalties for the same violation, Congress included the preclusion device in subsection 309(g)(6)(A). It provides that "any violation . . . shall not be the subject of a civil penalty action" by EPA or a citizen suit 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 assessed under this subsection, or such comparable State law . . . .<sup>89</sup>

But subsection 309(g)(6)(B) provides that the bar does not apply in the event that:

- (i) a civil action under section 1365(a)(1) . . . has been filed prior to commencement of an action under this subsection, or
- (ii) notice . . . has been given in accordance with section 1365(b)(1)(A) . . . prior to commencement of an action under this subsection and an action under section 1365(a)(1) . . . with respect to such alleged violation is filed before the 120th day after the date on which such notice is given.<sup>90</sup>

Although an EPA action under subsection 309(g) may bar a citizen suit, EPA must provide public notice of such an action, and citizens may intervene or, if a penalty has been agreed between EPA and the violator, demand a hearing on the adequacy of the penalty. Citizens may also appeal final EPA action on penalty assessments.<sup>91</sup> This is the only instance of which the

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<sup>86</sup> CWA § 309(d), (g)(2), 33 U.S.C. § 1319(d), (g)(2).

<sup>87</sup> CWA § 309(g)(1), (4), 33 U.S.C. § 1319(g)(1), (4).

<sup>88</sup> CWA § 309(g)(8), 33 U.S.C. § 1319(g)(8).

<sup>89</sup> CWA § 309(g)(6)(A), 33 U.S.C. § 1319(g)(6)(A).

<sup>90</sup> CWA § 309(g)(6)(A), 33 U.S.C. § 1319(g)(6)(B).

<sup>91</sup> CWA § 309(g)(8), 33 U.S.C. § 1319(g)(8).



author is aware that Congress provided citizens with judicial review of consented-to administrative penalties between EPA and violators. Of interest in interpreting the preclusions is subsection 309(g)(7), which provides that EPA penalty assessments do not "affect any person's obligations to comply with" the CWA, without mentioning the effect of state penalty assessments.<sup>92</sup>

The CWA subsection 309(g) preclusion device is a variant of the familiar three-element device against subsequent enforcement. It contains the notice and delay elements requiring EPA to issue a notice to the violator and to consult with the state before commencing a penalty action. It then gives the respondent thirty days to request a hearing. Uniquely, however, 309(g) contains the bar element for the device's limitation on successive actions by both EPA and citizens. Normally, preclusions on EPA enforcement are located in the EPA enforcement provisions, and preclusions on citizen enforcement are located in the citizen suit provisions. The CWA subsection 309(g)'s wedding of the two bar elements into one provision is a graphic illustration that the statutes' preclusions on EPA and citizen actions are variants of the same device. Despite its uniqueness in this regard, the CWA subsection 309(g) preclusion device is structured as the other preclusion devices and raises many of the same interpretive issues, albeit in a somewhat different context: (1) What levels of government may act to bar an EPA or citizen action? (2) What government actions will bar an EPA or citizen action? (3) When must the government action be commenced to bar an EPA or citizen action? (4) How diligently must the government prosecute the action to bar an EPA or citizen action? (5) What EPA or citizen actions will the government action bar? Before addressing these issues, however, it is useful to examine the legislative history of subsection 309(g), for Congress recognized that if not properly implemented, subsection 309(g) could interfere with the compliance goals of CWA sections 309 (EPA enforcement) and 505 (citizen enforcement), and structured subsection 309(g) to prevent that interference.

The subsection 309(g) preclusion device has generated considerable litigation and reported decisions, almost all of them in citizen suits.<sup>93</sup> Courts swayed by deference to prosecutorial discretion or otherwise hostile to citizen suits have disregarded the plain wording of subsection 309(g) to interpret the preclusion device broadly. They have done so without considering the implications of their interpretations on EPA enforcement under CWA subsection 309(g) and the other statutes. Moreover, they utterly fail

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<sup>92</sup> CWA § 309(g)(7), 33 U.S.C. § 1319(g)(7).

<sup>93</sup> This discussion of the subsection 309(g) preclusion device cites nearly fifty decisions considering its application in citizen suits. But the author is aware of only one reported subsection 309(g) decision in an EPA enforcement action. *See United States v. Smithfield Foods, Inc.*, 965 F. Supp. 769, 791–95 (E.D. Va. 1997), *aff'd in part, rev'd in part on other grounds*, 191 F.3d 516, 524–26 (4th Cir. 1999).

to grasp that the CWA subsection 309(g) preclusion device is part of a nuanced spectrum of preclusions on EPA and citizen actions in the statutes, rendering the congressional wording of each preclusion to be of particular significance in determining the legislative intent. Finally, they have ignored the legislative history of subsection 309(g), which demonstrates congressional intent to strengthen, not weaken, EPA enforcement authority and to limit the bar against subsequent enforcement when the initial penalty was inappropriately lenient.

## 2. Background and Legislative History

Congress's 1987 CWA amendments<sup>94</sup> strengthened the deterrent value of EPA's enforcement authorities in three ways.<sup>95</sup> First, Congress provided greater deterrence through civil penalties by raising the amount of penalties that courts could assess from \$10,000 per day to \$25,000 per day for each violation and by establishing factors for courts to consider in setting the amounts of penalty assessments, including the economic benefit of non-compliance to the violator.<sup>96</sup> Second, it provided to EPA the option of assessing administrative penalties in subsection 309(g). Finally, it increased the criminal sanctions that courts could impose and added a new criminal offense with particularly harsh sanctions for knowing violations which the violator knew put others in danger of death or serious bodily injury.<sup>97</sup> It based the administrative penalty and the knowing endangerment provisions on EPA proposals made as early as 1982.<sup>98</sup> Both the House and Senate bills contained provisions for all three enforcement enhancements, although they varied in their details.<sup>99</sup>

The legislative history emphasizes three aspects of congressional intent behind the new administrative penalty authority. First, Congress intended to strengthen EPA's enforcement program by giving it a new enforcement option. Second, and most important in terms of coverage, Congress intended the new administrative penalty authority to be used against

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<sup>94</sup> Pub. L. No. 100-4, §§ 312–314, 101 Stat. 7 (1987). Both chambers initially passed the amendments in 1985. A Conference Committee reconciled the two versions in 1986 and President Reagan vetoed the legislation that year. Congress enacted it over his veto in 1987. See *Cal. Sportfishing Prot. Alliance v. City of West Sacramento*, 905 F. Supp. 792, 803 n.11 (E.D. Cal. 1995) (recounting the history of the statute).

<sup>95</sup> Pub. L. No. 100-4, §§ 312–314, 101 Stat. 42–49 (1987).

<sup>96</sup> Pub. L. No. 100-4, § 313, 101 Stat. 45, 45 (1987) (codified at 33 U.S.C. § 1319(d)).

<sup>97</sup> Pub. L. No. 100-4, § 312, 101 Stat. 42, 42–44 (1987) (codified at 33 U.S.C. § 1319(c)).

<sup>98</sup> *Hearings Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment and Public Works*, 97th Cong. 34, 78–85 (1982) [hereinafter “*Senate Hearings*”] (written testimony of John Hernandez, Deputy Administrator, EPA); *Hearings Before the Subcomm. on Water Resources of the House Comm. on Public Works and Transportation*, 97th Cong. 341, 384–91 (1982) [hereinafter “*House Hearings*”] (written testimony of John Hernandez, Deputy Administrator, EPA).

<sup>99</sup> *Id.*

lesser violations, not against serious violations for which substantial penalties or injunctive relief are more appropriate. Third, almost as an afterthought, Congress was concerned that violators not be forced to pay two penalties for the same violation. The last-minute revision of the provision to accomplish the third goal created a cumbersome preclusion device encouraging some courts to misinterpret it to undercut the first two goals, potentially doing great damage to the entire statute.

The legislative history on the first point is straightforward; by all accounts congressional intent was to strengthen EPA enforcement.<sup>100</sup> Most of the legislative history focuses on the second point: that the new administrative penalty was for lesser violations. Indeed, the testimony of EPA's Deputy Administrator in hearings before both the Senate and House authorizing committees stressed that:

[t]he efficiency afforded by this administrative assessment plan would be negated if EPA used this procedure to assess penalties for major violations of the Act or complex cases. For this reason, it is EPA's intent to use administrative penalties to address clear and well documented violations of the Act which may not be serious enough to require judicial enforcement.<sup>101</sup>

The Senate Committee was quite concerned that the provision only be used for such lesser violations. The Senate Report reiterated:

This authority . . . is . . . not to replace a vigorous civil judicial enforcement program. Civil judicial enforcement is a keystone of successful enforcement of the Act and necessary for . . . cases requiring injunctive relief, serious violations of the Act, or large penalty actions, and cases where remedies are sought requiring significant construction or capital investment.<sup>102</sup>

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<sup>100</sup> The original enforcement provision provided EPA "with two civil enforcement options," administrative compliance orders and judicial actions for penalties and injunctions. S. REP. NO. 99-50, at 26 (1985). "These amendments give the Administrator a third option." *Id.* Administrative penalty assessments "could provide greater deterrent value than an administrative [compliance] order for a violation that does not warrant the more resource intensive aspects of judicial enforcement." *Id.* When introducing both the House bill and the Conference Committee bill for floor debate and vote, Rep. Roe, chief sponsor of the House Bill and Chairman of the House Authorizing Committee, stated that the administrative penalty provision was "designed to substantially increase EPA's enforcement capability to ensure compliance with the act." 131 CONG. REC. 19847 (1985); 132 CONG. REC. 31961 (1986). Sen. Chaffee Mitchell said substantially the same thing in support of the conference committee bill for the ultimate vote. "The amendments provide for new authority for the EPA to use administrative penalties . . ." 133 CONG. REC. 1270 (1987).

<sup>101</sup> See *House Hearings*, *supra* note 98, at 387; *Senate Hearings*, *supra* note 98, at 81.

<sup>102</sup> S. REP. NO. 99-50, at 26 (1985).

Indeed, two thirds of the Senate Report's discussion of subsection 309(g) is devoted to this concern, which explains many of the distinctive features of the Senate bill.

The initial version of the Senate bill<sup>103</sup> and the final House bill<sup>104</sup> provided EPA authority to commence a penalty proceeding against a person who "is in violation" of the statute. However, the final version of the Senate bill changed the tense of the phrase, providing EPA authority to commence a penalty action only against a person who "*has violated*" the statute.<sup>105</sup> Both chambers adopted the Senate past tense version in the enacted provision, subsection 309(g)(1)(A).<sup>106</sup> The Senate's use of the past tense was thus intentional and meaningful. The Senate report stated that the bill contained several measures to assure that EPA did not use the new authority against violations more appropriately addressed by judicial action, the first measure was use of the past tense:

First, this new authority is designed to address past, rather than continuing, violations . . . . Continuing violations are more appropriately addressed by abatement orders or injunctive actions, and, if EPA seeks both civil penalties and injunctive relief, one judicial action should be filed . . . . These limitations are intended to assure that violations of greater magnitude are handled judicially and pursued in a judicial forum.<sup>107</sup>

The Senate Report also identified public participation as another of the "several safeguards . . . to prevent abuse of the administrative penalty authority, such as significant violators escaping with nominal penalties."<sup>108</sup> Both the House and Senate bills contained detailed requirements for giving public notice of penalty assessments, allowing citizens to intervene in assessment proceedings, allowing citizens to request hearings if penalty assessments were concluded by agreement without a hearing, and authorizing citizens to appeal assessments to the courts.<sup>109</sup> But only the Senate bill allowed courts in such appeals to assess higher penalties than the EPA penalty being appealed.<sup>110</sup> This too was one of the safeguards the Senate bill contained against lenient penalty assessments for serious violations,<sup>111</sup>

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<sup>103</sup> S. 2652, 97th Cong. § 8 (1982), *reprinted in Senate Hearings*, *supra* note 98, at 15–17.

<sup>104</sup> H.R. REP. NO. 99-189, at 89 (1985).

<sup>105</sup> S. REP. NO. 99-50, at 100 (1985).

<sup>106</sup> 33 U.S.C. § 1319(g)(1)(A) (2000).

<sup>107</sup> S. REP. NO. 99-50, at 26 (1985).

<sup>108</sup> *Id.* at 27.

<sup>109</sup> S. REP. NO. 99-50, at 26–29, 102 (1985); H.R. REP. NO. 99-189, at 90 (1985).

<sup>110</sup> S. REP. NO. 99-50, at 102 (1985).

<sup>111</sup> The report accompanying the bill stated:

Providing citizens with a right to appeal will serve as an added safeguard to assure that the Agency assesses appropriate penalties . . . that take into account the seriousness of the violation . . . and serve to deter noncompliance . . . . Where it is

and was adopted in the enacted version.<sup>112</sup> Senator Chaffee, chief sponsor of the Senate bill, noted that state action could bar an EPA or citizen action “only where a State is proceeding under a State law that is comparable to section 309(g). For example, in order to be comparable, a State law must provide for a right to a hearing and for public notice and participation procedures similar to those set forth in section 309(g).”<sup>113</sup>

The Senate report identified a final measure to prevent use of the administrative penalty authority for violations more appropriately addressed by judicial enforcement: the bar on subsequent EPA or citizen penalty action was limited only to the specific violations against which a penalty had been assessed.<sup>114</sup>

The third legislative concern was that the new administrative penalty authority not result in duplicative penalty assessments for the same violation.<sup>115</sup> The Senate bill anticipated the possibility that EPA could seek civil penalties under sections 309(b), 309(d), and 311, and that citizens could seek civil penalties under section 505 after EPA had assessed a subsection 309(g) penalty for the same violations. The Senate bill provided preclusions against such successive penalty actions, and ultimately these preclusions in the enacted provision. The Senate bill made no accommodations for state administrative penalty assessments. The House bill contained no preclusions on citizen suits in subsection 309(g), but did propose a preclusion in section 505(a) if EPA or a state had assessed an administrative penalty.<sup>116</sup> The House bill was more deferential to states in other ways, requiring EPA to confer with them before assessing a penalty

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clear that the Agency has assessed such an unreasonably low penalty as to constitute and abuse of discretion, the court may choose to impose its own higher penalty rather than exercise its authority to remand.

S. REP. NO. 99-50, at 28-29 (1985).

<sup>112</sup> CWA § 309(g)(8), 33 U.S.C. § 1319(g)(8) (2000); *Joint Explanatory Statement of the Committee of Conference*, H.R. CONF. REP. NO. 99-1004, at 139 (1985) (“From the Senate bill, . . . court authority to impose additional penalties is included in the conference substitute . . .”).

<sup>113</sup> 133 CONG. REC. 1264 (1987).

<sup>114</sup> The Senate Committee underlined this in its report:

This limitation applies only to an action for civil penalties for the same violations which are the subject of the administrative civil penalties proceeding. It would not apply to an action for civil penalties for a violation of the same requirement of the Act that is not being addressed administratively or for a past violation of another pollutant parameter . . . . In addition, this limitation would not apply to: 1) an action seeking relief other than civil penalties . . . .

S. REP. NO. 99-50, at 28 (1985). Moreover, the Committee noted that “[t]his amendment does not preclude administrative or judicial enforcement actions by the Administrator for any violations not specifically penalized by the initial enforcement action.” *Id.*

<sup>115</sup> “[N]o one may bring an action to recover civil penalties under sections 309(b) and (d), 311(b), or 505 of this Act for any violation with respect to which the Administrator has commenced and is diligently prosecuting an administrative civil penalty action . . .” *Id.*

<sup>116</sup> H.R. REP. NO. 99-189, at 103 (1985).

and precluding EPA from assessing an administrative penalty for a violation for which the state could demonstrate it already had assessed an appropriate penalty.<sup>117</sup> The consultation provision was adopted in subsection 309(g)(1) as enacted. The broad preclusion from the House bill was not adopted, but the Conference Committee incorporated much of its substance into the provision ultimately adopted by adding penalty assessments under comparable state statutes to those that would preclude EPA or citizen penalty actions under subsection 309(g)(6).

Congress was aware of how the features of the provision knit together and intended the intricate result. For instance, Representative Edgar, a ranking member of the authorizing committee in the House, commented that, under the original House bill, "citizens would be precluded from seeking redress in cases of violation of the Clean Water Act. I understand that the Roe amendment will allow citizens to go to court in the case of continuing violations, which I believe is a fair compromise."<sup>118</sup>

The House Conference Committee Report reiterated the limitations the Senate included in the legislation to prevent EPA from abusing the new authority to protect violators from compliance by assessing small penalties against them.

This limitation applies only to an action for civil penalties for the same violations which are the subject of the administrative civil penalty proceeding. It would not . . . apply to 1) an action seeking relief other than civil penalties (e.g., an injunction or declaratory judgment); 2) an action under section 505(a)(1) of this Act filed prior to commencement of an administrative civil penalty proceeding for the same violation; or 3) a violation which has been the subject of a notice of violation under section 505(b)(1) of this Act prior to initiation of the administrative penalty process, provided that, in the latter case, the action under section 505(a)(1) of this Act is filed within 120 days of the notice of violation.<sup>119</sup>

The Senate Committee was rightly concerned with the potential for abuse of the new provision. Perversely implemented and interpreted, the preclusions could shield continuing violators from appropriate penalties, and even from compliance, by paying a pittance in administrative penalties to the State. Such an interpretation would eviscerate any deterrent value from civil penalties when the economic benefit of non-compliance

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<sup>117</sup> H.R. REP. NO. 99-189, at 89, 91 (1985).

<sup>118</sup> 131 CONG. REC. 19852 (1985). There was no amendment offered by Rep. Roe to the House bill or to what was to become subsection 309(g). The speaker evidently was referring to the entire bill amending the CWA, including its provision for subsection 309(g), for Rep. Roe was one of its chief sponsors.

<sup>119</sup> H.R. CONF. REP. NO. 99-1004, at 133 (1986).

exceeds \$25,000, which is usually the case. Such an interpretation could effectively eliminate citizen enforcement and could limit EPA enforcement to criminal prosecution. Indeed, such an interpretation could eviscerate not only the enforcement provisions of the statutes, but also the substantive requirements of the statutes by allowing paltry penalty assessments to shield violators from actions to force compliance. There is not a hint in the legislative history that Congress intended either of these results; indeed, the history indicates Congress anticipated these dangers and carefully drafted the preclusion device to avoid them.

### 3. *Interpreting the Preclusion Device in CWA Subsection 309(g).*

Several legal questions arise in the interpretation of subsection 309(g). This Section discusses each of these questions in turn based on the foregoing analysis.

#### *a. What Levels of Government May Act To Bar a Successive EPA or Citizen Penalty Action?*

Actions by the "Administrator" or a "State" may bar subsequent EPA and citizen penalty actions under subsection 309(g). The scope of the meaning of these terms, however, is a relevant question. The statute defines the "Administrator" to mean the Administrator of EPA,<sup>120</sup> and defines "State" to mean "a State, the District of Columbia, the Commonwealth of Puerto Rico" and various territories.<sup>121</sup> There are two issues regarding the meaning of "State." First, does the term include political subdivisions of a state, such as cities or sewer districts? Second, does the term include all states or only those with approved CWA permit programs? The statutory definition of "State" does not address either issue explicitly.

Because municipalities and other state subdivisions, such as sewer districts, may implement environmental programs responsive to the CWA and may have authority to assess penalties against violators of related local environmental requirements, defendants may claim cities are states for purposes of the subsection 309(g) bar.<sup>122</sup> But the CWA defines "State" with no reference to municipalities and, indeed, separately defines municipalities.<sup>123</sup> All courts considering the issue have held that municipalities

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<sup>120</sup> CWA § 101(d), 33 U.S.C. § 1251(d) (2000).

<sup>121</sup> CWA § 502(3), 33 U.S.C. § 1362(3) (2000). There is a question about the Administrator's ability to take enforcement actions in court. See Miller, *supra* note 1, at 429–30.

<sup>122</sup> The CWA, for instance, requires municipal sewage treatment plants to secure permits to regulate the treatment of their wastewater and the purity of their discharges. The CWA requires most of them to develop and enforce programs to regulate discharges into the sewer system from industrial water pollution sources. Thus, the CWA creates roles for them as both regulators and members of the regulated public. The CAA authorizes states to designate local agencies to implement and enforce state implementation plans.

<sup>123</sup> CWA § 502(4), 33 U.S.C. § 1362(4). The definition includes cities, towns, and spe-

are not states for purposes of preclusion in the citizen suit provisions.<sup>124</sup> There is no reason for a different answer under the subsection 309(g) preclusion provision.

A more serious question is whether “State,” for the purposes of the provision, means any state or only a state with an approved permit program. The plain meaning is any state, and this meaning is correct because the CWA defines “State” to include all states, not just states with approved programs,<sup>125</sup> and does not define “State” differently for purposes of subsection 309(g). When Congress intended to use a generally defined term in section 309 in a manner departing from the general definition, it provided a different special definition in section 309.<sup>126</sup> Its failure to provide a special definition for “State” in section 309 suggests that Congress did not intend a special meaning for the term in the section. Its special treatment of violations in states with approved programs in subsection 309(a) indicates it knew how to designate authorities in such states when it intended to do so. The structure of the section thus supports the plain meaning of “State” to be any state, regardless of the status of its permit program. The issue has been noted in one decision,<sup>127</sup> but never decided in a reported decision of which the author is aware.

This is the one issue examined in the Article for which the plain meaning leads to such absurd results that it should be disregarded. Penalties assessed under subsection 309(g) are capped at \$125,000. A \$125,000 penalty is blatantly insufficient to deter violation of a requirement to install pollution control equipment costing several million dollars and is, therefore, an inappropriate sanction for a polluter who violates a requirement, for example, to install such equipment. The legislative history is rife with congressional recognition of the lack of deterrent value of subsection 309(g) penalties for serious violations and of the consequent congressional intent to limit the use of subsection 309(g) to less serious violations. Indeed, in both section 309 generally and subsection 309(g) in particular, Congress admonished that the amount of penalties assessed take into account “the economic benefit (if any) resulting from the violation.”<sup>128</sup> Courts recognize that a penalty must be greater than the economic benefit or saving of the violation to the polluter to have either general or specific deterrent effect.<sup>129</sup> If a state assesses a five dollar penalty against a serious viola-

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cial sewer districts.

<sup>124</sup> See Miller, *supra* note 1, at 431–33; see also *supra* Part II.A.2.

<sup>125</sup> CWA § 502(3), 33 U.S.C. § 1362(3).

<sup>126</sup> See CWA § 309(c)(6), 33 U.S.C. § 1319(c)(6) (2000) (adding, for the purposes of subsection (c), “responsible corporate officer” to the general definition of “person” in CWA section 502, 33 U.S.C. § 1362(5) (2000)).

<sup>127</sup> N. & S. Rivers Watershed Ass’n v. Town of Scituate, 949 F.2d 552, 554 n.3 (1st Cir. 1991).

<sup>128</sup> CWA § 309(d), 309(g)(3), 33 U.S.C. § 1319(d), 1319 (g)(3) (2000). Subsection 309(g)(3) adds “or savings” after benefit.

<sup>129</sup> Friends of the Earth v. Laidlaw Env’tl. Servs. (TOC), Inc., 890 F. Supp. 470, 492



tion, the penalty will have no deterrent or punitive value; but worse, because of the bar against subsequent penalties, it will prevent the assessment of any penalties in the future that will have deterrent or punitive value. This eviscerates the federal penalty provisions and their deterrent values. Worse, some courts interpret the bar to prevent any subsequent enforcement action, whether for penalties or compliance. While they are plainly wrong,<sup>130</sup> under their interpretation, a state can assess a five dollar penalty against a violation and insulate the polluter from compliance with the federal requirements. This amounts to the federal judiciary empowering state agencies to amend federal statutes. This is an absurd result that Congress cannot have intended.

Interpreting "State" to mean a state with an approved program would limit the potential for states to eviscerate the federal program by assessing paltry penalties. To achieve EPA approval, a state must be committed enough to the federal program to enact comparable legislation and promulgate comparable regulations. When it does so, the state has a stake in the success of the federal program, thereby making it far less likely to undercut the federal program than a state with no commitment to it. Thus, interpreting "State" in this fashion avoids the absurd results of interpreting it to mean any state.

There is good reason to believe that Congress used "State" rather than "State with an approved permit program" in subsection 309(g) inadvertently. It added the bar from state penalties assessed under state authority comparable to subsection 309(g) at the last minute, in Conference Committee.<sup>131</sup> Making a last minute addition to a provision as long and complex as subsection 309(g) risks an inadvertent mistake. Senator Chaffee, the chief Senate sponsor of the amendments, appears to have recognized that the Conference Committee had made just such a mistake when it wrote that the bar was activated by a penalty assessed by a state rather than by a state with an approved program. He noted on the Senate floor in the debate on the Conference Committee bill, that "State" in subsection 309(g) means "State with an approved permit program."<sup>132</sup>

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(D.S.C. 1995) ("[T]o serve as an effective deterrent, a civil penalty must recover an amount beyond the economic benefit of noncompliance."); *see also* Atl. States Legal Found. v. Tyson Foods, Inc., 897 F.2d 1128, 1141 (11th Cir. 1990); PIRG v. Powell Duffryn Terminals, Inc., 720 F. Supp. 1158, 1166 (D.N.J. 1989), *aff'd in part, rev'd in part*, 913 F.2d 64 (3d Cir. 1990).

<sup>130</sup> *See infra* Part II.A.3.e.

<sup>131</sup> *See supra* Part I.B.2.

<sup>132</sup> Sen. Chaffee explained that:

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

The absurd plain meaning of “State” in subsection 309(g) thus appears to be drafting error, recognized soon after by the chief sponsor of the amendment that added subsection 309(g). As written, the provision encourages violators to seek states that assess paltry penalties in hopes of shielding themselves from meaningful penalties or even from compliance. At the very least, this renders the federal penalty provisions super-fluous and, at the very worst, renders the violated federal requirements meaningless. These absurd results can and should be avoided by interpreting “State” to mean a “State with an approved permit program,” as suggested by the chief Senate sponsor of the amendment prior to the Senate vote on the Conference Committee bill. That interpretation is consistent with the structure and policy of the statute.

Part One came to the opposite result when it considered the issue in the context of a “State” whose action could bar a citizen suit.<sup>133</sup> Although the interpretive choice there was also between “State” and “State with an approved program,” the analytical context was sufficiently different not to warrant departure from the plain meaning of “State.” For example, the interpretive issue with regard to citizen suits recurs in many statutes, emphasizing congressional intent. With regard to subsection 309(g), however, it occurs only once. Moreover, generally only state actions for compliance can bar a citizen suit; but, under 309(g), state-assessed penalties of five dollars can bar subsequent EPA and citizen enforcement. Under the citizen suit provisions, state actions can bar only citizen suits, but under 309(g), state actions can bar both citizen suits and EPA actions. In the citizen suit provisions, no legislative history supports interpreting “State” to mean “State with an approved program,” but under 309(g), the legislative history suggests just that. Thus, the contexts of the issues are sufficiently different to warrant different interpretive results.

*b. When Congress Provides that Particular Administrative Penalty Actions May Bar Successive EPA and Citizen Penalty Actions, May Other Enforcement Actions Bar Them?*

Subsection 309(g) specifically states that administrative penalty provisions bar subsequent enforcement, but does not refer to any preclusion under this subsection produced by other forms of enforcement activity. Under a plain-meaning reading of subsection 309(g), other forms of en-

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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 a 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).

133 CONG. REC. 1264 (1987).

<sup>133</sup> Miller, *supra* note 1, at 433–35.

forcement would not preclude subsequent enforcement, but many courts wrongly interpret the preclusion device in subsection 309(g) to provide that non-penalty state actions may bar successive EPA and citizen suits. This Section discusses which of these interpretations should be favored.

The plain meaning and *expressio unius* ("expression of one thing suggests the exclusion of others") canons of statutory interpretation both support a plain reading meaning.<sup>134</sup> Similarly, Part One concluded that courts overwhelmingly interpret the preclusion devices in the citizen suit provisions to bar citizen suits only when the government takes an action specified in the preclusion as barring suit.<sup>135</sup> Many courts are true to the plain reading and strong congressional intent that the listed penalty actions and no other actions bar citizen suits and EPA actions. Other courts, however, interpret the preclusion to allow all sorts of administrative actions, penalty and non-penalty actions, and formal and informal actions to bar citizen suits. Because the same preclusion device bars successive EPA actions as well as successive citizen actions, their holdings effectively bar any federal enforcement action under those circumstances.<sup>136</sup> That holding enables a violator to avoid compliance with federal law by the simple expedient of soliciting a paltry penalty assessment or other weak and ineffective action by the state. This is not a chimera; as demonstrated in this Section of the Article, violators do solicit ineffective state action as a sanctuary from compliance actions, and some courts have allowed this practice.<sup>137</sup>

The statute provides that action taken by EPA under subsection 309(g) does not affect EPA or citizen authority to enforce the CWA, "except that *any violation*" shall not be subject to a "*civil penalty action*" under sections 309(d), 311(b) or 505 if (1) EPA "under this subsection" or a state "under a State law comparable to this subsection" "has commenced and is diligently prosecuting" an action, or (2) EPA or a state has "issued a final order" and the violator has paid a penalty assessed "under this subsection, or such comparable State law."<sup>138</sup> The statutory language could not

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<sup>134</sup> WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 323 (1994).

<sup>135</sup> Miller, *supra* note 1, at 436–45.

<sup>136</sup> In *United States v. Smithfield Foods, Inc.*, the defendant argued that an earlier state action barred EPA's action under subsection 309(g), citing as precedent subsection 309(g) decisions in citizen suits. The *Smithfield* court analyzed the issue in the same manner in the EPA enforcement action as other courts had analyzed it in citizen enforcement actions. 965 F. Supp. 769, 782–83 (E.D. Va. 1997), *aff'd in part, rev'd in part on other grounds*, 191 F.3d 516, 526 (4th Cir. 1999).

<sup>137</sup> See Miller, *supra* note 1, at 465–73 (recounting various weak and ineffective state "enforcement" actions that defendants contended barred subsequent citizen suits). As one court commented, "[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." *Gardeski v. Colonial Sand & Stone Co.*, 501 F. Supp. 1159, 1168 (S.D.N.Y. 1980).

<sup>138</sup> CWA § 309(g)(6)(A), 33 U.S.C. § 1319(g)(6)(A) (2000) (emphasis added). In ongoing penalty actions, the bar is activated only by EPA or a state commencing and prosecuting an action "under this subsection," i.e., subsection 309(g), or "under a State law comparable to this subsection," i.e., a state law comparable to subsection 309(g). Meanwhile, in

be more clear: only an EPA penalty assessment under the authority of subsection 309(g) or a state penalty assessment under a comparable penalty authority activates the bar. The legislative history supports the plain English reading of the preclusion language, which originated in the Senate bill. The Senate report stated specifically that the bar operated “only for the same violations which are the *subject of the administrative civil penalties proceeding*.”<sup>139</sup>

The questions that arise during a consideration of what enforcement actions may bar subsequent enforcement differ depending on whether EPA or state action is alleged to be preclusive. If EPA action is at issue, the question is whether an EPA compliance or other non-penalty order will bar EPA or a citizen from commencing a subsequent penalty action. If state action is alleged to be preclusive, there are more numerous and complex questions.<sup>140</sup>

*i. May EPA Administrative Compliance Orders and Other Non-penalty Assessment Actions Preclude Successive EPA and Citizen Actions?*

The structure of the CWA provides evidence in regard to the preclusive effect of non-penalty assessment procedures. EPA has two administrative order authorities under different subsections of CWA section 309. Subsection 309(a) authorizes EPA to issue administrative compliance orders, not to issue penalty assessment orders. Subsection 309(g) authorizes EPA to issue penalty assessment orders, not to issue compliance orders. Not only does each of these two subsections authorize EPA to take very different types of enforcement actions, each subjects EPA's actions to very different procedural and judicial review regimes.<sup>141</sup> Other sections of the CWA

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concluded penalty actions the bar is activated only by EPA or a state issuing “a final order” and the violator paying a “penalty assessed under this subsection, or such comparable State law.” Again, “this subsection” is subsection 309(g) and a “comparable State law” is one comparable to subsection 309(g).

<sup>139</sup> S. REP. NO. 99-50, at 28 (1985) (emphasis added).

<sup>140</sup> See *infra* Part II.A.3.b.(ii).

<sup>141</sup> Subsection 309(g) specifies administrative procedures for EPA to follow in issuing penalty orders and authorizes judicial review of its penalty orders. 33 U.S.C. § 1319(g) (2000). Section 309(a) specifies no administrative procedures for EPA to follow in issuing compliance orders and it does not authorize judicial review of its compliance orders, nor does section 509, the CWA's general judicial review section. 33 U.S.C. §§ 1319(a), 1369 (2000). Indeed, circuit court opinions uniformly hold that no pre-enforcement review is available for EPA section 309(a) compliance orders. *Laguna Gatuna, Inc. v. Browner*, 58 F.3d 564 (10th Cir. 1995); *Reuth v. E.P.A.*, 13 F.3d 227 (7th Cir. 1993); *S. Pines Assocs. by Goldmeier v. United States*, 912 F.2d 713 (4th Cir. 1990); *Hoffman Group, Inc. v. E.P.A.*, 902 F.2d 567 (7th Cir. 1990); *City of Baton Rouge v. U.S. EPA*, 620 F.2d 478 (5th Cir. 1980). For other examples, see LAW OF ENVIRONMENTAL PROTECTION, Chap. 9:22 and cases cited therein, at 9-99-9-108 (Sheldon M. Novick ed., 1987).

provide EPA with authorities to issue orders addressing violations, although they are neither compliance nor penalty assessment orders.<sup>142</sup>

Because subsection 309(g) explicitly states that only EPA actions under “this subsection,” (i.e., subsection 309(g)), bar suit, it is not surprising that courts universally have held section 309(a) compliance orders have no preclusive effect on citizen suits, relying on the plain meaning of the statute.<sup>143</sup> That interpretation also is in accord with the *expressio unius* canon of statutory interpretation.<sup>144</sup> It also follows from the legislative history, which specifies that only EPA penalty assessments can be preclusive under subsection 309(g).<sup>145</sup> It is supported by the fact that, if Congress intended compliance orders to bar successive enforcement, it could easily have included such a bar, as it did in other statutes.<sup>146</sup> Finally, it is supported by judicial decisions holding that citizen suits are barred only by the government actions specified in the citizen suit preclusion device.<sup>147</sup> No courts have considered whether the subsection 309(g) bar to EPA action or citizen suits can be activated by EPA administrative orders under other sections of the statute. If a section 309(a) compliance order does not constitute a bar under subsection 309(g), however, it follows that EPA orders under other authorities cannot constitute a subsection 309(g) bar either.

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<sup>142</sup> For instance, EPA may order facilities violating the CWA to be barred from federal contracts or grants. CWA § 508, 33 U.S.C. § 1368 (2000); 40 C.F.R. §§ 32.1100–32.1105 (2004). It also may order abatement of emergencies, regardless of whether they arise from violations of the statute. CWA § 504, 33 U.S.C. § 1364 (2000).

<sup>143</sup> In *Washington Public Interest Research Group v. Pendleton Woolen Mills*, the Ninth Circuit considered an appeal from the dismissal pursuant to CWA subsection 309(g) of a citizen suit because EPA had issued a section 309(a) compliance order. 11 F.3d 883, 885–86 (9th Cir. 1993). The Ninth Circuit reversed, relying on the plain language of the statute. *Id.* at 886–87. Other courts considering the question have reached the same result. *Old Timer, Inc. v. Blackhawk-Central City Sanitation Dist.*, 51 F. Supp. 2d 1109, 1114 (D. Colo. 1999) (quoting as dicta legislative history asserting that “[t]his limitation applies only to an action for civil penalties for the same violations which are the subject of the administrative civil penalty proceeding,” H.R. CONF. REP. NO. 99-1004, at 133 (1986)); *Save Our Bays and Beaches v. City and County of Honolulu*, 904 F. Supp. 1098 (D. Haw. 1994) (holding that a section 309(a) compliance order did not bar citizen suit even though order reserved the right to assess penalties under § 309(g)); *Natural Res. Def. Council v. Fina Oil & Chem. Co.*, 806 F. Supp. 145, 146 (E.D. Tex. 1992) (noting that “comparable to this subsection” in CWA subsection 309(g)(6)(a)(ii) requires interpretation, while “under this subsection” in subsection 309(g)(6)(A)(i) does not); *Ark. Wildlife Fed’n v. Bekaert Corp.*, 791 F. Supp. 769, 775 (W.D. Ark. 1992) (concluding that the statute’s language and structure “only precludes a citizen’s suit if the Administrator is diligently prosecuting an action for administrative penalties”).

<sup>144</sup> See *ESKRIDGE*, *supra* note 134, at 323. *Expressio unius* means that expression of one thing suggests the exclusion of others.

<sup>145</sup> See *supra* note 114 (reviewing the legislative history).

<sup>146</sup> *Wash. Pub. Interest Research Group*, F.3d at 886–87.

<sup>147</sup> The vast majority of decisions interpreting the preclusions in the citizen suit sections hold that, when Congress specified one or more government action that could bar a citizen suit, it intended that other government actions could not bar a citizen suit. See *Miller*, *supra* note 1 at 436–45.

ii. *May State Administrative Compliance Orders and Other Non-penalty Actions Preclude Successive EPA and Citizen Actions?*

The question of what state actions may bar successive EPA and citizen actions is more complex than the question of what EPA actions will bar them, because of the necessity to determine the meaning of “an action under a State law comparable to this subsection.” The plain meaning of this phrase is that only a state administrative penalty action taken under a state authority comparable to subsection 309(g) may bar a successive action. However, the first court of appeals to consider the matter entirely ignored the wording of the provision, holding in *North and South Rivers Watershed Assn. v. Town of Scituate* that the statute should be interpreted in derogation of its wording to protect enforcement choices made by the state.<sup>148</sup>

The state order before the court in *Scituate*, was an administrative compliance order, not a penalty assessment order. The citizen enforcer argued that the state authority to issue a compliance order was not comparable to EPA’s authority under subsection 309(g) to issue a penalty assessment order. Explicitly disregarding the wording of subsection 309(g) and without examining its legislative history, the Court held that the state’s administrative compliance order was sufficient to bar the citizen suit under subsection 309(g) if the state had comparable administrative penalty authority somewhere in its statute. Faced with this, the citizen enforcer argued that the state’s unused administrative penalty assessment authority was not comparable to subsection 309(g) because the state statute did not require public notice and opportunity to comment on proposed penalty assessment orders, public participation in the proceedings, and public rights to appeal similar to those in subsection 309(g). The court dealt cavalierly with this argument in a footnote, apparently finding that the status of penalty assessment orders as public documents satisfied the public notice requirement and state regulations allowing intervention in penalty assessment actions “adequately safeguard the substantive interest of citizens in enforcement actions.”<sup>149</sup> Finally, compounding these errors, the court held that the state action barred all successive actions, not just penalty actions, again ignoring the wording of the statute.<sup>150</sup>

The court’s excursion from the statute has misled many courts in subsequent decisions and unduly has clouded the proper interpretation of this element of subsection 309(g)’s preclusion device.<sup>151</sup> There are three

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<sup>148</sup> 949 F.2d 552, 557 (1st Cir. 1991).

<sup>149</sup> *Id.* at 556 n.7.

<sup>150</sup> *Id.* at 557–58.

<sup>151</sup> Virtually every post-*Scituate* decision cited in this Article for not following the plain meaning of subsection 309(g) pays homage to *Scituate*. See, e.g., *Lockett v. EPA*, 319 F.3d 678 (5th Cir. 2003); *Jones v. City of Lakeland*, 175 F.3d 410 (6th Cir. 1999), *rev’d en banc on other grounds*, 224 F.3d 518 (6th Cir. 2000); *Sierra Club v. Colo. Refining Co.*, 852 F. Supp. 1476, 1482–1483 (D. Colo. 1994).

issues in addressing the interpretation of the “comparable state statute” phrase. What does “comparable” mean? What federal and state laws must be compared? And must the state use its comparable penalty authority and assess a penalty to bar a successive action? These questions are the only issues unique to the preclusion device in CWA subsection 309(g).<sup>152</sup> Before addressing these questions, it is instructive to understand why the *Scituate* court and those following it stray so far from the plain meaning of the statute.

The court’s errors result from its general approach to citizen suits. The court assumed it was more important to protect the enforcement choices made by the state than to examine the wording of the statute. It made this error by a combined consideration of: (1) the general policy of the CWA that states have the primary responsibility to combat water pollution;<sup>153</sup> (2) legislative history of the 1972 CWA, cited in *Gwaltney*, to the effect that Congress intended states to bring most enforcement actions;<sup>154</sup> and (3) the Supreme Court’s observation in *Gwaltney* that citizen suits are to supplement rather than supplant government enforcement.<sup>155</sup> This led the *Scituate* court to conclude that, when government enforcement action “begins and is diligently prosecuted, the need for citizen’s suits vanishes.”<sup>156</sup> To interpret subsection 309(g) consistently with this conclusion required the court to ignore its plain wording that only EPA and state administrative penalty actions will bar successive citizen actions and that such government actions will bar only successive actions for penalties. The court rationalized this omission by commenting that the wording of the subsection was merely the “happenstance of statutory drafting,”<sup>157</sup> which the court could disregard to accomplish the court’s higher goal of preventing citizens from interfering with the state’s enforcement choices. The court appeared oblivious that its logic bars successive EPA actions, enables violators to insulate themselves from compliance with federal law, and is contrary to legislative intent.

Aside from the court’s obvious disregard of the plain meaning and other controlling canons of statutory construction, each of the three supports it offers as a rationale for its approach is significantly in error. First, the general statement of congressional policy it recites favoring state responsibility for controlling water pollution is only a general preference, one that Congress explicitly and repeatedly overrode throughout the statute. For instance, it authorized EPA to establish national technology-based

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<sup>152</sup> Other issues are addressed generally in Miller, *supra* note 1 at 456–73. See in particular the discussion of what constitutes “diligent prosecution.”

<sup>153</sup> CWA § 101(b), 33 U.S.C. § 1251(b) (2000).

<sup>154</sup> *N. and S. Rivers Watershed Ass’n*, 949 F.2d at 557 (quoting *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 60 (1987) (citing S. REP. NO. 92-414, at 64 (1971), reprinted in 2 CWA LEGISLATIVE HISTORY, *supra* note 40, at 1482)).

<sup>155</sup> 484 U.S. at 60.

<sup>156</sup> 949 F.2d at 555.

<sup>157</sup> *Id.* at 556.

standards applicable to sources of water pollution in all states;<sup>158</sup> establish criteria for state water quality standards and approve state water quality standard programs as meeting the federal criteria;<sup>159</sup> establish national criteria for state permit programs and approve state permit programs as meeting the federal criteria;<sup>160</sup> inspect water pollution sources in any state;<sup>161</sup> and enforce against water pollution sources violating state-issued permits, in states with EPA approved permit programs, even when the states have already taken enforcement actions.<sup>162</sup> Indeed, in the citizen suit provision, Congress also authorized citizens to enforce against violations of state-issued permits in states with approved permit programs, even when the states have already taken enforcement actions.<sup>163</sup> Thus, Congress's preference for state implementation of water pollution control programs is qualified throughout the statute. Its preference for state implementation is also qualified by the wording of the preclusion device in subsection 309(g).

Second, the *Scituate* court's use of legislative history quoted in *Gwaltney* is curious, for the *Scituate* court earlier cautioned against uncritical reliance on legislative history.<sup>164</sup> In any event, the Supreme Court in *Gwaltney* cited Senate Report language from 1972 to interpret section 505, enacted in 1972, not to interpret subsection 309(g), enacted in 1987. Legislative history from 1972 is of no value in determining what a later Congress meant when it enacted subsection 309(g), fifteen years later.<sup>165</sup> Moreover, the Supreme Court edited the quoted language to change its meaning.<sup>166</sup> In reality, the report passage addresses EPA enforcement rather than citizen suits; it never suggests that citizen suits are subordinate to government enforcement. Indeed, it neither states nor implies that citizen suits are "proper only" under the circumstances the Court states.<sup>167</sup>

Finally, the Supreme Court's conclusion in *Gwaltney* that citizen suits supplement rather than supplant government enforcement is flawed because it is based entirely on the same legislative history, as well as for many other reasons examined in Part One.<sup>168</sup> Even so, the *Scituate* court's reli-

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<sup>158</sup> CWA §§ 301, 304, 33 U.S.C. §§ 1311, 1314 (2000).

<sup>159</sup> CWA §§ 303-304, 33 U.S.C. §§ 1313-1314 (2000).

<sup>160</sup> CWA § 402(b), 33 U.S.C. § 1342(b) (2000).

<sup>161</sup> CWA § 308, 33 U.S.C. § 1318 (2000).

<sup>162</sup> CWA § 309(a)(3), 33 U.S.C. § 1319(a)(3) (2000); *see also infra* Part II.C.

<sup>163</sup> CWA § 505, 33 U.S.C. § 1365(b)(1)(B) (2000) (authorizing citizens to proceed with suits in the face of state actions, if the state actions were commenced after the citizen suit, are not diligently prosecuted, are not judicial actions, or are not calculated to or capable of securing compliance); *see Miller, supra* note 1, at 435-73.

<sup>164</sup> 949 F.2d 552, 556 n.6 (1st Cir. 1991).

<sup>165</sup> *Sullivan v. Finkelstein*, 496 U.S. 617, 631-32 (1990) (Scalia, J., concurring).

<sup>166</sup> The Court found congressional history supported its conclusion only if it took Senate report language out of context and changed "if" to "only if." *Miller, supra* note 1, at 487.

<sup>167</sup> *See Miller, supra* note 1, at 487 nn.424-27.

<sup>168</sup> *Id.* at 488-90 nn.428-38.



ance on *Gwaltney* is misplaced. However questionable *Gwaltney*'s "supplement, not supplant" mantra may be, the Supreme Court only used it in dicta as a tertiary argument to *follow the plain meaning* of the CWA, while the *Scituate* court used it as a primary argument to *ignore the plain meaning* of the CWA, in blatant disregard of *Gwaltney*'s admonition to interpret the CWA's citizen suit provision in accordance with its plain meaning.<sup>169</sup>

The *Scituate* court concluded from these flawed or misunderstood points that when a state commences and diligently prosecutes any action against a violation, the need for a citizen suit disappears. In doing so, the court disregarded the congressional determination of the circumstances under which state action makes the need for EPA or citizen suit disappear. Congress explicitly stated in the plain words of subsection 309(g) when government action barred successive enforcement action, as it had in the preclusion devices in the citizen and EPA enforcement provisions of all of the statutes.

The *Scituate* court and its followers improperly rewrite the statute, seeking to preserve the states' enforcement choices, in deference to the states' enforcement discretion. Those courts perceive that the primary reason Congress included the preclusion device in subsection 309(g) was to preserve the state governments' enforcement authority. That may be the primary reason Congress included the preclusion devices in the citizen suit provisions.<sup>170</sup> Subsection 309(g), however, is not in the citizen suit provision of the CWA and the legislative history of subsection 309(g) indicates the reason Congress included the preclusion device in subsection 309(g) was to prevent the assessment of duplicative penalties for the same violations.<sup>171</sup> Indeed, the legislative history of subsection 309(g) contains no hint that preservation of the enforcement authority of the government was even a subsidiary purpose of the preclusion device.<sup>172</sup>

In the seminal opinion on the presumption of judicial deference to the government's enforcement discretion, the Supreme Court cautioned in *Heckler v. Chaney* that courts should not defer to such discretion when Congress circumscribes it.<sup>173</sup> When Congress enacted section 505, it circumscribed the ability of EPA and states to exercise their enforcement discretion free from the possibility of citizen suits. Under section 505 they could exercise enforcement discretion unfettered from citizen suits only

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<sup>169</sup> *Id.* at 485 nn.409–12.

<sup>170</sup> For an account of the legislative history of the citizen suit provisions, see *id.* at 420–25.

<sup>171</sup> See *supra* Part II.A.2.

<sup>172</sup> *Id.* Again, while the intent of the earlier Congress that drafted the preclusion device in section 505 was to preserve the government's enforcement authority, the intent of the earlier Congress in drafting section 505 is of no value in determining the intent of the later Congress that drafted the preclusion device in subsection 309(g). See *supra* note 165.

<sup>173</sup> 470 U.S. 821, 832–33 (1985) ("The presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers.").

by commencing a civil action in court prior to the initiation of a citizen suit and by diligently prosecuting the action. And even then EPA could not exercise its discretion free from citizen intervention in its judicial actions.<sup>174</sup> When Congress amended section 309 to include subsection 309(g), neither the text nor the legislative history of the new subsection suggests that it altered the bounds on EPA's or states' discretion to use *other* enforcement authorities free from the possibility of citizen suits. In adding subsection 309(g), Congress carefully bound EPA's and the states' discretion to assess administrative penalties by prescribing penalty assessment procedures, citizen participation procedures, and judicial review procedures. *Scituate*'s refusal to give plain meaning to the words of the statute ignores the bounds that Congress placed on EPA or the state to exercise its enforcement discretion free from the possibility of citizen suits or of the state to exercise its enforcement discretion free from the possibility of EPA or citizen enforcement. It also ignores the legislative history of subsection 309(g), reiterating the plain language of subsection 309(g) that only penalty actions activate the preclusion, preventing the government from assessing paltry penalties against continuing and serious violations and thereby insulating violators from actions seeking compliance.<sup>175</sup> Focus on preserving the states' enforcement discretion to act free from successive enforcement actions by others can be preserved only by limiting EPA's discretion to commence successive enforcement, for interpreting the preclusion device to bar citizen enforcement also bars EPA enforcement.

Finally, the *Scituate* court saw no reason to subject the state to duplicative and costly citizen enforcement that could not add to the environmental protection already afforded by the state's enforcement action and might detract from it. The court recited that the goal of the CWA was to combat water pollution and concluded that "[d]uplicative enforcement actions add little or nothing to compliance actions already under way, but do divert State resources away from remedying violations in order to focus on the duplicative effort."<sup>176</sup> The court found that "[d]uplicative actions aimed at exacting financial penalties in the name of environmental protection at a time when remedial measures are well under way do not further this goal. They are, in fact, impediments to environmental remedial efforts."<sup>177</sup> The court here seems to promote the congressional purpose of preventing duplicative penalties for the same violation.<sup>178</sup> But in *Scituate*, the penalty sought by citizens was not duplicative; the state had not assessed a penalty and did not desire to. The court imposed a preclusion different than Congress imposed in subsection 309(g), one that prevented

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<sup>174</sup> CWA § 505(b)(1)(B), 33 U.S.C. § 1365(b)(1)(B) (2000).

<sup>175</sup> See Miller, *supra* note 1, at 430–35.

<sup>176</sup> 949 F.2d 552, 556 (1st Cir. 1991).

<sup>177</sup> *Id.*

<sup>178</sup> See *supra* Part II.A.2.

any penalty from being assessed once the state ordered compliance, rather than one that prevented a duplicative penalty from being assessed once the state had assessed a penalty. Congress could have established such a preclusion, but chose not to.

The court was also unaware of the implications of its decision. While it rightly recognized that requiring compliance is more important than collecting penalties, it was unaware that its holding could shield violators from compliance as well as penalties in other contexts and that assessing significant penalties deters non-compliance, a point recognized twice by the Supreme Court under the CWA.<sup>179</sup> Moreover, the court failed to understand that an EPA or citizen action for penalties is not in conflict with, does not interfere with, and does not duplicate a state compliance order that does not assess penalties. A successive EPA or citizen action for compliance could conflict or interfere with an earlier state compliance order by seeking a different means or schedule of compliance than the state had imposed. An EPA or citizen action for compliance incorporating the same terms as an earlier state compliance order would duplicate the states' action. However, an EPA or citizen action for penalties does not involve the state, does not depart from its compliance order and does not duplicate it. Although the court commented that the state would be forced to squander scarce resources by involving itself in a citizen suit, it did not explain why the state had to involve itself in the citizen suit. The plaintiff was not suing the state, and the citizen suit decisions cited in Part One do not reveal one instance in which a state intervened in a citizen suit. Indeed, the author is unaware of any such case.

The court also suggested that the assessment of penalties would hinder pollution control. Of course, payment of penalties may divert funds the violator might otherwise use to attain compliance. But Congress decided the deterrence benefits of assessing penalties against violators outweigh detriments imposed on the violators. Moreover, Congress provided for the eventuality that the violator might not be able to comply if it had to pay a judicially assessed penalty, by instructing courts to take into account "the economic impact on the violator, and such other matters as justice may require" when determining the amount to assess.<sup>180</sup> In the end, the *Scituate* court's hostility toward successive actions by citizen enforcers is supported neither by its reasoning nor by wording of the statutes. Worse, it wrongly substituted its policy choice for the congressional policy choice, manifested in the wording of the subsection 309(g) preclusion device.

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<sup>179</sup> *Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000); *Tull v. United States*, 481 U.S. 412, 422 (1987).

<sup>180</sup> CWA § 309(d), 33 U.S.C. § 1319(d) (2000). For an instance in which a court considered a penalty previously assessed by the state in establishing the amount of penalty the court would assess in a citizen suit, see *Public Interest Research Group of New Jersey v. Hercules, Inc.*, 830 F. Supp. 1525 (D.N.J. 1993).

*iii. What Actions Under “Comparable” State Law May Bar Successive EPA and Citizen Penalty Actions?*

Thus far, this Section has delved into the preclusive effect of non-penalty actions by EPA and states and has concluded that non-penalty actions do not preclude subsequent enforcement under subsection 309(g). The remaining issue focuses on which actions do have preclusive effect, and raises three separate but related inquiries. What does “comparable” mean? What federal law is to be used as a benchmark for comparison? What state law is to be compared?

*(a) What Does “Comparable” Mean?*

The statute does not define “comparable.” The dictionary defines it as “equivalent, similar.”<sup>181</sup> Courts rightly point out that it does not mean “identical.”<sup>182</sup> This means the states have some latitude to enact penalty provisions that vary from the subsection 309(g) model but are still comparable to it. How far they may vary and still be comparable is a knotty question. The structure of subsection 309(g), however, does provide guidance. Subsection 309(g) establishes three sets of procedures: penalty assessment procedures; citizen participation procedures; and judicial review procedures, all to prevent misuse of the preclusive authority. That suggests a comparable state provision is one that has all three sets of procedures and that each set of state procedures is approximately the same as its corresponding set of federal procedures.<sup>183</sup>

The legislative history does not directly elaborate on the meaning of “comparable” because the phrase was added to the legislation at the last minute in the Conference Committee. The tenor of the Senate report, however, does provide some insight into the intended meaning of the term. The Senate Committee was deeply concerned that EPA not abuse subsection 309(g) authority by assessing lenient penalties for continuing or serious violations warranting injunctions and large penalties.<sup>184</sup> The Committee crafted several limitations to prevent this. With regard to penalty assessment procedures, it limited administrative penalty assessments to

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<sup>181</sup> WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 267 (9th Ed. 1983).

<sup>182</sup> *McAbee v. City of Fort Payne*, 318 F.3d 1248, 1252 (11th Cir. 2003); *Ark. Wildlife Fed'n v. ICI Americas, Inc.*, 29 F.3d 376, 381 (8th Cir. 1994).

<sup>183</sup> *McAbee*, 318 F.3d at 1254.

Unlike many of the other paragraphs in section 1319(g), paragraph (6) makes no references to particular paragraphs within the subsection. Instead, paragraph (6) refers to the subsection as a whole, which includes not only penalty-assessment provisions but also public-participation and judicial-review provisions. This is strong textual evidence that Congress intended courts to consider all three classes of provisions when deciding whether state law is “comparable. . . .”

<sup>184</sup> See *supra* notes 107–114 and accompanying text.

past violations and required that EPA take into account the violator's economic benefits of non-compliance in determining the penalty to assess.<sup>185</sup> With regard to public participation procedures, it required public notice of and opportunity to comment on proposed penalty assessments and authorized citizen intervention in penalty assessments. With regard to judicial review, it authorized citizens to appeal as insufficient EPA penalty assessments, even penalties made in the context of judicial settlements between EPA and violators, as long as the citizens meet specified standards of review.<sup>186</sup> These public rights, of course, continue to reflect the strong emphasis on citizen participation that gave rise to the citizen suit provisions.<sup>187</sup> But the legislative history of the requirements indicates they were crafted to prevent EPA from addressing serious and continuing violations with paltry penalties instead of injunctions and significant judicially assessed penalties. State penalty assessments, of course, are subject to the same lenient enforcement abuses as EPA penalty assessments. In view of the Senate Committee's strong intent to prevent such abuse, the most logical meaning of "comparable" state law is that state law must have comparable protections against excessively lenient enforcement before it can bar successive EPA and citizens actions. Indeed, Senator Chafee, chief sponsor of the bill, stated in the Senate debates that a state action could bar an EPA or citizen action "only when a State is proceeding under a State law that is comparable to subsection 309(g)."<sup>188</sup> This legislative history supports the same conclusion as suggested by the structure of the provision.

The limitations the Senate Committee crafted to protect the provision from abuse are easily discernible and fairly objective factors with which to make a comparability analysis. Not surprisingly, as discussed below, most courts have focused their comparability analyses on some of these factors, particularly on the notice and comment and citizen participation intervention rights. Surprisingly, however, none of their decisions recognize that the legislative history establishes that Congress placed limita-

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<sup>185</sup> *Id.*

<sup>186</sup> If subsection 309(g) penalties are limited to past violations, it may be asked whether citizens have standing to appeal them under *Steel Co. v. Citizens for a Better Environment*, which considered the standing of citizens to enforce against a violator for wholly past violations. 523 U.S. 83 (1998). Because the violation had ceased, the Court concluded that whatever injury the citizen plaintiffs had suffered from it had also ceased, depriving plaintiffs of standing. *Id.* at 106–10. Of course, in appeals under subsection 309(g)(8), citizens are not suing violators for past violations, but are seeking judicial review of a present EPA administrative action. They could plead a present and future injury caused by EPA's failure to assess a sufficient penalty to provide both general and specific deterrence, which would suffice under *Friends of the Earth*. See 528 U.S. at 185–86.

<sup>187</sup> See Miller, *supra* note 1, at 420–25 (discussing the legislative history of the citizen suit provisions). Citizen participation in the CWA is emphasized in CWA subsection 101(e), 33 U.S.C. § 1251(e) (2000); see *Citizens for a Better Env't v. EPA*, 596 F.2d 720 (7th Cir. 1979).

<sup>188</sup> 133 CONG. REC. 1264 (1987); see also *infra* note 206.

tions on the 309(g) preclusion to prevent abuse subsection 309(g) penalty authority by imposing paltry penalties against serious violations.

The *Scituate* court did not attempt to define what “comparable” means, except to reject in a footnote the argument that the public notice and participations requirements in the state statute must be identical to the notice and participation requirements in subsection 309(g).<sup>189</sup> It apparently conceded that the state statute must contain such requirement, but applied a very relaxed test. For instance, it concluded in the footnote that the nature of penalty assessment orders as public documents provided sufficient public notice to meet the comparability test. It summarily stated that, as long as the state statute’s provisions “adequately safeguard the substantive interests of citizens in enforcement actions,” the comparability test is met.<sup>190</sup> That is an enigmatic statement, for the limiting factors in subsection 309(g) are procedural rights, not substantive rights. While in theory government enforcement always protects the substantive rights of its citizens, theory does not approach reality.<sup>191</sup> Recognizing that, Congress limited the preclusion devices to allow some successive enforcement. Nevertheless, some courts have followed *Scituate*, including the Fifth and Eighth Circuits.<sup>192</sup>

The most thorough analysis of the issue is in the recent appellate decision, *McAbee v. Fort Payne*.<sup>193</sup> First, the court determined that subsection 309(g) contained three sets of requirements for comparability: (1) penalty assessment procedures; (2) public notice and participation provisions; and (3) judicial review provisions.<sup>194</sup> Then it examined whether the standard for comparability should be either (1) “rough comparability” for each set of requirements or (2) a balance of “overall effect[s],” a weaker test. It equated

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<sup>189</sup> 949 F.2d 552, 556 n.7 (1st Cir. 1991).

<sup>190</sup> *Id.*

<sup>191</sup> See *supra* note 137.

<sup>192</sup> *Arkansas Wildlife Federation v. ICI Americas, Inc.*, 29 F.3d 376 (8th Cir. 1994), followed *Scituate*, holding that state procedures did not have to be precisely the same as subsection 309(g) procedures, “as long as the state law contains comparable penalty provisions which the state is authorized to enforce, has the same overall enforcement goals as the federal CWA, provides interested citizens a meaningful opportunity to participate at significant stages of the decision-making process, and adequately safeguards their legitimate substantive interests.” *Id.* at 381–82. While this reference to citizen participation may appear to be somewhat more true to congressional intent than *Scituate*, it enabled the *Arkansas Wildlife* court to find a state procedure requiring no pre-order public notice and comment to be comparable to the federal procedure requiring them. The citizens unsuccessfully contended that Arkansas administrative penalty procedures were not “comparable” to subsection 309(g) because they did not require public notice of or opportunity to comment on proposed orders and provided citizens only an after the fact opportunity to intervene. *Id.* at 381–82; see also *Lockett v. EPA*, 319 F.3d 678 (5th Cir. 2003); *Jones v. City of Lakeland*, 175 F.3d 410 (6th Cir. 1999), *rev’d en banc on other grounds*, 224 F.3d 518 (6th Cir. 2000); *Sierra Club v. Colo. Refining Co.*, 852 F. Supp. 1476, 1482–1483 (D. Colo. 1994) (holding that subsection 309(g) bars CWA citizen suit when state enforces under its hazardous waste statute); *Saboe v. Oregon*, 819 F. Supp. 914 (D. Or. 1993).

<sup>193</sup> 318 F.3d 1248 (11th Cir. 2003).

<sup>194</sup> *Id.* at 1254.

the balance of "overall effects" test with that adopted by *Scituate* and its progeny.<sup>195</sup> However, it rejected the balance of overall effects test in favor of rough comparability of each set of requirements for three reasons. First, the overall effects standard balances "incommensurable values."<sup>196</sup> That makes it arbitrary, inviting courts to reach different conclusions on similar state provisions. Indeed, such an arbitrary suggestion is no standard at all. Second, the rough comparability for each requirement standard is easy to apply and reduces uncertainty for everyone involved.<sup>197</sup> Third, the legislative history explicitly adopts a standard comparing each of the three requirements.<sup>198</sup> Under this standard, the court ruled a state procedure not requiring pre-order public notice and comment was not comparable to subsection 309(g).<sup>199</sup> The Sixth and Ninth Circuits are roughly in accord with the decision in *Fort Payne*.<sup>200</sup>

Most courts have dealt seriously with whether state law was comparable to subsection 309(g), placing the burden of proof of comparability on the defendant pleading the bar.<sup>201</sup> They have split fairly evenly on whether particular state penalty assessment provisions are comparable to subsection 309(g), usually focusing on the public notice and citizen participation aspects of the state statutes. One court, for instance, held a state statute was not comparable to subsection 309(g) because it authorized the state agency to assess a penalty only with the consent of the violator and had no provision for citizen participation in the administrative order issuance or for citizen appeal of an assessment order.<sup>202</sup> Another held that a state's procedure was not comparable to subsection 309(g) because it did not require public notice or participation, although it allowed appeal by persons receiving notice,<sup>203</sup> quite similar to the Massachusetts procedure the First Circuit found comparable in *Scituate*.

Other courts have held that similar state statutes are not comparable to subsection 309(g).<sup>204</sup> A number of district courts have found state pen-

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<sup>195</sup> *Id.* at 1255. The court concluded that *Arkansas Wildlife Federation* followed *Scituate* in this regard.

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

<sup>197</sup> *Id.*

<sup>198</sup> 318 F.3d at 1255-56.

<sup>199</sup> *Id.* at 1257. The court did, however, find comparable to subsection 309(g) the state's authority to assess administrative penalties from \$100 to \$25,000 per violation, capped at \$250,000, with penalty factors similar to the federal factors.

<sup>200</sup> *Jones v. City of Lakeland*, 224 F.3d 518 (6th Cir. 2000); *Citizens for a Better Env't v. Union Oil Co. of Cal.*, 83 F.3d 1111 (9th Cir. 1996).

<sup>201</sup> *Jones*, 224 F.3d at 529; *Citizens for a Better Env't*, 83 F.3d 1111; *Cnty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy*, No. CY-98-3011, 2001 WL 1704240, at \*6-\*7 (E.D. Wash. Feb. 27, 2001); *United States v. Smithfield Foods, Inc.*, 965 F. Supp. 769 (E.D. Va. 1997), *aff'd in part, rev'd in part on other grounds*, 191 F.3d 516, 525-26 (4th Cir. 1999). See also *infra* notes 203-205.

<sup>202</sup> *Smithfield Foods*, 965 F. Supp. at 792-93.

<sup>203</sup> *Waste Action Project v. Atlas Foundry & Mach. Co.*, No. C975082R, 1998 WL 210846, at \*6 (W.D. Wash. Mar. 5, 1998).

<sup>204</sup> *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169, 1182 (D. Idaho 2001); *Cnty.*

alty assessment authorities comparable to subsection 309(g), after examining the state authorities and determining they had none of the deficiencies found in the above decisions.<sup>205</sup> The decisions turn, in whole or in part, on the lack of state requirements that the state give public notice of and opportunity to comment on proposed penalty orders or that states allow public intervention in administrative penalty assessment proceedings.<sup>206</sup> Some courts, however, relying on the *Scituate* line of reasoning, have found state authorities comparable to subsection 309(g) despite the state statute's lack of requirements for public notice, opportunity for comment, and intervention.<sup>207</sup> The most dramatic split in this regard is between decisions of the circuits holding that "ex-post facto" notice and comment are and are not comparable to the pre-order notice and comment of subsection 309(g).<sup>208</sup> As the Eleventh Circuit rightly points out,

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Ass'n for Restoration of the Env't, 2001 WL 1704240, at \*6-7 (E.D. Wa. Feb. 27, 2001); Lead. Envtl. Awareness Dev. v. Exide Corp., No. CIV. 96-3030, 1999 WL 124473 at \*31 (E.D. Pa. Feb. 19, 1999); Atl. States Legal Found., Inc. v. Montgomery County N. Reduction Plant, No. C-3-95-156, 1996 WL 1670982, at \*5 (S.D. Ohio Mar. 11, 1996) (determining that citizen participation was neither required nor permissive); Molokai Chamber of Commerce v. Kukui (Molokai), Inc., 891 F. Supp. 1389, 1405 (D. Haw. 1995); Save Our Bays and Beaches v. City and County of Honolulu, 904 F. Supp. 1098, 1133 (D. Haw. 1994); Natural Res. Def. Council v. Vygen Corp., 803 F. Supp. 97, 101 (N.D. Ohio 1992); Pub. Interest Research Group of N.J., Inc. v. GAF Corp., 770 F. Supp. 943, 950 (D.N.J. 1991); Atl. States Legal Found., Inc. v. Universal Tool & Stamping Co., 735 F. Supp. 1404, 1416 (N.D. Ind. 1990); Tobyhanna Conservation Ass'n v. Country Place Waste Treatment Co., 734 F. Supp. 667, 670 (M.D. Pa. 1989); Waste Action Project v. Atlas Foundry & Mach. Co., No. C975082R, 1998 WL 210846, at \*6 (W.D. Wash. Mar. 5, 1998).

<sup>205</sup> Lockett v. EPA, 176 F. Supp. 2d 628, 634 (E.D. La. 2001), *aff'd*, 319 F.3d 678 (5th Cir. 2003); Pape v. Menominee Paper Co., 911 F. Supp. 273, 277 (W.D. Mich. 1994); Cal. Sportfishing Prot. Alliance v. City of West Sacramento, 905 F. Supp. 792 (E.D. Cal. 1995); Conn. Coastal Fishermen's Ass'n v. Remington Arms Co., 777 F. Supp. 173, 183 (D. Conn. 1991).

<sup>206</sup> For instance, the court in *Atlantic States Legal Foundation v. Universal Tool & Stamping Co., Inc.*, 735 F. Supp. 1404 (N.D. Ind. 1990), began its analysis with the statement of Sen. Chaffee, one of the authors of subsection 309(g):

[T]he limitation of 309(g) applies only where a State is proceeding under a State law that is comparable to section 309(g). For example, in order to be comparable, a State law must provide for a right to a hearing and for public notice and participation procedures similar to those set forth in section 309(g) . . . .

*Id.* at 1415 (quoting 133 CONG. REC. S. 737 (1987)). The court found that state procedures were not comparable to subsection 309(g) if they required public notice of hearings on nonconsensual penalty orders, but not of penalty assessments concluded by consent.

<sup>207</sup> *Knee Deep Cattle Co. v. Bindana Inv. Co.*, 904 F. Supp. 1177, 1182 (D. Or. 1995) (requiring that state procedures be comparable, not identical; discretionary public notice enough), *rev'd on other grounds*, 94 F.3d 514 (9th Cir. 1996); *Saboe v. Oregon*, 819 F. Supp. 914, 918 (D. Or. 1993) (stating that mandatory public notice is "not necessarily the *sine qua non* of comparability").

<sup>208</sup> *McAbee v. City of Fort Payne*, 318 F.3d 1248, 1256-57 (11th Cir. 2003) (holding "ex-post facto" notice and comment not comparable to the pre-order notice and comment of subsection 309(g)); *Lockett*, 319 F.3d 678, 686-87 (5th Cir. 2003) (holding "ex-post facto" notice and comment comparable to the pre-order notice and comment of subsection 309(g)); *Jones v. City of Lakeland*, 224 F.3d 518, 523-24 (6th Cir. 2000) (holding "ex-post facto" notice and comment not comparable); *Ark. Wildlife Fed'n v. ICI Americas, Inc.*, 29



a right to pre-order participation is markedly different from the right to post-decision participation. In pre-order proceedings, an agency has not hardened its position and interested persons are not subject to the same technical pleading requirements or burdens of proof that are imposed once the state has issued an order.<sup>209</sup>

Such differences in notice and comment requirements “strike at the heart of whether the statute ‘provides interested citizens a meaningful opportunity to participate at significant stages of the decision-making process.’”<sup>210</sup> Without public notice, of course, other public participation rights may be moot. Several courts have held that lack of the right to or denial of citizen intervention denotes a lack of diligent prosecution.<sup>211</sup> But this goes more toward the comparability of state and federal procedures than it does to diligent prosecution.

Congress placed procedural requirements on EPA’s penalty assessment procedures under subsection 309(g), not just to protect the due process rights of violators, but also to prevent EPA from assessing insignificant penalties against serious offenses, thereby insulating the offenders from significant penalties. The length to which Congress went in this regard is highlighted by its uniquely providing citizens with the right to seek judicial review of penalties consented to by EPA and violators and to petition reviewing courts to assess higher penalties. Courts have not recognized this, which may explain why they focus on the familiar public notice and intervention requirements as if they were merely normal procedures to assure government transparency. When it is recognized that these and other requirements were placed on EPA’s procedures not just to promote transparency of government,<sup>212</sup> but to prevent abuse by under-enforcement, and that such abuse is just as likely from states as from EPA, it is inescapable that state penalty assessment procedures cannot be comparable to subsection 309(g) without similar requirements to prevent such abuse.

*(b) What Federal Law Must Be Compared?*

The question of which federal law should be the basis of comparison is answered once again by reference to the plain meaning and structure of the CWA. The plain meaning of “an action under a State law comparable

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F.3d 376, 381–82 (8th Cir. 1994) (holding “ex-post facto” notice and comment comparable).

<sup>209</sup> *McAbee*, 318 F.3d at 1257.

<sup>210</sup> *Id.* (quoting *Ark. Wildlife Fed’n*, 29 F.3d at 381).

<sup>211</sup> See *Frilling v. Vill. of Anna*, 924 F. Supp. 821 (S.D. Ohio 1996); *Friends of the Earth v. Laidlaw Envtl. Servs., Inc.*, 890 F. Supp. 470 (D.S.C. 1995); *Love v. N.Y. State Dep’t of Envtl. Conservation*, 529 F. Supp. 832 (S.D.N.Y. 1981).

<sup>212</sup> Section I.B.2 of Part One describes the legislative history of the citizen suit provisions, including their role as part of citizen participation in government, in turn a part of the quest for transparency in government. See *Miller*, *supra* note 1, at 420–25.

to *this subsection*” in subsection 309(g) is a state administrative penalty assessment authority having the same characteristics as CWA subsection 309(g). Although the statute does not define “subsection,” the nomenclature of federal statutory structure is familiar. A subsection in the United States Code is a principal subpart of a section and is delineated by a lower-case letter in parentheses. “This subsection,” then, defines itself as subsection 309(g).

When Congress drafted section 309 and, later, subsection 309(g), it was conscious of the differences between the title (Title 33 of the United States Code), a chapter of the title (the CWA), a section of the chapter (309), a subsection of the section (309(g)), a paragraph of the subsection (309(g)(6)), and a subparagraph of the paragraph (309(g)(6)(A)). Indeed, it carefully observed those distinctions and correctly used the different terms throughout section 309 and subsection 309(g).<sup>213</sup> It is unlikely in this one instance that Congress intended “this chapter” or “this section” when it wrote “this subsection.” Every court considering whether EPA may bar a citizen suit by issuing a compliance order under subsection 309(a) has assumed that the bar under subsection 309(g)(6)(A)(i) for an action under “this subsection” meant subsection 309(g), not the entire Chapter of the CWA or even the entire section 309.<sup>214</sup> It is extremely unlikely that Congress intended “this subsection” in CWA subsections 309(g)(6)(A)(ii)–(iii) to mean anything other than subsection 309(g).

*(c) What State Law Must Be Compared?*

Once the meaning of “comparable” is understood and a reference point in federal law established, the question of which state law is to be compared may be answered by applying the lessons of the foregoing analysis. The “comparable” state law phrases in subsections 309(g)(6)(A)(ii) and (iii) differ somewhat. In (ii) the phrase is “an action under a State law comparable” to “this subsection,” i.e., subsection 309(g). Because the only action that EPA can take under subsection 309(g) is to assess an administrative penalty, the only action that a state could take under a comparable state law would be to assess an administrative penalty. That means, to be comparable, a state law must provide administrative penalty author-

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<sup>213</sup> For instance, in section 309(a)(1) it correctly distinguished between “section,” and “subsection.” 33 U.S.C. § 1319(a)(1) (2000). In section 309(a)(2) it correctly distinguished between “section,” “subsection,” and “paragraph.” 33 U.S.C. § 1319(a)(2) (2000). In section 309(c)(3), it correctly distinguished between “title,” “chapter,” “section,” “subsection,” “paragraph,” and “subparagraph.” 33 U.S.C. § 1319(c)(3) (2000). Apart from subsection 309(g), it correctly referenced subsections no less than seven times: subsections 309(a)(1)–(3), (c)(5)–(6), and (d)–(f). 33 U.S.C. § 1319(a)(1)–(3), (c)(5)–(6), (d)–(f) (2000). In subsection 309(g) itself, Congress correctly distinguished between “title,” “chapter,” “section,” “paragraph,” and “subparagraph.” 33 U.S.C. § 1319(g) (2000). See *McAbee*, 318 F.3d at 1255; *supra* note 182.

<sup>214</sup> See *Miller*, *supra* note 1, at 433–35.

ity. In (iii), the phrase is “a penalty assessed under . . . such comparable State law.” The reference here to a state assessed penalty reinforces the conclusion that “comparable State law” is administrative penalty authority. Moreover, because (iii) refers to “such” comparable state law, and the only antecedent reference to a “comparable state law” is in (ii), both phrases refer to the same state administrative penalty authority. The remaining questions are: (1) whether the state administrative penalty assessment authority must be embedded in the enforcement provision of its water pollution statute, as subsection 309(g) is embedded in the enforcement provision of the CWA; (2) whether the state must actually use that authority to bar subsequent EPA and citizen actions; and (3) what is a penalty?

The *Scituate* court suggested the comparable state authority could be found outside the state’s water pollution enforcement provision.<sup>215</sup> Some courts have followed *Scituate* by looking outside the state’s penalty assessment authority for public participation and judicial review provisions applicable to that authority.<sup>216</sup> Other courts have rejected *Scituate* and looked only within the relevant state provision.<sup>217</sup> It does no violence to the comparability requirement for public participation, procedural, and judicial review requirements comparable to those in subsection 309(g) to be located in state statutes outside the state’s water pollution enforcement provisions, as long as those requirements apply to the state’s assessment of penalties for violations of its water pollution statute. Of course, if a state has comparable public participation, procedural, and judicial review requirements outside its water pollution enforcement provisions and those requirements do not apply to the state’s assessment of penalties for violations of its water pollution statute, the state does not have a water pollution violation penalty assessment authority comparable to subsection 309(g). The wording and structure of subsection 309(g) indicate that the citizen participation and judicial review procedures must relate to the state’s water pollution administrative penalty assessment procedures to be comparable to subsection 309(g). Moreover, the legislative history makes it clear that the purpose of requiring citizen participation and citizen appeal of penalty amounts is to prevent paltry penalty assessments for water pollution

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<sup>215</sup> 949 F.2d 552, 556 (1st Cir. 1991). The court reasoned that:

It is enough that the Massachusetts statutory scheme, under which the State is diligently proceeding, contains penalty assessment provisions comparable to the Federal Act, that the State is authorized to assess those penalties, and that the overall scheme of the two acts is aimed at correcting the same violations, thereby achieving the same goals.

<sup>216</sup> *Jones v. City of Lakeland*, 224 F.3d 518, 523–24 (6th Cir. 2000). In *McAbee*, the court noted and discussed the issue, but concluded it need not decide it. 318 F.3d at 1255 n.8.

<sup>217</sup> *Citizens for a Better Env’t v. Union Oil Co. of Cal.*, 83 F.3d 1111, 1117–18 (9th Cir. 1996).

violations where more aggressive enforcement is needed.<sup>218</sup> That purpose could not be served unless the citizen participation and judicial review provisions in the state law applied to the state's water pollution administrative penalty assessment procedures.

*(d) Must the State Use Its "Comparable Authority" To Bar a Successive EPA or Citizen Penalty Action?*

If a state must have legal authority comparable to subsection 309(g) to preclude an EPA or a citizen enforcement action, it follows that the state must use that authority to preclude an EPA or a citizen action. Surprisingly, a line of cases has reached contrary conclusions. This Section will elucidate the proper interpretation of this issue.

The plain meaning of subsection 309(g) limits preclusion to situations in which the state "has commenced . . . an action under a State law comparable to this subsection."<sup>219</sup> If a state has an administrative penalty authority that is comparable to subsection 309(g), but uses an administrative compliance order authority that is not comparable, it simply has not "commenced an action under a State law comparable" to subsection 309(g). The compliance order authority cannot be comparable to subsection 309(g), even if it theoretically has comparable citizen participation and judicial review provisions, because it has no administrative penalty assessment procedures. Moreover, compliance order authority could not have citizen participation and judicial review provisions comparable to those in subsection 309(g), because the latter are tailored to participating in and appealing decisions regarding penalty amounts.<sup>220</sup>

This is emphasized by the parallel structure of the clauses dealing with EPA and state actions. The preclusion of EPA and citizen penalty actions applies only for a violation

- (i) with respect to which the Administrator . . . has commenced and is diligently prosecuting an action under this subsection,
- (ii) with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection, or
- (iii) for which the Administrator . . . or the State has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under this subsection, or such comparable State law . . .<sup>221</sup>

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<sup>218</sup> See *supra* Part II.A.2.

<sup>219</sup> CWA § 309(g)(6)(A)(ii), 33 U.S.C. § 1319(g)(6)(A)(ii) (2000).

<sup>220</sup> CWA § 309(g)(4)(c), (8), 33 U.S.C. § 1319(g)(4)(c), (8) (2000).

<sup>221</sup> CWA § 309(g)(6)(A), 33 U.S.C. § 1319(g)(6)(A).

Clauses (i), dealing with EPA actions, and (ii), dealing with state actions, are exactly parallel, except that (i) ends with “under this subsection” while (ii) ends with “under a State law comparable to this subsection.” Every court considering clause (i) has held that it refers only to EPA administrative penalty actions.<sup>222</sup> The plainest and most logical reading of the parallel state provision is that clause (ii) also refers only to administrative penalty actions. Of course, it is a familiar canon of statutory construction that similar terms in a statute should be interpreted in the same way.<sup>223</sup> Clause (iii) is even clearer, for it uses the same operative words for both EPA and state assessed penalties that have been paid. The structure of the paragraph admits no other reading than that it bars duplicative EPA or citizen enforcement only when the state assesses an administrative penalty.

Moreover, the legislative history of subsection 309(g) indicates the intent of Congress was to prevent EPA from abusing the authority to assess paltry penalties against continuing or serious violations warranting judicial action for injunctions and severe penalties.<sup>224</sup> It would make no sense for Congress to allow citizens to act to prevent EPA from this practice, but not to allow citizens and EPA to act to prevent states from doing so.

The first court of appeals decision to consider the issue, *North and South Rivers Watershed Ass’n, Inc. v. Town of Scituate*, however, held that a state administrative action need not be an action taken under state authority comparable to subsection 309(g) to bar a citizen suit under subsection 309(g)(6)(A)(ii), as long as the state has comparable administrative penalty assessment authority somewhere in its arsenal.<sup>225</sup> As discussed above, the court was far less interested in interpreting the words of the statute than in forwarding its policy of deferring to state enforcement decisions. Other courts have followed its lead, relying on the absence of the word “penalty” in (ii).<sup>226</sup> They ignore the unanimous precedent that an EPA subsection 309(a) compliance order does not bar a citizen suit under (i), even though (i) also omits the word “penalty” and EPA obviously has subsection 309(g) authority elsewhere in its arsenal. The inclusion or omission of the word “penalty” in (i) and (ii) does not bear on this issue because subsection 309(g) is an authority to issue penalty orders and nothing else. There is no reason for (i) and (ii) to mention “penalty,” because they both describe the government’s ongoing administrative action, and under subsection 309(g) or a comparable state authority, that action can only be

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<sup>222</sup> See *supra* Part II.A.3.b.(i).

<sup>223</sup> See ESKRIDGE, *supra* note 134, at 324.

<sup>224</sup> See *supra* Part II.A.2.

<sup>225</sup> 949 F.2d 552, 555–56 (1st Cir. 1991).

<sup>226</sup> *United States v. Smithfield Foods, Inc.*, 965 F. Supp. 769, 792 n.34 (E.D. Va. 1997), *aff’d in part, rev’d in part on other grounds*, 191 F.3d 516, 525–26 (4th Cir. 1999); *Sierra Club v. Colo. Refining Co.*, 852 F. Supp. 1476, 1484–85 (D. Colo. 1994); *Atl. States Legal Found. v. Tyson Foods, Inc.*, 682 F. Supp. 1186, 1187–89 (N.D. Ala. 1988).

assessment of a penalty. Congress used “penalty” in (iii) to describe the violator’s compliance with the government’s penalty order, not to describe the purpose or contents of the government’s action. The evident purpose of “penalty” in (iii) is to limit the preclusion in completed actions to instances in which the violator is not a scofflaw, but actually has paid the penalty assessed. There is no inconsistency in interpreting (i), (ii) and (iii) all to refer only to penalty orders; indeed, it is the only consistent interpretation, for there is no discernable reason for completed administrative proceedings under (iii) to preclude subsequent enforcement actions only if the violator actually pays a penalty, when ongoing administrative proceedings under (ii) may preclude concurrent enforcement where the government is not attempting to assess a penalty.

Indeed, the court in *Scituate* admitted as much. “[A] narrow reading of section 309(g)(6)(A) . . . turns on the logistical happenstance of statutory drafting.”<sup>227</sup> The theme and variations nature of the preclusion device that Congress used throughout the EPA and citizen enforcement provision of the environmental statutes makes it clear that the words Congress used in the preclusion device reflect its intent rather than “happenstance.” The decision admits that it simply ignored the words of the statute to follow the court’s policy choices.

A few pre-*Scituate* courts had reached similar results, relying on deference to the state’s enforcement discretion.<sup>228</sup> Other courts have followed *Scituate*.<sup>229</sup> Some courts have taken the *Scituate* line of reasoning to extremes to hold that virtually any action on the part of the state will bar a citizen suit.<sup>230</sup> The *Scituate* court and its followers focus exclusively on what they term the secondary nature of citizen suits, compounding the illogic of the Court’s reasoning in *Gwaltney* by ignoring the Supreme Court’s primary plain meaning rationale for its holding in that decision and the importance it placed on the conclusion that only government actions for compliance could bar citizen suits. They also fail to see that their rulings make EPA a secondary enforcer as well, for the subsection 309(g) preclusion applies to EPA in the same manner as it does to citizen actions. However, it is not credible that Congress intended to make EPA a secondary enforcer when its avowed purpose in enacting subsection 309(g)

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<sup>227</sup> 949 F.2d at 556.

<sup>228</sup> *Conn. Coastal Fishermen’s Ass’n v. Remington Arms Co., Inc.*, 777 F. Supp. 173, 183–86 (D. Conn. 1991); *N.Y. Coastal Fishermen’s Ass’n v. N.Y. City Dep’t of Sanitation*, 772 F. Supp. 162, 165 (S.D.N.Y. 1991); *Atl. States Legal Found., Inc.*, 682 F. Supp. at 1189.

<sup>229</sup> For a similar case, see *Knee Deep Cattle Co. v. Bindana Investments Co.*, 904 F. Supp. 1177 (D. Or. 1995), *rev’d*, 94 F.3d 514 (9th Cir. 1996).

<sup>230</sup> In *Williams Pipe Line Co. v. Bayer Corp.*, for instance, the state had issued a series of directives to a permit violator to investigate and remediate the violations. The record did not disclose whether the directives “were written or oral, or their specific content.” 964 F. Supp. 1300, 1320 n.17 (S.D. Iowa 1997). The court held that “a citizens suit [sic] may be barred even absent formal administrative proceedings where . . . the state has authority to issue orders and assess penalties for violations but chooses instead to order compliance and settle informally with the violator.” *Id.* at 1322.

was to strengthen EPA enforcement. Indeed, the legislative history contains not one hint that it intended to make EPA enforcement secondary. These decisions ignore the plain meaning of the statute and the intent of Congress, in favor of policies of their own, to the detriment of achieving the goals of the CWA.

The Ninth Circuit, in *Citizens for a Better Environment v. Union Oil Company of California, Inc.*,<sup>231</sup> provided an accurate analysis of the wording and structure of subsection 309(g)(6)(A) to reject the holding in *Scituate*. The court rejected, for three reasons, the *Scituate* holding that the subsection 309(g) bar on citizen suits applied when the state had administrative penalty authority comparable to subsection 309(g) somewhere in its arsenal.<sup>232</sup> First, the plainest reading of the statute is that when subsection 309(g)(6)(A)(iii) bars an action because a state "assessed [a penalty] under this subsection, or such comparable State law," the state must have assessed the penalty under a comparable state law to activate the bar.<sup>233</sup> Second, subsection 309(g)(4) requires that EPA administrative penalty assessment proceedings have a list of procedural safeguards for the respondent and for other interested parties.<sup>234</sup> The court was right; the legislative history demonstrates that Congress included the safeguards in subsection 309(g) to prevent the government from abusing its enforcement discretion by issuing lenient penalties for serious ongoing violations rather than requiring compliance, an abuse that may be made by either state or federal enforcers.<sup>235</sup> To be comparable to subsection 309(g), state administrative penalty procedures must contain such safeguards. The requirement that comparable state provisions contain safeguards against abuse by enforcers would be meaningless if the state uses non-comparable authorities lacking such safeguards to bar subsequent enforcement. This reasoning applies even if the safeguards were provided when the state used the comparable enforcement authority in some other case.

Finally, the court concluded that a contrary result would cause state actions to be more preclusive than EPA actions, since only EPA actions assessing penalties would bar a citizen suit, while all state administrative orders, whether assessing a penalty or not, would preclude citizen suits as long as the state had an unused comparable penalty authority somewhere in its arsenal.<sup>236</sup> Indeed, EPA filed an amicus brief making just that point.<sup>237</sup> Although not noted by the court, the ultimate consequences of its third line of reasoning are even more persuasive. If, as some courts hold, any

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<sup>231</sup> 83 F.3d 1111 (9th Cir. 1996). See also *Knee Deep Cattle Co.*, 94 F.3d at 516 (following *Union Oil* in holding that a state must actually use its penalty authority to bar a citizen suit under subsection 309(g)).

<sup>232</sup> 83 F.3d at 1118.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> See Miller, *supra* note 1, at 445-49.

<sup>236</sup> *Citizens for a Better Env't.*, 83 F.3d at 1118.

<sup>237</sup> *Id.* at 1118-20.

state order or action could bar citizen suits or EPA actions, it would make both citizens and EPA secondary enforcers. By enacting subsection 309(g), however, Congress intended to strengthen EPA's enforcement authority by giving it a new remedy, rather than to curtail its enforcement authority by allowing the states to oust its enforcement authority with ineffective actions. The Senate Committee envisioned that the new authority would increase the number of EPA enforcement actions, adding new administrative penalty actions to an undiminished number of civil actions and continuing administrative penalty orders.<sup>238</sup> Many courts have no trouble following *Citizens for a Better Environment*, easily discerning that the plain reading of the statute mandates its result and recognizing that state administrative compliance order authorities are no more comparable to subsection 309(g) than is EPA's own compliance order authority in subsection 309(a).<sup>239</sup>

The court also held that not only must the state use its comparable administrative penalty authority to invoke the subsection 309(g) preclusion to bar a citizen suit or an EPA action, the state must also assess a penalty and be diligently pursuing the penalty under subsection 309(g)(6)(A)(ii) or have finally assessed a penalty that the violator pays under subsection 309(g)(6)(A)(iii).

(e) *What Is a Penalty?*

In many cases, violators agree to perform good works in lieu of payments to the government, and seek to use these works as a shield against subsequent enforcement. This practice raises the question of whether these

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<sup>238</sup> See the discussion in *supra* Part II.A.2.

<sup>239</sup> *Natural Res. Def. Council v. NVF Co.*, No. 97-496-SLR, 1998 WL 372299, at \*12 (D. Del. June 25, 1998) (holding that state monitoring of voluntary action was not assessment of a penalty to invoke the subsection 309(g) bar); *Friends of Santa Fe County v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 1347 (D.N.M. 1995) ("Defendants, and many courts, wish to read more into the citizen suit bar of this subsection than exists. Although their desire is well-founded, and their policy goals are laudable, their vision cannot be reconciled with the literal terms of the statute."). The preclusion is narrowly drawn to operate only if the state has commenced and is diligently assessing a penalty or has assessed a penalty that has been paid. See also *Molokai Chamber of Commerce v. Kukui (Molokai), Inc.*, 891 F. Supp. 1389 (D. Haw. 1995) (determining that the state must assess a penalty to bar citizen suits); *Pub. Interest Research Group of N.J., Inc. v. N.J. Expressway Auth.*, 822 F. Supp. 174, 184 (D.N.J. 1992) (holding that subsection 309(g) does not bar citizen suits when the state assessed no penalty). The most recent of this line of decisions, *Old Timer, Inc. v. Blackhawk-Central City Sanitation District*, summarized the case law on both sides of the issue and examined the evolution of the enforcement provisions of the statute to reach its conclusion. 51 F. Supp. 2d 1109 (D. Colo. 1999). In particular, it quoted remarks of Sen. Chaffee, one of the primary drafters of subsection 309(g) and a conferee in reconciling the House and Senate versions of the provision. He repeated in different terms the basic tenet that citizen suits are precluded "where the Federal Government or a State has commenced and is diligently prosecuting an administrative civil penalty action." *Id.* at 1114 (emphasis added by the court) (quoting 133 CONG. REC. 1264 (1987)). See also *Knee Deep Cattle Co. v. Bindana Inv. Co.*, 94 F.3d 514, 516 (9th Cir. 1996).



good works may be considered penalties under subsection 309(g). The CWA does not define "penalty." The Miscellaneous Receipts Act, however, requires that penalties be paid to the Treasury,<sup>240</sup> which leads to the inference that a payment resulting from a subsection 309(g) or other action is a penalty only if it is in the form of a payment to the Treasury, unless Congress otherwise provides.<sup>241</sup> Good works are therefore not penalties,<sup>242</sup> although they may have a role to play in settlements of enforcement actions in addition to penalties.<sup>243</sup> Violators may also wish to make payments to the Treasury but avoid the opprobrium associated with the payment of a "penalty" by calling it something else. Faced with this, one court stated that the violator "simply 'cannot have it both ways,'" and held that a payment defendant went to great lengths to have characterized as a payment rather than a penalty, was not a penalty.<sup>244</sup> This seems fair, for a penalty must have some stigma to meet its objective of deterrence. Moreover, a defendant may secure benefits from disgorging its assets in forms other than penalties.<sup>245</sup>

Whether the violator's payment is a penalty turns on the same two principles whether it results from an EPA or state action: the payment must be to the Treasury (or the state equivalent) and good works do not qualify. Some state statutes require that violators pay penalties into a special fund for environmental improvement rather than into the state treasury.<sup>246</sup> Such payments are denominated penalties by the state statutes and thus carry the appropriate opprobrium for stigma purposes. And while they eventually may be applied to environmental good works, they are applied at a time and manner of the state's discretion; thus, the violator cannot claim a

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<sup>240</sup> 31 U.S.C. § 3302(c)(1) (2000).

<sup>241</sup> Congress did provide in the CAA citizen suit provision subsection 304(g)(2), 42 U.S.C. § 7604(g)(2) (2000), that courts could direct that up to \$100,000 of civil penalties assessed in citizen suits could be "used in beneficial mitigation projects which are consistent with this chapter and enhance the public health or the environment."

<sup>242</sup> See *Sierra Club v. Elec. Controls Design, Inc.*, 909 F.2d 1350 (9th Cir. 1990).

<sup>243</sup> CAA subsection 304(g)(2), 42 U.S.C. § 7604(g)(2) (2000) is a limited departure from the Miscellaneous Receipts Act requirement that penalties be paid to the Treasury. The other citizen suit provisions, e.g., CWA § 505, 33 U.S.C. § 1365 (2000), contain no comparable exceptions to the general rule. It is common, however, for consent decrees to contain agreements by defendants to undertake such good works as an offset against what otherwise would be a penalty payment to the Treasury. Citizen enforcers, more concerned with improving the local environment than enriching the Treasury, are especially amenable to such offsets. EPA and the Department of Justice call such good works Supplemental Environmental Projects ("SEPs") and will agree to them in consent decrees under conditions elaborated in EPA policy on the subject. See the discussion of SEPs in 2 ENVTL. L. INST., LAW OF ENVIRONMENTAL PROTECTION 9-237-9-240 (Sheldon N. Novick et al. eds., 2004).

<sup>244</sup> *Citizens for a Better Env't v. Union Oil Co. of Cal.*, 83 F.3d 1111, 1116 (9th Cir. 1996) (quoting plaintiff's brief).

<sup>245</sup> The payment of penalties may not be tax deductible, while payments for good works may be.

<sup>246</sup> See, e.g., CAL. WATER CODE § 13385(n)(1) (West 2004); LA. REV. STAT. ANN. § 30:2205 (West 2004); N.C. GEN. STAT. § 130A-306 (2004).

reputational benefit from any resulting environmental improvement. Such payments should be considered penalties for CWA subsection 309(g) purposes.

*c. When Must the Government Commence a Subsection 309(g) Action To Bar a Successive EPA or Citizen Penalty Action?*

In addition to the question of which types of enforcement actions result in preclusions, it is necessary to determine when these actions must be undertaken by the enforcer to remain within the ambit of subsection 309(g). Subsection 309(g)(6)(B) lifts the preclusion against citizen penalty actions if the citizen files suit either (1) prior to the commencement of “an action under this subsection” or (2) if “an action under this subsection” was commenced after the citizen gave notice of his section 505 action and filed his complaint prior to 120 days after the notice.<sup>247</sup>

The first part of this bar-lifting provision is comparable to the provision in the citizen suit section that the bar is activated only if the government commences its action before the citizen commences an action. Courts interpreting the citizen suit provisions have routinely held that government actions filed after the commencement of the citizen suit do not bar the citizen suit.<sup>248</sup> Courts considering the issue under subsection 309(g) come to the same conclusion.<sup>249</sup> Working together with the notice requirement of section 505, the first part of this bar lifting provision has the same effect as the notice and bar provision of section 505, discussed in Part One.<sup>250</sup> Together, they encourage government enforcement by giving the government notice that the citizen is about to act, allowing the government free rein if it acts first, and giving the government sixty days in which to act first. If the government does not act within that time, the citizen is free to proceed.

The second part of this bar-lifting provision is less deferential to government enforcers than the comparable provisions of the citizen suit section; it allows citizens to proceed even if the government does commence a penalty action before the citizen suit is filed, as long as the citizen served its notice before the government commenced its action.<sup>251</sup> This actually undercuts the intended purpose of the section 505 preclusion device. The purpose of the notice is to encourage government enforcement, and the purpose of the bar is to give the government free rein if it re-

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<sup>247</sup> 33 U.S.C. § 1319(g)(6)(B) (2000).

<sup>248</sup> Miller, *supra* note 1, at 449–52.

<sup>249</sup> *Altamaha Riverkeepers v. City of Cochran*, 162 F. Supp. 2d 1368, 1373 (M.D. Ga. 2001); *Pub. Interest Research Group of N.J. v. Hercules Inc.*, 830 F. Supp. 1525, 1538–39 (D.N.J. 1993).

<sup>250</sup> Miller, *supra* note 1, at 449–52.

<sup>251</sup> *Altamaha Riverkeepers*, 162 F. Supp. 2d at 1373; *Pub. Interest Research Group of N.J., Inc. v. Elf Atochem N. Am., Inc.*, 817 F. Supp. 1164, 1172 (D.N.J. 1993); *Mass. Pub. Interest Research Group v. ICI Americas, Inc.*, 777 F. Supp. 1032, 1036 (D. Mass. 1991).

sponds to the notice within sixty days by commencing and diligently prosecuting an enforcement action.<sup>252</sup> The subsection 309(g) variant provides less encouragement of government enforcement, because it does not always give the government free rein if it commences its action within sixty days after the citizen suit notice.<sup>253</sup> The legislative history of subsection 309(g) does not explain this divergence from the delay and bar elements of the citizen suit preclusion. The divergence probably reflects the relatively lenient nature of the subsection 309(g) sanction.

The main questions with subsection (B)'s lifting of the bar are whether: (1) the bar against citizen suits is lifted by state actions as well as by EPA actions, and (2) the bar against EPA actions is lifted in the same manner as for citizen actions. As for the first question, subsection 309(g)(6)(B) lifts the bar for actions "under this subsection" in specified circumstances. EPA penalty assessments, of course, are "under this subsection" and the bar is accordingly lifted for them under those circumstances. Most courts assume, without analysis, that the bar is also lifted for state penalty assessments under the same circumstances.<sup>254</sup> A plain reading of the statute, however, suggests that it lifts the bar on citizen suits only for EPA penalty assessments. It applies only to penalty actions "under this subsection," subsection 309(g), not a provision of state law. If states impose administrative penalties, they do so using their comparable state authority, not using the federal subsection 309(g) authority. To interpret subparagraph (B) as lifting the bar for state action is to read "under this subsection" as if it read "under this subsection or comparable state law." This, of course, ignores the plain meaning of "under this subsection," and the fact that Congress used "under this subsection or comparable State law" elsewhere in subsection 309(g) when it intended that meaning.

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<sup>252</sup> See Miller, *supra* note 1, at 421–23 (noting legislative history establishing encouragement of government enforcement as the purpose of the notice and delay provision).

<sup>253</sup> CWA § 309(g)(6), 33 U.S.C. § 1319(g)(6) (2000).

<sup>254</sup> *Knee Deep Cattle Co. v. Bindana Inv. Co.*, 94 F.3d 514, 516 (9th Cir. 1996); *Ark. Wildlife Fed'n v. ICI Americas, Inc.*, 29 F.3d 376, 382 (8th Cir. 1994); *Altamaha Riverkeepers*, 162 F. Supp. 2d at 1373; *Cnty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy*, No. CY-98-3011, 2001 WL 1704240, at \*7 (E.D. Wash. Feb. 27, 2001); *Kara Holding Corp. v. Getty Mktg., Inc.*, 67 F. Supp. 2d 302, 308–09 (S.D.N.Y. 1999); *Old Timer, Inc. v. Blackhawk-Central City Sanitation Dist.*, 51 F. Supp. 2d 1109, 1113–15 (D. Colo. 1999); *N. Cal. River Watch v. Sonoma County Water Agency*, No. C 97-4263.CRB, 1998 WL 886645 (N.D. Cal. Dec. 16, 1998); *Natural Res. Def. Council v. NVF Co.*, No. 97-496-SLR, 1998 WL 372299, at \*11 (D. Del. June 25, 1998); *Sierra Club v. Hyundai Am., Inc.*, 23 F. Supp. 2d 1177, 1178–79 (D. Or. 1997); *Sierra Club v. Colo. Ref. Co.*, 852 F. Supp. 1476, 1484 (D. Colo. 1994); *Pub. Interest Research Group of N.J., Inc. v. Elf Atochem N. Am., Inc.*, 817 F. Supp. 1164, 1172 (D.N.J. 1993); *Pub. Interest Research Group of N.J., Inc. v. Witco Chem. Corp.*, No. 89-3146, 1990 WL 66178 (D.N.J. May 17, 1990); *Mass. Pub. Interest Research Group v. ICI Americas, Inc.* 777 F. Supp. 1032, 1036 (D. Mass. 1991); *Pub. Interest Research Group of N.J. v. Yates Indus., Inc.*, 757 F. Supp. 438, 444–45 (D.N.J. 1991), *reconsideration denied in part and granted in part on other grounds*, 790 F. Supp. 511 (D.N.J. 1991).

Noting this, the court in *California Sportfishing Protection Alliance v. City of West Sacramento* held that the bar against citizen suits was lifted only for federal penalty assessments, not for state penalty assessments.<sup>255</sup> It conducted an exhaustive review of the legislative history of the subsection and could find no discussion or indication of what Congress intended by omitting reference to state actions in subsection 309(g)(6)(B) or that it intended to omit it. The court acknowledged the omission could have been a result of inadvertence, a drafting error, or a deliberate choice on federalism grounds.<sup>256</sup> Although most courts considering the matter have assumed the bar-lifting provision applies to state as well as EPA actions, *California Sportfishing* rightly noted that they made this assumption without analysis or acknowledgment of the apparent plain meaning of the statute.<sup>257</sup> The one court examining the *California Sportfishing* analysis rejected it as leading to absurd results.<sup>258</sup> Indeed, the results are worse than that court recognized, as the discussion in the following paragraphs makes clear.

Subsection (B) lifts the bar only for subsequent citizen actions, not for subsequent EPA actions. No matter when a state commences a penalty action, it will bar an EPA or citizen judicial penalty action, as long as the state diligently prosecutes it. Curiously, it bars EPA only from seeking judicial assessment of a penalty under subsection 309(d), not EPA assessment of an administrative penalty under subsection 309(g). Read literally, however, subsection 309(g) gives states the ability to thwart the use of penalties as deterrents under the CWA because the small cap on subsection 309(g) penalties virtually eliminates its use as a deterrent of serious violations. Reading the provision as some courts do, it also gives states the ability to thwart the use of injunctive remedies to require compliance.<sup>259</sup> Under their interpretation, a state may refrain from acting while EPA or a citizen proceeds with a compliance action, wait until the eve of trial or even until the defendant has rested its case, and only then commence and diligently pursue an insignificant administrative penalty action under authority comparable to subsection 309(g) to bar EPA or citizen action for significant penalties or to secure compliance, at least for the same violations for which the state assessed the penalty.

There is no apparent reason on the face of the statute or in the legislative history of subsection 309(g) that the assessments should have such different effects depending on which level of government makes them. Indeed, the legislative history emphasizes the congressional intent to

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<sup>255</sup> 905 F. Supp. 792, 802–03 (E.D. Cal. 1995).

<sup>256</sup> It was probably inadvertence or a drafting error, because the preclusive effect of state actions was an addition to the amendment made at the last minute in the Conference Committee. *See id.*; *see also supra* Part II.A.2.

<sup>257</sup> 905 F. Supp. at 802 n.10.

<sup>258</sup> *Sierra Club*, 23 F. Supp. 2d at 1182.

<sup>259</sup> *See infra* Part II.A.3.e.

strengthen EPA's enforcement authorities and not to weaken citizen enforcement.<sup>260</sup> A similar omission in subsection 309(g)(7) does additional damage. It provides that EPA penalty assessments do not affect the violator's obligation to comply with the CWA. If it is interpreted by giving meaning to the paragraph's failure to mention state penalty assessments, the subsection may mean state penalty assessments could affect a violator's obligation to comply with the CWA. Indeed, a literal reading of paragraphs (g)(6) and (7) leads to surprising results. Commencement and diligent prosecution by EPA of a subsection 309(g) penalty has the following consequences: (1) EPA may not seek penalties under other CWA authorities; (2) citizens may not seek penalties in citizen suits, unless they commenced their action within the prescribed times; and (3) violators paying penalties must still comply with the CWA. Commencement and diligent prosecution by a state of a penalty under state law comparable to subsection 309(g) would have the following consequences: (1) EPA may not seek penalties under subsection 309(d), but it may under subsection 309(g); (2) citizens may not seek penalties in citizen suits, even though they filed the suits long before the state commenced its penalty action; and (3) violators paying state penalties may no longer be obligated to comply with the CWA.

The end result is that a violator who would have to spend millions of dollars to comply may be able to insulate itself from compliance or any significant penalty by paying a minimal administrative penalty to the state under comparable administrative penalty authority. This is an absurd result that undermines implementation and enforcement of the CWA. It turns a provision that Congress intended to increase EPA's enforcement abilities and to increase the number of EPA enforcement actions into a provision that makes EPA a distinctly secondary enforcer.

An examination of the legislative history of the provision demonstrates that Congress did not intend these results and that they were inadvertent, resulting from last-minute redrafting of the provision to include comparable state actions in the preclusion device.<sup>261</sup> The results are absurd, and

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<sup>260</sup> "Citizen suits are a proven enforcement tool. They operate as Congress intended—to both spur and supplement government enforcement actions. They have deterred violators and achieved significant compliance gains." S. REP. NO. 99-50, at 28 (1985); *see also supra* Part II.A.2 (discussing the legislative history of CWA subsection 309(g)).

<sup>261</sup> The Senate bill contained essentially the same language as subsection 309(g)(6)(A), but it included no reference to state penalty assessments under comparable state law. S. REP. NO. 99-50, at 101-02 (1985). The House bill provided essentially the language of subsection 309(g)(6)(A)(ii), with no reference to section 505, but would have amended section 505 to bar citizen suits if EPA or a state "has commenced and is diligently pursuing the assessment of a civil penalty under section 309(g) of this Act." H.R. REP. NO. 99-189, at 91, 103 (1985).

Moreover, the Senate bill contained nearly the same language as subsection 309(g)(6)(B). S. REP. NO. 99-50, at 101-102 (1985). The House bill did not, but it included a provision to the effect that EPA was not authorized to assess a subsection 309(g) penalty if the state had already assessed an "appropriate" penalty. H.R. REP. NO. 99-189, at 103 (1985). The

the statute should be interpreted to avoid them.<sup>262</sup> The easiest way to avoid those absurd results is to interpret the remainder of subsection 309(g) preclusions in accordance with their plain meaning—not to interpret them to bar injunctive actions for compliance instead of just actions for penalties.<sup>263</sup> Congress should amend subsection 309(g) to eliminate this and the other anomalies in the provision discussed in this Article.

Whether a government penalty proceeding bars a successive action depends on when the government “has commenced” the action and whether it is diligently prosecuting it. Subsection 309(g) does not define “has commenced.” It does, however, require EPA to notify both the violator and the public of proposed penalty assessment orders and offer them the opportunity to comment and request a hearing prior to issuing the penalty assessment order.<sup>264</sup> EPA has promulgated regulations establishing procedures for penalty assessments, including filing an administrative complaint.<sup>265</sup> Part One of this Article concluded that EPA “commences” an administrative penalty proceeding when it files an administrative complaint with the Regional Hearing Clerk pursuant to the agency’s Consolidated Rules of Practice.<sup>266</sup> When does a state commence its penalty assessment proceeding? States are not bound to follow EPA’s procedural regulations to have comparable penalty assessment authorities. They are, however, required to have comparable authorities, including comparable penalty assessment procedures.<sup>267</sup> Therefore, a state commences its proceedings by a preliminary filing giving notice of the agency’s intent to issue a penalty assessment order. Exactly what the filing is will depend on the particulars of the state’s procedures.

Some courts have held that the issuance of a negotiated consent order commences a state proceeding.<sup>268</sup> Their conclusions are erroneous for several reasons. First, the “has commenced” language is found in section

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House bill also incorporated language that was virtually identical to subsection 309(g)(7). H.R. REP. NO. 99-189, at 103 (1985). Thus, the Senate bill addressed duplicative penalties by EPA and citizens, but not by states and EPA or citizens. The House bill addressed duplicative penalties by EPA and states, but not between citizens and EPA or states. The Conference Committee attempted to combine the two by adding references to state penalty actions in subsection 309(g)(6)(B) and (7). The execution, however, was less than precise.

<sup>262</sup> *Green v. Bock Laundry Mach. Co.*, 490 U.S. 527 (1989) (Scalia, J., concurring).

<sup>263</sup> See *infra* Part II.A.3.e.

<sup>264</sup> CWA § 309(g)(2), (4), 33 U.S.C. § 1319(g)(2), (4) (2000).

<sup>265</sup> See 40 C.F.R. §§ 22.1–.30 (2003).

<sup>266</sup> See Miller, *supra* note 1, at 452–56.

<sup>267</sup> Congress specified penalty assessment procedures, public participation procedures and judicial review procedures to prevent EPA from abusing subsection 309(g) authority by assessing small penalties for continuing, serious violations rather than seeking compliance injunctions and serious penalties. This concern and the specifics of the procedures are strong “evidence that Congress intended courts to consider all three classes of provisions when deciding whether state law is ‘comparable.’ . . .” *McAbee v. Fort Payne*, 318 F.3d 1248, 1254 (11th Cir. 2003).

<sup>268</sup> See, e.g., *McAbee*, 318 F.3d at 1251 n.6; *Ark. Wildlife Fed’n v. ICI Americas, Inc.*, 29 F.3d 376, 379–89 (8th Cir. 1994).

309(g)(6)(A)(i) & (ii), where it is followed by “and is diligently prosecuting.” “Is diligently prosecuting” is in the present tense, indicating the proceeding must be ongoing, not concluded for clauses (i) or (ii) to apply.<sup>269</sup> This is emphasized by subsection 309(g)(6)(A)(iii), using the past tense “has issued a final order” and “has paid a penalty,” indicating the proceeding must be concluded and the defendant must have paid the penalty for clause (iii) to apply, and the defendant must have paid the penalty for the clause to apply. If the negotiated consent order is a penalty assessment order and the violator has paid the penalty, there is nothing for the government to do to diligently prosecute the order. If the negotiated consent order is a compliance or other non-penalty order, there may be much for the government to do to diligently prosecute it, but that is not the sort of order that bars successive prosecution under subsection 309(g), as recognized by other courts.<sup>270</sup>

*d. How Diligently Must the Government Prosecute a CWA  
Subsection 309(g) Action To Bar a Successive EPA or Citizen  
Penalty Action?*

The mere initiation of an applicable enforcement action within the timing restrictions is not sufficient to preclude subsequent enforcement. Instead, the enforcer must continue to diligently prosecute the violation. The analysis of the meaning of diligent prosecution is slightly different for CWA subsection 309(g)(6) than in the preclusions in the citizen suit sections, but in both, the tense of the provision affects interpretation. Paragraph 309(g)(6) provides a bar in (i) and (ii) if EPA or the state “has commenced and is diligently prosecuting” an administrative penalty action and in (iii) if either regulator “has issued” a final order and the violator “has paid” a penalty. The same “has commenced” and “diligently prosecuting” test in the citizen suit preclusions applies only to ongoing prosecutions, for “diligently prosecuting” is in the present tense. Its present tense meaning in the citizen suit provisions is emphasized by its close juxtaposition to the past tense “has commenced.”<sup>271</sup> The legislative distinction between tenses is even more pronounced in the subsection 309(g) preclusion. Not only does it juxtapose the past and present tenses in “has commenced and is diligently prosecuting” in (i) and (ii), it also juxtaposes the present and past tenses in (i) and (ii) with the exclusively past

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<sup>269</sup> See Miller, *supra* note 1, at 457–63.

<sup>270</sup> *McAbee*, 318 F.3d at 1256 (holding that a state order was not “comparable” to federal CWA, and thus did not bar the successive action); *Wash. Pub. Interest Research Group v. Pendleton Woolen Mills*, 11 F.3d 883, 886–87 (9th Cir. 1993) (holding that an EPA compliance order did not bar successive suits); *Old Timer v. Blackhawk-Central City Sanitation Dist.*, 51 F. Supp. 2d 1109, 1114 (D. Colo. 1999) (holding that an EPA compliance order did not bar successive suits).

<sup>271</sup> Miller, *supra* note 1, at 457–63.

tense in (iii). The fact that Congress distinguished between the tenses in both CWA subsection 309(g) and section 505 reinforces that it did so deliberately and intended the resultant meaning in both of them. That Congress intended its use of different tenses in section 505 to have meaning was the Court's primary reason for its holding in *Gwaltney*.<sup>272</sup> That reasoning applies doubly here. Thus, diligent prosecution is not a requirement for the bar under (iii) when a penalty has been finally assessed and paid, but is required in (i) and (ii), when prosecutions by EPA and states are still ongoing. This is consistent with the notion that diligent prosecution reflects the effort put into the prosecution rather than the results achieved.<sup>273</sup>

Diligent prosecution in the context of the citizen suit provisions meant that the action commenced was capable of and calculated to require compliance and was being prosecuted with sufficient energy and vigor to be reasonably capable of securing compliance.<sup>274</sup> That flowed from the wording of the phrase "diligently prosecuting a civil action in a court . . . to require compliance."<sup>275</sup> Subsection 309(g), on the other hand, does not condition the preclusion on the government action requiring compliance. This concept has no bearing on the diligent prosecution requirement in subsection 309(g) because it is such a limited remedy. It authorizes no action to require compliance, instead authorizing such small penalties that they can deter only the least serious violations. This reinforces the conclusion that "diligently prosecuting" has nothing to do with the amounts of penalties assessed.<sup>276</sup> Subparagraph (iii), dealing specifically with penalties that have been assessed and paid, does not suggest that the amounts are relevant to whether the preclusion applies.<sup>277</sup> Further, if the penalty amounts ultimately paid are not relevant to the preclusion, it is not relevant that the government prosecutes the assessment procedures with sufficient energy and vigor to be reasonably capable of securing a penalty with strong deterrent value. Instead, the context suggests that "diligently prosecuting" in subsection 309(g) is intended only to prevent the government from initiating a penalty action and thereafter sitting on its hands while barring EPA and citizen penalty actions indefinitely.

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<sup>272</sup> *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 57 (1987); see also *id.*

<sup>273</sup> "Diligent" is defined as "characterized by steady, earnest, and energetic application and effort." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 223 (1983).

<sup>274</sup> Miller, *supra* note 1, at 463-73.

<sup>275</sup> CWA § 505(b)(1)(B), 33 U.S.C. § 1365(b)(1)(B) (2000) (emphasis added).

<sup>276</sup> *But see* *Altamaha Riverkeepers v. City of Cochran*, 162 F. Supp. 2d 1368, 1373 n.5 (M.D. Ga. 2001) (noting that the state had assessed a \$5,000 penalty for continuing violations and commenting that "[s]uch leniency hardly qualifies as 'diligent prosecution.'").

<sup>277</sup> If citizens wish to protest the inadequacy of EPA assessed penalties, they may seek judicial review alleging the penalty amount is an abuse of discretion and ask the reviewing court to assess additional penalties. 33 U.S.C. § 1319(g)(8) (2000).



Courts have addressed whether prosecutions were diligent under subsection 309(g) only because they reached the issue after making initial interpretive errors on the applicability of the subsection 309(g) bar. Rather than adhering to the language of subsection 309(g), these courts assessed the diligent prosecution of state actions other than penalty assessments under state law comparable to subsection 309(g).<sup>278</sup> They also considered the diligence of the results of government actions that were completed rather than ongoing prosecutions.<sup>279</sup> Furthermore, they examined the diligence of state actions in connection with EPA and citizen actions not seeking penalties for the same violations covered by the state actions.<sup>280</sup> These errors in interpretation are a far more serious detriment to effective EPA and citizen enforcement than the courts' failure to recognize that diligence in prosecution is a measure of the energy the state puts into its administrative penalty assessment proceedings rather than the results it achieves by its action. Examining the docket of an ongoing civil judicial action in comparison with the dockets of typical civil judicial actions in the jurisdiction is a reasonable way to examine the diligence of the prosecution of the action.<sup>281</sup> The same exercise should suffice for assessing the diligence of a state's prosecution of its penalty assessment. After all, the purpose of requiring diligent prosecution here is only to prevent the government from initiating a penalty action and then not prosecuting it, thus forever barring a penalty action by another party.

*e. When Congress Provides that a Government Penalty Action May Bar a Successive EPA or Citizen Penalty Action Against the Same Violation, May the Government Action Bar Successive EPA or Citizen Actions Against Other Violations?*

From time to time, violators attempt to invoke past enforcement actions to preclude subsequent enforcement against different violations, raising the question of whether government action may bar successive EPA or citizen actions against other violations. Government actions preclude citizen actions only for the common violations they address.<sup>282</sup> This issue recurs in CWA subsection 309(g). CWA subsection 309(g)(6)(A) provides

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<sup>278</sup> See, e.g., *N. & S. Rivers Watershed Ass'n v. Town of Scituate*, 949 F.2d 552 (1st Cir. 1991) (involving a compliance order); *Williams Pipeline Co. v. Bayer Corp.*, 964 F. Supp. 1300 (S.D. Iowa 1997) (involving an informal action); *Atl. States Legal Found. v. Tyson Foods*, 682 F. Supp. 1186 (N.D. Ala. 1988) (involving a compliance order); see *supra* Part II.A.3.b.

<sup>279</sup> See, e.g., *Scituate*, 949 F.2d at 552; *Cmty. of Cambridge Env'tl. Health v. City of Cambridge*, 115 F. Supp. 2d 550 (D. Md. 2000); *Atl. States Legal Found.*, 682 F. Supp. at 1186.

<sup>280</sup> See, e.g., *Cmty. of Cambridge Env'tl. Health*, 115 F. Supp. 2d at 550; *Atl. States Legal Found.*, 682 F. Supp. at 1186; see *infra* Part II.A.3.e.

<sup>281</sup> See Miller, *supra* note 1, at 464–65.

<sup>282</sup> See *id.* at 473–78.

that “any violation” for which EPA or a state is assessing or has assessed and collected a penalty “shall not be the subject of a *civil penalty* action” under sections 309(d), 311, or 505.<sup>283</sup> Thus, a plain reading of the provision indicates it imposes two conditions on the preclusion. First, subsection 309(g)(6)(A) precludes EPA and citizen actions only to the extent that they address violations for which the state is assessing or has assessed a penalty. As a result, it applies to the penalties assessed against any *violation*, not against any *violator*. Second, the provision only precludes EPA and citizen actions for penalties, as opposed to other actions.

The plain reading of the provision is supported by the *expressio unius* canon of statutory construction.<sup>284</sup> To say that EPA and citizens are precluded from maintaining actions for “any violation” subject to a government administrative penalty action means they are not precluded from maintaining actions for violations not subject to government administrative penalty actions. Similarly, to preclude EPA and citizens from maintaining penalty actions implies they are not precluded from prosecuting compliance actions. This latter point is reinforced by SDWA subsection 1423(c)(5),<sup>285</sup> the parallel provision to CWA subsection 309(g). In SDWA subsection 1423(c)(5), Congress provided that when EPA assesses an administrative penalty, the defendant “shall not be subject to an action” by EPA or citizens under other enforcement provisions of the statute.<sup>286</sup> Congress knew how to preclude all successive actions when EPA assessed an administrative penalty; Congress was clear about when it intended preclude such actions and when it did not in CWA subsection 309(g).

The legislative history indicates that Congress intended this plain meaning of the statute. The Senate Report explained the provision explicitly in this regard.

This limitation applies only to an action for civil penalties for the same violations which are the subject of the administrative civil penalties proceeding. It would not apply to an action for civil penalties for a violation of the same requirement of the Act that is not being addressed administratively or for a past violation of another pollutant parameter . . . . In addition, this limitation

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<sup>283</sup> 33 U.S.C. §§ 1319(d), 1321, 1365 (2000) (emphasis added). The CWA citizen suit provision, subsection 505(a), provides that citizens may not commence suits against violations of the CWA “[e]xcept as provided in . . . subsection 309(g).” The section 505 preclusion does not bar a citizen suit because of an EPA or state administrative penalty proceeding. See Miller, *supra* note 1, at 436–45. It only incorporates whatever preclusion subsection 309(g) imposes.

<sup>284</sup> See ESKRIDGE, *supra* note 134, at 323.

<sup>285</sup> 42 U.S.C. § 300h-2(c)(5) (2000).

<sup>286</sup> *Id.*

would not apply to: 1) an action seeking relief other than civil penalties (e.g., an injunction or declaratory judgment) . . . .<sup>287</sup>

The House Conference Report repeats this set of limitations on the subsection 309(g) bar almost verbatim.<sup>288</sup>

Determining the scope of the preclusion raises several issues. The most obvious is whether a government penalty action against violations on particular dates may bar a successive action for violations of the same requirement on subsequent dates. The plain reading of the provision and its legislative history indicate that the government action should not preclude a successive enforcement action in such a situation. It is no surprise that when a state assessed and concluded a penalty action, collecting a penalty for violations occurring two years prior to the commencement of a citizen suit, a court held that the state action did not bar a citizen suit for violations subsequent to the state action.<sup>289</sup> A contrary ruling would allow violators to continue their violations forever without further penalty, just by paying the state for a one-day violation.

In a variant of this issue, another court held that a citizen suit against a violation of requirements relating to pollutant A was not precluded by a government action against a violation of requirements relating to pollutant B, although remedial actions to be taken to bring pollutant B into compliance should also bring pollutant A into compliance.<sup>290</sup> It so held because the two actions were not against the same violations and the government's action was injunctive in nature and application of the preclusion "would effectively insulate Defendant Plant from *any* civil liability for its allegedly impermissible and repeated lead discharges."<sup>291</sup> Some courts have held that when a state issues an administrative order against a violation, subsection 309(g) bars citizen actions against future violations, although they are based on the false predicate that subsection 309(g) will bar citizen suits when states issue compliance orders.<sup>292</sup> Subsection 309(g), however, does not address the effect of compliance orders and many of the citizen suit preclusion devices do not either.<sup>293</sup>

The plain reading of subsection 309(g) and its legislative history also indicate that a government penalty action does not bar a citizen suit for

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<sup>287</sup> S. REP. NO. 99-50, at 28 (1985).

<sup>288</sup> H.R. CONF. REP. NO. 99-1004, at 133 (1986).

<sup>289</sup> *N. Cal. River Watch v. Sonoma County Water Agency*, No. C 97-4263, 1998 WL 886645, at \*4 (N.D. Cal. Dec. 16, 1998); *see also Conn. Fund for the Env't v. Acme Electro-Plating, Inc.*, 822 F. Supp. 57 (D. Conn. 1993); *Knee Deep Cattle Co. v. Bindana Inv. Co.*, 94 F.3d 514 (9th Cir. 1996).

<sup>290</sup> *Atl. States Legal Found. v. Montgomery County N. Reduction Plant*, No. C-3-95-156, 1996 WL 1670982 (S.D. Ohio Mar. 11, 1996).

<sup>291</sup> *Id.* at \*6.

<sup>292</sup> *Lockett v. EPA*, 319 F.3d 678, 689-90 (5th Cir. 2003).

<sup>293</sup> *E.g.*, CWA § 505, 33 U.S.C. § 1365 (2000); *see also Miller, supra* note 1, at 436-43.

an injunction requiring compliance. Yet in *North and South Rivers Watershed Assn., Inc. v. Town of Scituate*,<sup>294</sup> the court held that the preclusion barred citizen suits for injunctions as well as for civil penalties. The court reasoned that section 505 does not differentiate among remedies, but “simply provides civilians with a general grant of jurisdiction for all remedies available.”<sup>295</sup> It noted that the Court in *Gwaltney* had commented that the provision for civil penalties and injunctions were in the same sentence in section 505, but in different subsections in section 309, thus suggesting a relation between the two remedies in section 505 that was absent in section 309.<sup>296</sup> From this and the Court’s characterization of citizen suits in *Gwaltney* as supplemental, the First Circuit concluded that the “309(g) bar extends to *all* citizen actions brought under section 505, not merely civil penalties.”<sup>297</sup> It labeled a contrary result “absurd,” because it would defer to “the primary enforcement responsibility of the government only where a penalty is sought in a civilian action, as if the policy considerations limiting civilian suits were only applicable within that context.”<sup>298</sup>

The Court’s rejection of the clear statutory language of subsection 309(g) that bars only civil penalty actions is a high-water mark in the Court’s substitution of its policy judgment for legislative policy judgment. This substitution is harmful in its own right, and moreover, the Court’s policy judgment is flawed. While it may be rational to bar a citizen suit for a penalty after the state has assessed an administrative penalty under a state law comparable to subsection 309(g), it is not rational to bar a suit for an injunction because the state has assessed such a penalty. An administrative penalty with an upper limit of \$125,000 will not deter a serious violation of a legal obligation that would require the expenditure of millions of dollars. If EPA and citizens cannot seek an injunction after a state has assessed a small penalty in such a situation, compliance with the statute will have been subverted. Under the *Scituate* rationale, the state can insulate a violator from compliance with the statute by assessing a small administrative penalty. Contrary to the *Scituate* court’s opinion, that policy and result is absurd. Nevertheless, some courts have followed *Scituate* in this holding.<sup>299</sup>

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<sup>294</sup> 949 F.2d 552 (1st Cir. 1991).

<sup>295</sup> *Id.* at 557–58 (citing *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 58 (1987)).

<sup>296</sup> *Id.* at 557–58 (citing *Gwaltney*, 484 U.S. at 58). This might enable the First Circuit to conclude the provision would not block an EPA request for an injunction, while it would block a citizen request for one. As discussed in the text, however, the provision does not block either EPA or citizens from seeking an injunction to require compliance.

<sup>297</sup> *Id.* at 558.

<sup>298</sup> *Id.*

<sup>299</sup> *Knee Deep Cattle Co. v. Bindana Investment Co.*, 904 F. Supp. 1177 (D. Or. 1995), *rev’d*, 94 F.3d 514 (9th Cir. 1996), followed *Scituate* without elaboration. The Eighth Circuit rejected some of the First Circuit’s reasoning but came to the same conclusion in *Arkansas Wildlife Federation v. ICI Americas, Inc.*, 29 F.3d 376 (8th Cir. 1994). It commented that the opposite result was not absurd, although it was “undesirable” because it

The first decision rejecting the reasoning and results of *Scituate* was *Coalition for a Livable West Side, Inc. v. New York City Department of Environmental Protection*.<sup>300</sup> There the court found “no basis for the First Circuit’s redrafting of the statute” because “[t]he language of § [309](g)(6) is clear and unambiguous,” and creates a “bar [that] applies only to *civil penalty* actions.”<sup>301</sup> It found such partial bar supported by the policy underlying the preclusion device: preventing duplicative penalties for the same violation while authorizing compliance injunctions against violations that continued despite the assessment of penalties. Moreover, it found the fear of defendants being “whipsawed” between government and citizen enforcement actions to be unfounded, for trial courts have sufficient authority to prevent that result, including the authority to stay citizen actions. It noted that federal courts in citizen suits should treat with deference injunctive relief already granted by state courts.<sup>302</sup> That deference is not owed, however, where the state has only assessed a relatively small administrative penalty. Most courts outside the First and Eighth Circuits reject the reasoning and results of *Scituate*.<sup>303</sup>

The *Scituate* approach ignores the underlying reason the CWA provided three sets of enforcers. Previous water pollution control legislation

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“could result in undue interference with, or unnecessary duplication of, the legitimate efforts of the state agency.” *Id.* at 383. *Lockett v. EPA*, 176 F. Supp. 2d 628, 636 (E.D. La. 2001), followed *ICI Americas* without elaboration.

<sup>300</sup> 830 F. Supp. 194 (S.D.N.Y. 1993).

<sup>301</sup> *Id.* at 197.

<sup>302</sup> *Id.*

<sup>303</sup> See *PMC, Inc. v. Sherwin Williams Co.*, 151 F.3d 610, 619 (7th Cir. 1998) (Posner, J.) (“Although broad reading of ‘actions’ would be consistent with Congress’s evident desire that citizens’ suits supplement rather than displace state enforcement, we do not consider the argument strong enough to override the statutory text, especially when we consider the interminable character of much administrative process.”); *Atl. States Legal Found. v. Hamelin*, 182 F. Supp. 2d 235 (N.D.N.Y. 2001); *Kara Holding Corp. v. Getty Petroleum Mktg., Inc.*, 69 F. Supp. 2d 302, 308 (S.D.N.Y. 1999); *Sierra Club v. Hyundai Am., Inc.*, 23 F. Supp. 2d 1177, 1179 (D. Or. 1997); *United States v. Smithfield Foods, Inc.*, 965 F. Supp. 769, 791 (E.D. Va. 1997), *aff’d in part, rev’d in part on other grounds*, 191 F.3d 516, 525 (4th Cir. 1999); *Atl. States Legal Found. v. Montgomery County N. Reduction Plant*, No. C-3-95-156, 1996 WL 1670982, at \*6 (S.D. Ohio Mar. 11, 1996); *N.Y. Coastal Fishermen’s Ass’n v. N.Y. City Dep’t of Sanitation*, 772 F. Supp. 162 (S.D.N.Y. 1991); *Orange Env’t, Inc. v. County of Orange*, 860 F. Supp. 1003 (S.D.N.Y. 1994). These cases followed *Livable West Side* without elaboration. The court in *California Sportfishing Protection Alliance v. City of West Sacramento* followed the reasoning of *Livable West Side*, finding the language to be “unambiguous that only civil penalty actions are barred.” 905 F. Supp. 790, 806 (E.D. Cal. 1995). Although it acknowledged some strength in the logic of *Scituate*, it found such reasoning “perilous” when “dealing with a statute so complex as the Clean Water Act which has within it so many cross currents.” *Id.* at 806. These complex “cross currents” run throughout section 505. See Miller, *supra* note 1, at 445–49; *Sierra Club v. Hyundai Am., Inc.*, 23 F. Supp. 2d (D. Or. 1997); *Friends of Santa Fe County v. LAC Minerals, Inc.*, 892 F. Supp. 1333 (D.N.M. 1995). In *Friends of Santa Fe*, the court found the subsection 309(g) bar simply to prevent duplicative penalties for the same violation: “many courts wish to read more into the citizen suit bar of this subsection than exists. Although their desire is well-founded and their policy goals are laudable, their vision cannot be reconciled with the literal terms of the statute.” 892 F. Supp. at 1347.

was ineffective, in part because it was not well enforced.<sup>304</sup> It is more likely to be effectively enforced with three rather than only one or two enforcers. This is particularly true where the government's enforcement response is a small subsection 309(g) administrative penalty of up to only \$125,000. In the context of violations that cost far more to correct, this has little or no deterrent value; if significant violators can be insulated from compliance by paying traffic ticket penalties to state officials, enforcement of and compliance with the CWA are thwarted. This was not Congress's purpose in enacting subsection 309(g).

*B. Enforcement Provisions Requiring Prior Notice to the State and Barring Federal Action if the State Commences "Appropriate" Action*

The foregoing analysis shows subsection 309(g) to be a complex preclusion containing a strict limitation based on each of the three elements commonly used by Congress to preclude subsequent enforcement by EPA and citizens. Other preclusions against EPA enforcement use each of the three elements or a subset of them. This Section discusses preclusions in several statutes that incorporate each of the notice, delay and bar elements and analyzes legal issues that arise under these provisions.

The EPA enforcement provisions in the SDWA, FIFRA and CWA all include preclusion devices under which EPA may enforce only after giving the state notice, waiting thirty days, and determining that the state has not taken "appropriate" enforcement action. These versions of the preclusion device incorporate all three of its elements, in virtually the same form found in most of the citizen suit provisions.

The SDWA provisions are the most restrictive on subsequent EPA enforcement. The SDWA has two primary regulatory programs: drinking water standards for public water supplies and permits for underground injection of wastes and other materials. Both programs may be administered either by EPA or by states with programs approved by EPA as meeting statutory criteria. EPA may enforce against violations of either drinking water standards or underground injection requirements without restriction in states lacking approved programs.<sup>305</sup> But in states with approved programs, it must first notify the state and the violator and, for drinking water standards violations, provide advice and technical assistance to them. Under either program, if the state has not "commenced appropriate enforcement action" after thirty days, EPA may itself commence an administrative or civil action for compliance and penalties.<sup>306</sup>

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<sup>304</sup> See Miller, *supra* note 1, at 407 n.22.

<sup>305</sup> SDWA §§ 1414(a)(2), 1423(a)(2), 42 U.S.C. §§ 300g-3(a)(2), 300h-2(a)(2) (2000). Subsection 1414(a)(2)(B) requires EPA to give prior notice to the local elected official responsible for the water supply system. 42 U.S.C. § 300g-3(a)(2)(B).

<sup>306</sup> SDWA §§ 1414(a)(1), 1423(a)(1), 42 U.S.C. §§ 300g-3(a)(1), 300h-2(a)(1). For drinking water standards violations, if the state in which the violation occurs has an ap-

FIFRA, by contrast, authorizes EPA as the sole regulator of pesticide manufacture and sale, but contemplates enforcement against violations of pesticide use regulations by either EPA or states with EPA-approved programs or cooperative agreements with EPA.<sup>307</sup> There are no restrictions on EPA enforcement of the federal manufacture and sale provisions. Nor are there restrictions on EPA enforcement of the use requirements in states lacking approved use programs or cooperative agreements. But in states with approved use enforcement programs or cooperative agreements, EPA may not enforce against use violations without “referring” the violation to the state, providing the state thirty days to act, and finding the state has not commenced “appropriate enforcement action.”<sup>308</sup> These restrictions do not operate during emergency conditions requiring immediate action.<sup>309</sup>

CWA subsection 309(a) provides EPA a choice when enforcing in a state with an approved permit program: It may proceed (1) under subsection 309(a)(3), requiring it only to provide the state with copies of its enforcement documents,<sup>310</sup> or (2) under subsection 309(a)(1), which requires EPA first to give a notice of violation to the state and the violator, wait thirty days, and then proceed only if the state has not commenced “appropriate enforcement action.”<sup>311</sup> This is not much of a burden on EPA; it may always choose to enforce under subsection 309(a)(3), unencumbered by the notice, delay and bar preclusion, but if it does give the state and violator a notice of violation, it chooses the notice, delay and bar route and is bound by the requirements of section 309(a)(1). Of course, EPA could also give the state informal prior notice of its intent to proceed under subsection 309(a)(3) and not give the violator prior notice, doubly indicating that it is not proceeding under subsection 309(a)(1). This procedure has the advantage of giving the state the courtesy of notice without invoking the potential preclusion of subsection 309(a)(1).

It might be argued that subsection 309(a)(3) is a drafting error and should be interpreted to include the notice and delay provisions of subsection 309(a)(1), but subsection 309(a)(3) would be redundant if it did not authorize EPA to enforce without prior notice to the state. Where possible, statutes should be interpreted to avoid rendering portions of them su-

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proved program, EPA must provide the state a copy of the order issued by EPA, and the order does not become effective until EPA has afforded the state an opportunity to confer.

<sup>307</sup> FIFRA § 26, 7 U.S.C. § 136w-1 (2000). Pesticide use must comply with directions on pesticide labels approved by EPA in the course of registering the pesticide.

<sup>308</sup> FIFRA § 27(a), 7 U.S.C. § 136w-2(a) (2000).

<sup>309</sup> FIFRA § 26(c), 7 U.S.C. § 136w-2(c) (2000). FIFRA does not contain a provision comparable to those in CAA section 303, CWA section 504, and SDWA section 1431, allowing EPA to take action to abate an imminent and substantial endangerment without prior notice to the state and without a violation of the statute. EPA's authorization in FIFRA subsection 27(a) to act without prior notice to the state, when EPA enforces against violations of the statute creating emergency conditions, in part makes up for FIFRA's lack of emergency authority.

<sup>310</sup> CWA § 309(a)(3)–(4), 33 U.S.C. § 1319(a)(3)–(4) (2000).

<sup>311</sup> CWA § 309(a)(1), 33 U.S.C. § 1319(a)(1).

perfluous.<sup>312</sup> Moreover, the legislative history demonstrates that this result is exactly what Congress intended. The Committee report accompanying the House CWA bill, for instance, lists four enforcement authorities the bill gave EPA, including both EPA's authority to issue administrative compliance orders without the preclusion device and its authority to issue such orders with the preclusion device.<sup>313</sup> More pointedly, EPA's comments to Congress on the proposed subsection 309(a)(3) indicated that the subsection might be a drafting error and should be amended to make it subject to the notice and delay requirements of subsection 309(a)(1).<sup>314</sup> Congress ignored the suggestion.

These preclusions on EPA enforcement are almost identical to the notice, delay and bar preclusions Congress typically placed in citizen suit provisions.<sup>315</sup> One difference is that the EPA delay period is shorter, thirty days, rather than the sixty-day delay period common in citizen suit provisions. The legislative history does not explain the reason for this difference. Perhaps more importantly, the bar on EPA action is activated by an "appropriate state enforcement action," while the bar on citizen action is usually activated by commencement and "diligent prosecution" of specific types of enforcement actions "to seek compliance." Again, the legislative history provides no explanation for the difference.

These preclusions on EPA enforcement action raise several legal issues. Is an EPA enforcement action invalid without the required prior notice and delay? When is a state action "commenced"? What is a state enforcement action? What is an "appropriate" state enforcement action? While there are few reported decisions on these issues in the EPA preclusions except for in the context of CWA subsection 309(g), decisions on identical issues in the citizen suit preclusions address all of the issues.<sup>316</sup> Because these EPA preclusion devices are virtually identical to the preclusion devices in the citizen suit sections, they should be interpreted in the same way.<sup>317</sup>

With regard to whether an EPA enforcement action is invalid without the required prior notice and delay, the Court has held that the preclusion device in citizen suit provisions bars citizen actions unless plaintiffs have

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<sup>312</sup> See *ESKRIDGE*, *supra* note 134, at 324 (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>313</sup> H. REP. NO. 92-911, at 114-15 (1972), *reprinted in* CWA LEGISLATIVE HISTORY, *supra* note 40, at 801-02.

<sup>314</sup> *Id.* at 160, *reprinted in* CWA LEGISLATIVE HISTORY, *supra* note 40, at 847.

<sup>315</sup> See *Miller*, *supra* note 1, at 449-52; *supra* Part I.B.

<sup>316</sup> See *Miller*, *supra* note 1.

<sup>317</sup> There is one significant difference regarding the notice required in the citizen and EPA enforcement preclusion devices. The citizen suit preclusion devices typically require citizens to give notice "in such manner as the Administrator shall prescribe by regulation." *E.g.*, CWA § 505(b), 33 U.S.C. § 1365(b) (2000). EPA has promulgated rather detailed regulations. See 40 C.F.R. Parts 54, 135, 254, 374 (2003). The EPA enforcement sections contain no such requirements.



complied with the required notice and delay period.<sup>318</sup> The Court did not go so far as to hold that the notice was a jurisdictional prerequisite to suit, but held that a citizen suit must be dismissed absent proper notice and delay. This leaves open a multitude of questions regarding the effects of technical deficiencies in notices, and courts are split on whether technical deficiencies will defeat an enforcement action.<sup>319</sup> Both the Court's holding and remaining questions regarding the effect of technical deficiencies with notices in the citizen suit preclusion device apply to the preclusion device in EPA enforcement provisions.<sup>320</sup> They are reinforced by cases holding that the notice and delay elements in the EPA enforcement provisions are mandatory, even when their preclusion devices lack the bar element.<sup>321</sup>

Discussing when a state action is "commenced" virtually all the reported decisions in citizen suit cases hold that state actions barring citizen suits are "commenced" by formal initiation of the action, such as the filing of a complaint with a court or administrative tribunal,<sup>322</sup> noting that Federal Rule of Civil Procedure 3 provides that a civil action is commenced by filing a complaint in court.<sup>323</sup> Because these decisions interpret the same word, in the same statute, in the same context and in different versions of the same preclusion device, the interpretation should apply to the preclusions on EPA enforcement as well.<sup>324</sup>

The third issue is which state enforcement actions may bar a federal action. The structures of the statutes are of some help here, as is precedent from an analogous question under the citizen suit statutes. In all three statutes, the state "enforcement action" language appears in sections providing EPA specific enforcement authorities and entitled, in whole or in part, "enforcement."<sup>325</sup> Because "enforcement" is used in the same sections to refer to both EPA and state actions, the word should have the same meanings, whether the enforcer is a state or federal entity.<sup>326</sup> Those provisions which indicate exactly what Congress meant by federal enforcement: the exercise of the particular enforcement mechanisms Congress conferred

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<sup>318</sup> *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989).

<sup>319</sup> See Robin Kundis Craig, *Notice Letters and Notice Pleadings: The Federal Rules of Civil Procedure and the Sufficiency of Environmental Citizen Suit Notice*, 78 OR. L. REV. 105 (1999).

<sup>320</sup> See *supra* note 317.

<sup>321</sup> See *infra* Part II.C.; *infra* note 350.

<sup>322</sup> See *Miller*, *supra* note 1, at 452–56.

<sup>323</sup> *Clorox Corp. v. Chromium Corp.*, 158 F.R.D. 120, 125 (N.D. Ill. 1994).

<sup>324</sup> The same or similar terms in a statute should be interpreted in the same way. See *ESKRIDGE*, *supra* note 134, at 324 (citing *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) and *United Savings Ass'n of Tex. v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365 (1988)).

<sup>325</sup> CWA § 309, 33 U.S.C. § 1319 (2000) ("Enforcement"); SDWA § 1414, 42 U.S.C. § 300g-3 (2000) ("Enforcement of drinking water regulations"); FIFRA § 27, 7 U.S.C. § 136w-2 (2000) ("Failure by the State to assure enforcement of State pesticide use requirements.").

<sup>326</sup> See *supra* note 312.

on EPA included ordering compliance, assessing administrative penalties, and seeking civil penalties, injunctive relief and criminal sanctions. This analysis suggests that unless otherwise specified, state enforcement actions may bar EPA enforcement actions only if the state actions are the same types of actions EPA is authorized to take. The preclusion devices in the citizen suit provisions and judicial interpretation of them reinforce this conclusion. Although the citizen suit preclusion devices usually specify the types of government action that will bar citizen suits, they also specify that only action for “compliance” will do so.<sup>327</sup> Only enforcement actions are actions for compliance.

What is an “appropriate” state enforcement action? Here, the structures of the statutes are helpful. In the EPA enforcement provisions, Congress directed EPA to issue orders requiring compliance and gave courts jurisdiction to restrain violations and require compliance.<sup>328</sup> Because EPA enforcement actions seek compliance,<sup>329</sup> a state action is “appropriate” to bar federal action only if the state action seeks and is capable of achieving compliance. The citizen suit provisions bar suit if the government has taken specified actions,<sup>330</sup> often in court, “to require compliance.”<sup>331</sup> The legislative history of the citizen suit preclusions equates an action “appropriate” to bar a citizen suit with an action capable of and calculated to achieve compliance.<sup>332</sup> Indeed, even the Supreme Court emphasized that the provisions “specifically provide that citizen suits are barred only if the Administrator has commenced an action ‘to require compliance.’”<sup>333</sup> Not every state “enforcement” action is capable of or calculated to require compliance. An administrative order to comply may be incapable of achieving compliance when directed at a powerful, recalcitrant industry that has disregarded a series of previous compliance orders. An administrative order requiring an action other than compliance is not calculated to require compliance, nor is an administrative order that appears to require compliance but is really an extension of a compliance date to accommodate the violator. Decisions addressing the issue interpret the requirement that state actions be capable of and calculated to require compliance to bar a citizen suit in accordance with its plain meaning and legislative history.<sup>334</sup>

The remaining question is who must determine if a state action is “appropriate” to bar EPA enforcement. Of necessity, EPA must make the initial determination, because it must decide whether or not to act. Only

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<sup>327</sup> See Miller, *supra* note 1, at 436–45.

<sup>328</sup> E.g., CWA § 309(a)(1), (3), 33 U.S.C. § 1319(a)(1), (3).

<sup>329</sup> In the CWA enforcement provision, for instance, EPA is to issue orders requiring violators “to comply,” and courts are to exercise authority to “restrain” violations and “to require compliance.” CWA § 309(a)(1), (a)(3), (b), 33 U.S.C. § 1319(a)(1), (a)(3), (b).

<sup>330</sup> See Miller, *supra* note 1, at 436–45.

<sup>331</sup> E.g., CWA § 505(b)(1)(B), 33 U.S.C. § 1365(b)(1)(B) (2000).

<sup>332</sup> See Miller, *supra* note 1, at 445–48.

<sup>333</sup> *Gwaltney of Smithfield, Ltd., v. Chesapeake Bay Found.*, 484 U.S. 49, 60 n.7 (1987).

<sup>334</sup> See Miller, *supra* note 1, at 436–45.

later may the defendant ask a court to decide whether EPA made an acceptable determination. That raises the question of whether the court is reviewing EPA's determination or making the determination *de novo*. If it is reviewing EPA's determination, *United States v. Mead Co.*<sup>335</sup> holds that EPA's determination is not entitled to deference following *Chevron U.S.A., Inc. v. Natural Resources Defense Council*,<sup>336</sup> because EPA did not make the determination in a rulemaking or other formal action. Even under *Mead*, however, EPA may be entitled to some deference.<sup>337</sup> Perhaps *Heckler v. Chaney* governs, holding that agency decisions to enforce are entitled to the utmost deference.<sup>338</sup> However, *Heckler v. Chaney* defers to prosecutorial discretion because there is no law generally applicable to when government enforcement is appropriate against a violator.

There are several differences between the situations here and in *Heckler v. Chaney*. First, there are two enforcers here: the question is which of them receives the most deference in federal judicial review. Second, the statute specifies that EPA may enforce if the state does not take "appropriate" enforcement action, meaning an action capable of and calculated to achieve compliance. Third, *Heckler v. Chaney* challenged the agency's decision not to enforce, while this question addresses decisions to enforce. Finally, this may not be a question of judicial review at all. If EPA must allege in its complaint that the state did not take appropriate enforcement action, EPA may have the burden of proof on the issue. This is different from judicial review, although the degree of burden that EPA must bear may be calculated in the same manner as the degree of deference to which its decision would be accorded on judicial review.

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<sup>335</sup> 533 U.S. 218 (2001).

<sup>336</sup> 467 U.S. 837 (1984).

<sup>337</sup> The Court noted:

[t]he fair measure of deference to an agency administering its own statute has been understood to vary with the circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertise, and to the persuasiveness of the agency's position. . . . The approach has produced a spectrum of judicial responses, from great respect at one end, to near indifference at the other.

533 U.S. at 228 (2001) (internal citations omitted). Prior to *Mead*, courts had generally looked to *Chevron* and deferred to an agency's interpretation of a statute it administered if the statute was ambiguous and the agency's interpretation was reasonable. In *Mead*, the Court limited *Chevron* deference, but did not impose bright-line limits. It indicated that *Chevron* deference should be accorded to decisions by agencies acting under "express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or ruling for which deference is claimed." *Id.* at 229. It noted further that most of the agency interpretations to which it had accorded *Chevron* deference were "the fruits of notice-and-comment rulemaking or formal adjudication." *Id.* at 230. EPA decisions that a state action is "appropriate" to bar a deferral action are not such formal actions and hence not subject to *Chevron* deference. But they are subject to some degree of deference, which EPA can enhance by making the determinations with care, transparency, and some degree of formality.

<sup>338</sup> 470 U.S. 821, 831 (1985).

*C. Enforcement Provisions Requiring Prior Notice to the State*

The next most stringent preclusion provisions against EPA enforcement require only one of the three basic preclusion elements. This Section investigates cases in which statutes require only notice before the initiation of subsequent enforcement activity. This type of preclusion is present in the CAA and RCRA, and each statute's provisions will be discussed in turn.

The CAA requires EPA to give the state and the violator notice thirty days before commencing administrative or civil enforcement actions for violations of state implementation plans, but not for other violations.<sup>339</sup> As originally enacted, the CAA provision authorized EPA to enforce only if the violation continued for more than thirty days after the notice.<sup>340</sup> The purpose of the notice, as drawn from the original notice provision itself, was to enable the violator to escape from enforcement by complying within thirty days.<sup>341</sup> The notice requirement was, and still is, followed by a provision authorizing EPA, upon finding a state is generally not enforcing its state implementation plan, to declare a "period of federally assumed enforcement."<sup>342</sup> The only difference between EPA's normal enforcement authority and its authority during a period of federally assumed enforcement is that during the latter it may enforce against violations of state implementation plans without prior notice. The purpose of the notice apparent from the "federally assumed enforcement" provision is to enable the state to enforce rather than to enable violators to come into compliance.<sup>343</sup> The fact that EPA is not required to give the state or the violator prior notice before enforcing federally developed requirements of the CAA reinforces this.<sup>344</sup> This makes policy sense, because state implementation plans are developed by states and are state law, unenforceable federally until federalized by EPA approval. The notice requirement was ill-suited to that purpose of enabling enforcement, however, for it did not bar EPA from enforcement if the state took enforcement action, but only if the violator came into compliance.

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<sup>339</sup> CAA § 113(a)(1), (3), 42 U.S.C. § 7413(a)(1), (3) (2000).

<sup>340</sup> CAA § 113(a)(1), 84 Stat. 1686 (1970) (current version at 42 U.S.C. § 7413(a)(1)).

<sup>341</sup> The current version allows EPA to enforce thirty days following the notice regardless of whether the violation is continuing. Now the violator no longer can escape from enforcement by quick compliance. 42 U.S.C. § 7413(a)(1).

<sup>342</sup> CAA § 113(a)(2), 42 U.S.C. § 7413(a)(2).

<sup>343</sup> *United States v. B & W Inv. Props.*, 38 F.3d 362, 366 (7th Cir. 1994) ("[T]he notice of violation requirement for state implementation plans serves a different function than simply alerting the violator . . . allowing the state to act to enforce its own implementation before the EPA steps in.").

<sup>344</sup> The purpose of the requirement that citizens give *prior* notice to EPA and states of the citizens' intent to enforce is to give the government prosecutors the opportunity to take the enforcement action themselves without the interference of a pending citizen suit. Miller, *supra* note 1, at 445–48.

The requirement was amended in 1990, continuing to require EPA to give the state and the violator thirty day's prior notice before commencing administrative or civil actions for violations of state implementation plans, but no longer barring EPA from enforcement under any circumstances after the thirty-day waiting period.<sup>345</sup> In terms of either rationale for the notice, this amendment seems an empty formality. Of course, if circumstances change within the thirty-day delay period, EPA may decide not to enforce and either enforcement by the state or compliance by the violator might be a significant change of circumstances. But this leaves the choice of whether to enforce under such circumstances entirely with EPA. Whereas in the earlier version Congress ruled out enforcement if the violator had come into compliance.

The EPA enforcement provision in RCRA Subchapter III, the hazardous waste regulatory program, requires EPA to give prior notice to a state before issuing an administrative order or commencing a civil action against a violator in the state, but only if the state has an approved hazardous waste regulatory program.<sup>346</sup> This is similar to the CAA prior notice requirement before EPA enforcement against violations of state implementation plans, but there is no waiting period and no provision for a "period of federally assumed enforcement." Since prior notice is required only in states with approved programs, the evident purpose of the notice is to allow these states, rather than EPA, to enforce. Since there is no waiting period before EPA can enforce, however, the notice again seems an empty gesture. Defendants have argued that EPA may not enforce under RCRA if a state has already done so, but this is a losing argument because Congress knew how to provide such a bar, could have provided such a bar, and did not.<sup>347</sup>

A plain reading of these provisions requires EPA to give prior notice to the state before enforcing. This reading is supported by the juxtaposition with neighboring provisions that do not require prior notice.<sup>348</sup>

The same reasoning might lead to the conclusion that if EPA commences an enforcement action without giving the required notice, its actions also must be dismissed. Indeed, one pre-*Hallstrom* decision held the CAA's prior notice provision to be jurisdictional,<sup>349</sup> but its persuasiveness is dubious in view of the Court's refusal to so hold in *Hallstrom*. Other

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<sup>345</sup> Pub. L. No. 101-549, § 701, 104 Stat. 2399, 2672-73 (1990).

<sup>346</sup> RCRA § 3008(a)(1), (2), 42 U.S.C. § 6928(a)(1), (2) (2000).

<sup>347</sup> See *infra* Part III.C.

<sup>348</sup> In its neighboring provision, the CAA does not require EPA to give thirty days prior notice before enforcing against violations of federally promulgated standards. CAA § 113(a)(3), 42 U.S.C. § 7413(a)(3) (2000). In its neighboring provisions, RCRA does not require EPA to give prior notice before enforcing against violations in a state without an EPA approved state program. RCRA § 3008(a), 42 U.S.C. § 6928(a). See also *supra* Part II.B.

<sup>349</sup> See *United States v. Ford Motor Co.*, 736 F. Supp. 1539, 1547 (W.D. Mo. 1990).

courts have held that the CAA's prior notice provision is mandatory,<sup>350</sup> but they were decided prior to the amendment of CAA subsection 113(a) in 1990, which deleted the bar element that had precluded EPA from enforcement unless the violation continued for thirty days after the notice. As long as the device contained a bar, EPA enforcement could be avoided by compliance within the delay period. Once Congress removed the bar from the CAA preclusion device, however, neither the violator nor the state could prevent EPA from taking action. The same is true for the RCRA preclusion device. Under these circumstances, no harm is done if EPA fails to give proper notice, and there is no reason to hold the notice to be mandatory. That result would avoid the issue of deciding the effect of technical defects in notices if notices are held to be mandatory. As noted above, however, the CAA's thirty-day waiting period at least offers both the state and the violator the opportunity to convince EPA not to enforce. Since EPA's failure to give such notice would deprive them of this congressionally mandated opportunity, the CAA notice should be interpreted as mandatory and an EPA action without it should be dismissed or stayed pending notice. This does not leave EPA without remedy if the violation would cause real damage during the waiting period. Under the CAA,<sup>351</sup> as under most of the statutes,<sup>352</sup> EPA may issue an order or seek an injunction to abate imminent and substantial endangerment to public health or welfare or the environment from air emissions, without a waiting period,<sup>353</sup> and even in the absence of a violation of the statute.

#### *D. Enforcement Provisions Requiring Subsequent Notice to the State*

Like the preceding Section, the preclusions discussed in this Section require the satisfaction of only the notice element to avoid preclusion. The preclusions in this Section, however, require notice after, rather than before, initiation of subsequent enforcement. The CWA and CAA both contain specific provisions to this effect, requiring that EPA notify the state

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<sup>350</sup> *Id.* at 1550 ("The Act is clear in its requirement that EPA must serve Ford with a notice of violation of the *applicable* plan before it may proceed with either administrative or judicial enforcement proceedings. The requirement is jurisdictional."); *United States v. Louisiana-Pacific Corp.*, 682 F. Supp. 1122, 1128 (D. Colo. 1987)("[B]efore the EPA is authorized to bring a civil enforcement action . . . (1) the EPA must issue a NOV to the alleged offender, and (2) the violation alleged must continue for thirty days after the issuance of the NOV."); *see also* *United States v. Gen. Motors Corp.*, 876 F.2d 1060, 1063 (1st Cir. 1989), *aff'd on other grounds*, 496 U.S. 530 (1990); *Navistar Int'l Transp. Co. v. EPA*, 858 F.2d 282, 286 (6th Cir. 1988) (finding the notice requirement in CAA section 120, 42 U.S.C. § 7420, is mandatory but technical defects in the notice are insufficient to defeat EPA's action.).

<sup>351</sup> CAA § 303, 42 U.S.C. § 7603 (2000).

<sup>352</sup> *See, e.g.*, CWA § 504, 33 U.S.C. § 1364(a) (2000); RCRA § 7003, 42 U.S.C. § 6973 (1990).

<sup>353</sup> The imminent and substantial endangerment provisions may require that EPA consult with the state before commencing action. *See, e.g.*, CAA § 303, 42 U.S.C. § 7603.

when it takes administrative<sup>354</sup> or civil action<sup>355</sup> against violators in the state. The CAA requires that EPA send to the state copies of EPA-issued orders to comply with federally developed requirements and notice of the commencement of all civil enforcement actions, while the CWA requires that EPA do so immediately. A plain reading of those provisions does not require EPA to give prior notice to the state, a reading that is supported by their juxtaposition with neighboring provisions that do require prior notice.<sup>356</sup> The CAA requires EPA to give prior notice to the state when enforcing against violations of state implementation plans, but only requires it to give subsequent notice to the state when enforcing against violations of federally developed requirements. This reflects, although imperfectly, the degree of state involvement in the development, implementation and enforcement of the particular requirements.<sup>357</sup> The CWA requirement is

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<sup>354</sup> CWA §§ 309(a)(4)–(5), 404(s)(2), 33 U.S.C. §§ 1319(a)(4)–(5), 1344(s)(2) (2000); CAA § 113(a)(3)–(4), 42 U.S.C. § 7413(a)(3)–(4) (2000).

<sup>355</sup> CWA §§ 309(b), 404(s)(3), 33 U.S.C. §§ 1319(b), 1344(s)(3); CAA § 113(b), 42 U.S.C. § 7413(b).

<sup>356</sup> In its neighboring provision, the CAA requires EPA to give thirty days prior notice before enforcing against violations of state implementation plans and permits, a requirement discussed in *supra* Part II.C. CAA § 113(a)(3)–(4), (b), 42 U.S.C. § 7413(a)(3)–(4), (b). In its neighboring provision, the CWA requires EPA to give the state thirty days prior notice before enforcing against violations of the statute and to refrain from further enforcement if the state initiates appropriate enforcement within that time, a requirement discussed in the same section. CWA § 309(a)(1), 33 U.S.C. § 1319(a)(1).

<sup>357</sup> States are expected to develop implementation plans to achieve federally promulgated ambient air quality standards and to develop and administer permit programs addressing all CAA requirements for affected sources. CAA §§ 110, 501–507, 42 U.S.C. §§ 7410, 7661–7661f (2000). EPA must give states notice *prior* to taking enforcement action against a violation of one of these requirements. On the other hand, EPA is to develop, implement and enforce standards for new sources, hazardous air pollutants, acid rain precursors, and ozone depleting substances. CAA §§ 111–112, 401–416, 601–618, 42 U.S.C. §§ 7411, 7651–7651o, 7671–7671q (2000). EPA must give states only *subsequent* notice after taking enforcement action against violations of one of these requirements. But these distinctions are imprecise. *See United States v. B & W Inv. Props.*, 38 F.3d 362, 365–66 (7th Cir. 1994) (explaining the distinction and holding that CAA subsection 113(b)(3) does not require EPA to give prior notice before enforcing federally promulgated hazardous waste emission standards).

If a state fails to develop an implementation plan meeting the CAA's criteria, EPA itself ultimately may have to develop the plan. CAA § 110(c), 42 U.S.C. § 7410(c) (2000). But EPA must give the state thirty days prior notice before taking enforcement action against violations of a state implementation plan, whether the state or EPA developed it. This prior notice is mandatory. *See B & W Inv. Props.*, 38 F.3d at 363–66. At the same time, the statute contemplates that EPA will delegate to states its implementation authorities over federally developed requirements. CAA §§ 111(c), 112(l), 42 U.S.C. §§ 7411(c), 7412(l) (2000). EPA, however, is required only to give subsequent notice to the state when enforcing against these violations, whether or not EPA has delegated implementation to a state. Moreover, states are to develop permit programs applying all CAA requirements to permitted sources, whether states or EPA developed the requirements. CAA §§ 501–507, 42 U.S.C. §§ 7661–7661f (2000). The enforcement provision requires EPA to give the state thirty day's *prior* notice of EPA enforcement actions against violations of "an applicable implementation plan or permit," while it also authorizes EPA to proceed to enforce with *subsequent* notice only for violations of "subchapter V," the CAA subchapter establishing the CAA permit program. Evidently, Congress has made the CAA far too complex for it to maintain complete consistency in the degrees of state involvement warranting prior or

less complicated but more curious. The basic regulatory device of the CWA is a permit program that may be implemented either by EPA or by a state with an EPA-approved program that meets all of the federal criteria.<sup>358</sup> If Congress followed the pattern it established in the CAA, it would have required EPA to give prior notice before enforcing against violations in a state with an approved program and subsequent notice after enforcing against violations in states without approved programs. Instead, it required EPA to give notice, albeit subsequent notice, to states without approved programs, but left to EPA the choice to give either prior or subsequent notice to states with approved programs.<sup>359</sup>

These “subsequent notice” requirements, by their very nature are not conditions precedent to EPA enforcement. Not surprisingly, the few reported decisions considering the issue hold they are not conditions precedent to suit.<sup>360</sup> The paucity of decisions probably results both from EPA’s faithfully providing states with subsequent notice and from the defendants’ expectations that courts will not hold that EPA’s failure to provide subsequent notice deprives EPA of jurisdiction to proceed with properly commenced enforcement actions.

#### *E. Enforcement Provisions with No Preclusions on Successive Enforcement*

Up to this point, we have considered preclusion devices that use any or all of the basic notice, delay and bar elements to govern subsequent enforcement. The final and weakest type of device uses none of these three elements, instead allowing unrestrained subsequent enforcement by EPA.

Many EPA enforcement provisions contain no preclusions on EPA enforcement.<sup>361</sup> Of course, there are no reported decisions on the lack of statutory preclusions in these provisions. Common law preclusions may still be relevant, however, if EPA commences an enforcement action after citizens have taken an enforcement action under the citizen suit provision of the statute or if the state has taken enforcement action under comparable state authority.

Despite the lack of controversy over these provisions, they are instructive for interpreting the other provisions because of the pattern of the statutes in which they are found. Congress placed no preclusions on EPA enforcement in statutes that contemplate exclusive federal implementa-

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subsequent notice by EPA to a state.

<sup>358</sup> See CWA § 402, 33 U.S.C. § 1342 (2000).

<sup>359</sup> Compare CWA § 309(a)(1), 33 U.S.C. § 1319(a)(1) (2000), with CWA § 309(a)(3), 33 U.S.C. § 1319(a)(3).

<sup>360</sup> *B & W Inv. Props.*, 38 F.3d at 365–66.

<sup>361</sup> FIFRA § 14, 7 U.S.C. § 136(l)(2000); TSCA §§ 16, 207, 15 U.S.C. §§ 2615, 2647 (2000); MPRSA § 105, 33 U.S.C. § 1415 (2000); EPCRA § 325, 42 U.S.C. § 11045 (2000).



tion and enforcement<sup>362</sup> or in parts of statutes that do so.<sup>363</sup> Statutes or provisions that contemplate implementation and enforcement by both EPA and states<sup>364</sup> impose stronger versions of the preclusion on EPA enforcement discussed above. This pattern indicates that Congress varied the strength of the preclusions in EPA enforcement provisions to match the strength of EPA's role in relation to the role of the states in implementing the particular program being enforced. Congress used variants of the statutory preclusion knowingly and advisedly, intending the exact measure of preclusion provided in each enforcement provision. Interpreting the preclusions differently than their plain meanings ignores the legislative intent inherent in this pattern.

### III. LIMITATIONS ON FEDERAL ENFORCEMENT INFERRED FROM OTHER PROVISIONS

The preceding analysis described the various preclusions against subsequent EPA enforcement by analyzing the plain meaning, legislative history, and structure of the environmental statutes. While this analysis is proper and should be exhaustive, some defendants in environmental cases have attempted to infer additional preclusions against EPA action. This Part examines the arguments levied by these parties and concludes that the primary reason all but one of these arguments fail is that, when Congress intended to limit EPA enforcement in such circumstances, it explicitly limited it by the preclusion devices in the enforcement provisions themselves.

Defendants argue that federal law, including federal enforcement authorities, ceases to operate in the state once EPA approves a state program, thereby making federal enforcement impossible. The statutes, however, do not provide that they are suspended in a particular state upon approval of that state's environmental program. Indeed, the statutes confer many authorities on EPA to oversee approved state programs. Those statutory authorities would be meaningless if the federal statutes were suspended upon approval of the state programs.

Defendants next argue that, if EPA approval of a state's program suspends the federal program but not the federal statute and its enforcement authorities, violations of the approved state programs are violations of state law and the federal statutes do not authorize federal enforcement against violations of state law. Under some of the statutes, however, violations of

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<sup>362</sup> TSCA §§ 16, 207, 15 U.S.C. §§ 2615, 2647 (regulating the manufacture and sale of chemicals); MPRSA § 105, 33 U.S.C. § 1415 (regulating ocean dumping); EPCRA § 325, 42 U.S.C. § 11045 (concerning emergency planning and public disclosure relating to manufacture and use of hazardous chemicals).

<sup>363</sup> FIFRA §§ 9, 14, 7 U.S.C. §§ 136g, 136j (2000) (regulating the registration and sale of pesticides); CWA §§ 311–312, 33 U.S.C. §§ 1321–1322 (2000) (regulating spills of oil and hazardous waste and use of marine sanitation devices); CAA § 205, 42 U.S.C. § 7524 (2000) (regulating automobile emissions).

<sup>364</sup> For example, the permitting programs of the CAA, CWA, and RCRA.

approved state programs are violations of federal law, and all of the statutes authorize federal enforcement against violations of approved state programs.

Next, defendants argue that the statutes do not authorize successive federal enforcement against violations of approved state programs if states have already taken an action against the violations. Congress developed the preclusion device to deal with successive enforcement and varied the device's three elements in each of the EPA enforcement provisions to establish just how Congress intended to limit successive EPA enforcement under each statute, including whether and to what extent a state action would bar a successive EPA enforcement action. Thus, the wording of the enforcement provisions' preclusion devices should be looked to for determining whether Congress intended to preclude EPA enforcement; Congress did not intend that such a preclusion be inferred from other provisions.

Finally, defendants argue that the statutes do not authorize federal enforcement against provisions of approved state programs that are beyond the scope of or more stringent than the comparable federal requirements. The structure of the statutes and EPA's interpretation of them suggest that a provision in an EPA-approved state program that is more stringent than its federal counterpart is federally enforceable, while a provision in such a state program that is beyond the scope of the federal program is not.

Although defendants make these arguments under all of the statutes, they make them most frequently and most fervently under RCRA because of the uniquely defendant-friendly wording in its state program approval provision. Ultimately, however, their arguments fare no better under RCRA than under the other statutes. Because the analysis under the CAA and CWA is virtually identical, the Article considers them together. RCRA is considered individually because although the analysis under RCRA is parallel to that under the CAA and CWA, it is complicated by its unique language.<sup>365</sup>

*A. Does EPA Approval of a State Program To Implement a Federal Statute Suspend Operation of the Federal Statute in that State?*

*1. The CAA and CWA*

The CAA and the CWA do not hint that they are suspended, in whole or in part, by EPA approval of a state's air or water pollution control program. Moreover, that concept is inconsistent with their statutory structures for several reasons. First, both statutes establish major federally ad-

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<sup>365</sup> While this Article could make similar analyses under other statutes, most enforcement litigation occurs under these three statutes, thus rendering such further analysis of limited value.

ministered regulatory programs that are not part of the core cooperative federalism programs. The CAA, for instance, establishes a program to regulate motor vehicle emissions administered directly by EPA and not through approved state implementation plans.<sup>366</sup> The CWA establishes a program to prevent and penalize spills of oil and hazardous substances administered by EPA and the Coast Guard and not through approved state permit programs.<sup>367</sup> It would not make sense for EPA's approval of a state's implementation plan or permit program to suspend these other environmental protection programs in the state. Such suspension would eliminate important federal environmental protections without replacing them with state protections.

Second, in addition to the regulation of pollution sources that may be accomplished either by EPA or states with EPA-approved programs, both statutes confer general authorities on EPA alone. For instance, both authorize EPA to make grants to state environmental agencies to administer pollution control programs.<sup>368</sup> It would not make sense for EPA's approval of a state's implementation plan or permit program to suspend EPA's grant authority, because the greatest need for federal financial assistance to states occurs when states administer approved plans and programs.

Third, both the CAA and the CWA contemplate that EPA may approve a state permit program encompassing some but not all of the federal permit program. Under the CAA, for instance, EPA may approve a state permit program that does not include sources of pollutants in areas that have already attained National Ambient Air Quality Standards or sources subject to national emission standards for hazardous air pollutants.<sup>369</sup> The CWA authorizes EPA to approve state permit programs covering a "significant and identifiable" "major category of discharges."<sup>370</sup> EPA's approval of a partial state permit program does not foreclose its implementation and enforcement of the uncovered portion of the federal program.

Finally, both statutes establish EPA oversight authorities on state implementation and enforcement of the approved plans and programs. The

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<sup>366</sup> CAA §§ 202–250, 42 U.S.C. §§ 7521–7590 (2000). The CAA preempts state regulation of motor vehicle emissions placed on motor vehicle manufacturers, except for very limited programs that are more stringent than EPA's. CAA § 209, 42 U.S.C. § 7543 (2000). It also requires under some circumstances that states include in their implementation plans programs to test motor vehicle emissions from vehicles being used by consumers to ensure that they meet federal emission standards. *See, e.g.*, CAA § 182(a)(2)(B), (b)(4), (c)(3), 42 U.S.C. § 7511a(a)(2)(B), (b)(4), (c)(3) (2000). *See also* CAA §§ 601–618, 42 U.S.C. §§ 7671–7671q (2000) (concerning the Stratospheric Ozone Protection Program).

<sup>367</sup> CWA § 311, 33 U.S.C. § 1321. The Oil Pollution Act, 33 U.S.C. §§ 2701–2761 (2000), has subsumed much of the substance of this provision. *See also* CWA § 404, 33 U.S.C. § 1344 (2000) (concerning the Wetlands Protection Program, a separate permit program largely administered by the Army Corps of Engineers).

<sup>368</sup> CWA § 105, 33 U.S.C. § 1255 (2000); CAA § 105, 42 U.S.C. § 7405 (2000).

<sup>369</sup> CAA § 502(d)(2)(A), (d)(2)(C), (f)(3), 42 U.S.C. § 7661a(d)(2)(A), (d)(2)(C), (f)(3) (2000).

<sup>370</sup> CWA § 402(n), 33 U.S.C. § 1342(n) (2000).

CAA, for instance, charges EPA with the responsibility for assuring that states' approved plans actually achieve the federal air quality standards and requires the agency to impose sanctions on states if the plans do not.<sup>371</sup> The CWA authorizes EPA to withdraw approval of state permit programs and to veto state-issued permits that do not meet federal standards.<sup>372</sup> Both statutes authorize EPA to enforce against violations of state implementation plans and state-issued permits and to declare "periods of federally assumed enforcement" if it finds widespread failure of the state to enforce the approved program.<sup>373</sup> It would not make sense for EPA's approval of a state program to suspend these oversight authorities, for such authorities are not activated until EPA approves the state program. Such an interpretation would render those authorities meaningless. This interpretation is to be avoided, as statutes should be interpreted to give meaning to all of their parts.<sup>374</sup> Finally, it has long been held under the CWA that EPA may enforce against violations of a permit issued by a state with an approved program, even if the state already has commenced an enforcement action.<sup>375</sup>

## 2. RCRA

The analysis of whether EPA approval of a state program suspends operation of the federal RCRA standards in that state under RCRA is parallel to the analysis under the CAA and CWA, but is complicated by different language in RCRA. Congress provided in RCRA subsection 3006(b) that an EPA approved state permit program operates "in lieu of the Federal program under this subchapter" (subchapter III), effectively suspending the federal program in states with approved programs.<sup>376</sup> However, it did not define the "program" that was suspended.<sup>377</sup> In determining what is suspended, it is important to recognize that RCRA follows the same statutory pattern as the CAA and CWA with regard to the relationships between the entire federal statute and the approved state programs. First, RCRA establishes major regulatory programs that are not part of the core cooperative federalism program. For instance, it creates in Subchapter IV a solid waste regulatory program that is not part of its core hazardous

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<sup>371</sup> See, e.g., CAA § 179, 42 U.S.C. § 7509 (2000).

<sup>372</sup> CWA § 402(b)–(d), 33 U.S.C. § 1342(b)–(d).

<sup>373</sup> CWA § 309(a)(1)–(3), 33 U.S.C. § 1319(a)(1)–(3) (2000); CAA § 113(a)(1)–(b), 42 U.S.C. § 7413(a)(1)–(b) (2000).

<sup>374</sup> See *ESKRIDGE*, *supra* note 134, at 324 (citing *Kungys v. United States*, 485 U.S. 759, 778 (1988) and *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 510 n.22 (1986)).

<sup>375</sup> *United States v. ITT Rayonier, Inc.*, 627 F.2d 996, 1001 (9th Cir. 1980); *United States v. Cargill, Inc.*, 508 F. Supp. 734 (D. Del. 1981).

<sup>376</sup> RCRA § 3006(b), 42 U.S.C. § 6926(b) (2000).

<sup>377</sup> *Wyckoff Co. v. EPA*, 796 F.2d 1197, 1200 (9th Cir. 1986); *United States v. Flanagan*, 126 F. Supp. 2d 1284, 1287 (C.D. Cal. 2000).

waste permit program.<sup>378</sup> It would make no sense for EPA's approval of a state hazardous waste program to suspend EPA's non-hazardous solid waste program in the state, for that would eliminate an important federal environmental protection without replacing it with state protections.

Second, RCRA contains general authorities, some of which relate to, but are not part of, the core hazardous waste program. For instance, like the CAA and CWA, RCRA authorizes EPA to make grants to states to administer hazardous and solid waste control programs.<sup>379</sup> It would be counterproductive for EPA's approval of a state program to suspend these authorities and requirements for the same reasons that it is counterproductive under the CAA and CWA. The plain meaning of subsection 3006(b) is that EPA approval of a state program suspends only the Federal program under Subchapter III. The subsection 3006(b) begins by stating that "[a]ny State which seeks to administer and enforce a hazardous waste program pursuant to *this subchapter*" shall submit its program for EPA approval. If EPA approves the program, the "State is authorized to carry out such program in lieu of the federal program under *this subchapter* . . ."<sup>380</sup> To the extent these authorities are not contained in Subchapter III, they fall outside whatever program is suspended.

Third, RCRA, like the CAA and CWA, contemplates that EPA may approve state programs that cover some, but not all, of the federal requirements. In the case of RCRA, however, Congress limited partial state programs to those covering all of the requirements of the original statute, authorizing EPA to issue permits covering requirements of the federal program added in subsequent amendments.<sup>381</sup> EPA approval of a partial state program, therefore, does not displace portions of the federal program for which EPA has not approved the state program.

Finally, RCRA establishes EPA oversight authorities over approved state programs, authorizing EPA to withdraw its approval of state programs and to enforce against violations of permits issued by states with approved programs.<sup>382</sup> These authorities are in Subchapter III.<sup>383</sup> The "Federal program" suspended by subsection 3006(b) cannot be the entire Subchapter III itself, for it would not make sense for EPA's approval of a state hazardous waste program to suspend the oversight authorities Congress

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<sup>378</sup> RCRA §§ 4001–4010, 42 U.S.C. §§ 6941–6949a (2000). Subchapter IV authorizes EPA only to establish standards to be met by solid waste disposal facilities.

<sup>379</sup> RCRA § 2007, 42 U.S.C. § 6916 (2000).

<sup>380</sup> 42 U.S.C. § 6926(b) (2000) (emphasis added).

<sup>381</sup> RCRA § 3006(c)(4), (g), 42 U.S.C. § 6926(c)(4), (g) (2000). This reflects the fact that while Congress enacted the full hazardous waste permitting program in 1976, it substantially amended that program in many details in 1984. States meeting the requirements for approval under the 1976 statute could not meet many of the particulars added in 1984, requiring both state and EPA action to issue permits meeting all of the statute's amended requirements.

<sup>382</sup> RCRA §§ 3006(e)–3008(a)(2), 42 U.S.C. §§ 6926(e)–6928(a)(1) (2000).

<sup>383</sup> RCRA §§ 3001–3019(e), 42 U.S.C. §§ 6921–6939(e) (2000).

granted EPA for approved state programs. That would render the oversight authorities superfluous, again an interpretation to be avoided.<sup>384</sup> On the other hand, once EPA approves a state hazardous waste program under RCRA, there is no need for EPA's own regulations to continue in effect, to the extent they impose on the regulated public requirements that are now governed by the approved state's hazardous waste regulations. Therefore, it is logical to consider the federal regulations to be the "Federal program" that is suspended.

Nevertheless, defendants argue that EPA approval of a state RCRA program suspends all of RCRA, including EPA and citizen enforcement authorities, because RCRA subsection 3006(b) states that once EPA approves a state program, the

State is authorized to carry out such program in lieu of the Federal program under this subchapter in such State and to issue and enforce permits for the storage, treatment, or disposal of hazardous waste . . . .<sup>385</sup>

This provision cannot suspend all of RCRA, however, for its very words limit its suspension to the federal program under Subchapter III. When EPA approves only part of a state Subchapter III program, it cannot suspend that part of the federal program for which the partially approved state program has no counterpart. Such suspension would eviscerate those federal requirements. It cannot suspend the oversight authorities in Subchapter III, for they can only operate after EPA approves a state program. It makes no sense for it to suspend the EPA enforcement authorities in Subchapter III for violations of approved state programs for the same reasons. Defendants reply that the subsection 3006(b) phrase means nothing if it does not at least suspend EPA's enforcement authorities.

For subsection 3006(b) to suspend federal enforcement authorities, either: (1) the federal enforcement authorities must be included in the superseded "Federal program" or (2) "in lieu of" must modify "issue and enforce permits." Parsing the sentence fragment demonstrates that neither of these assertions can be sustained by a grammatical plain reading.<sup>386</sup>

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<sup>384</sup> See *supra* note 374.

<sup>385</sup> 42 U.S.C. § 6926(b) (2000).

<sup>386</sup> See *ESKRIDGE*, *supra* note 134, at 323 (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)); see also *United States v. Power Eng'g Co.*, 125 F. Supp. 2d 1050, 1059 (D. Colo. 2000) (parsing the sentence fragment).

The subject of this sentence fragment is the approved "State" and the verb is the passive "is authorized." The object is the long conjunctive phrase, composed of two infinitive sub-phrases. A more understandable restatement of the sentence fragment is: "the State is authorized: (1) to carry out its approved program in the State in lieu of the Federal program, and (2) to issue and enforce permits for the storage, treatment, or disposal of hazardous waste."

Defendants' first argument is that RCRA's federal enforcement authorities are included

The structure and wording of the EPA enforcement sections also demonstrate that subsection 3006(b) does not supersede EPA enforcement authority. The House Report accompanying RCRA stated that:

[t]his section [section 3006] develops a structure under which states can plan and implement a state hazardous waste program, in lieu of the federal program which is *developed* and implemented by the Administrator.<sup>387</sup>

EPA, of course, develops a regulatory program of standards for the regulated public to comply with, not a statutory program for the enforcement of the regulatory provisions. The EPA enforcement provision specifically requires EPA to give notice to a state with an approved program before commencing civil or administrative enforcement against violations in the state.<sup>388</sup> This authority would be meaningless if subsection 3006(b) suspended EPA's enforcement authority when EPA approved a state program. The EPA enforcement provision also authorizes EPA to suspend or revoke a permit "issued by the Administrator or a State under this subchapter."<sup>389</sup> EPA could not suspend a permit issued by a state under RCRA until EPA had approved the state's program, and it could not do so after approval if approval suspended federal statutory authority.<sup>390</sup> Congress

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within the superseded "Federal program" in the first infinitive sub-phrase, "to carry out such program in lieu of the Federal program . . . ." That reading of the first sub-phrase, however, renders the second sub-phrase, "and to issue and enforce permits," redundant and without meaning. If the superseded "Federal program" includes permit issuance and enforcement, the second sub-phrase adds nothing to the first. On the other hand, giving full force and meaning to the second phrase does not deprive the first phrase of meaning, if the state program operating "in lieu of" the superseded "federal program," is that set of state regulations establishing standards and procedures for permit issuance operating in place of EPA regulations doing the same. H.R. REP. NO. 94-1491, at 29 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6267.

Defendants' second argument is that "in lieu of" modifies "to issue and enforce permits." But "in lieu of" is placed in the middle of the first sub-phrase, behind the introductory infinitive. That confines its meaning to the first of the two sub-phrases. To modify the second as well as the first infinitive sub-phrase, it should either be placed before both sub-phrases or repeated in the second sub-phrase. On the other hand, "in lieu of" has meaning when it modifies only the first sub-phrase. Thus, as a matter of grammar, the "in lieu of" language in subsection 3006(b) does not suspend federal enforcement authorities when EPA approves a state program, but does suspend the EPA regulations that apply to the regulated public in the absence of an approved state program. There is no reason to assume Congress used tortured grammar, intending "in lieu of" to apply to both sub-phrases, because the correct grammatical reading applying it only to the first sub-phrase has meaning and makes sense. Legislative history supports this conclusion.

<sup>387</sup> H.R. REP. NO. 94-1491, at 29 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6267 (emphasis added).

<sup>388</sup> RCRA § 3008(a)(2), 42 U.S.C. § 6928(a)(2) (2000).

<sup>389</sup> RCRA § 3008(a)(3), 42 U.S.C. § 6928(a)(3).

<sup>390</sup> RCRA subsection 3005(d) contains similar authority, but appears to give EPA authority only to revoke EPA-issued permits. 42 U.S.C. § 6925(d) (2000). RCRA § 3008(a)(3) is not redundant because it authorizes EPA to revoke state-issued permits. 42 U.S.C. § 6928(a)(3) (2000).

also amended the criminal provisions in section 3008 to clarify its intent that federal enforcement authorities continue unimpeded in a state after EPA approved the state's hazardous waste regulatory program. As originally written in 1980, for instance, subsection 3008(d)(4) made criminal offenses of various fraudulent actions regarding records that "regulations promulgated by the Administrator under this [subtitle]" required the regulated public to maintain.<sup>391</sup> In 1984, Congress amended the subsection to expand the offenses by adding the parenthetical phrase ("or by a State in the case of an authorized State program") between "Administrator" and "under."<sup>392</sup> Moreover, it used the same federal and state regulation wording when it added the new offense of transporting hazardous waste without a manifest in subsection 3008(d)(5).<sup>393</sup> The first two offenses in the subsection are treating, storing or disposing of hazardous waste without or in violation of a permit "under this [subtitle]," evidencing similar intent.<sup>394</sup> Again, these provisions would be meaningless if subsection 3006(b) suspended the federal enforcement provisions when EPA approved a state program.

The conclusion that subsection 3006(b) does not suspend EPA enforcement authority is reinforced by the subsection's failure to suspend citizen suit authority when EPA approves a state program. Subsection 3006(b) does not suspend citizen suit authority because it only suspends the federal program "under this [subtitle]." Subsection 3006(b) is in Subchapter III which does not include the citizen suit provision.<sup>395</sup>

These factors lead to the conclusion that RCRA's federal enforcement authorities are not suspended by EPA's approval of state hazardous waste programs. If there is any ambiguity, deference must be given to EPA's interpretation of the statute if it is a reasonable one and is embodied in a rulemaking.<sup>396</sup> EPA has repeatedly interpreted RCRA in rulemak-

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<sup>391</sup> Pub. L. No. 96-482, § 13, 94 Stat. 2334, 2340 (1980).

<sup>392</sup> Pub. L. No. 98-616, § 232(a)(3), 98 Stat. 3221, 3257 (1984). Congress also changed the wording of subsection 3008(d)(3) to conform to this language.

<sup>393</sup> *Id.*

<sup>394</sup> RCRA §§ 3008(d)(1), (2), 42 U.S.C. §§ 6928(d)(1), (2). Prior to amendment in 1984, RCRA subsection 3008(d)(1) made it an offense to transport hazardous waste to a facility without a permit "under section 3005 (or section 3006 in the case of a State program)." Pub. L. No. 94-580, § 3008(d)(1), 90 Stat. 2795, 2812 (1976). In 1984, Congress shortened that wording to "a permit under this [subtitle]." Pub. L. No. 98-616, § 232(a)(1), 98 Stat. 3221, 3256 (1984). It used the same shortened phrase in the new subsection 3008(d)(2), making it an offense to treat, store or dispose of hazardous waste without or in violation of a "permit under this [subtitle]." Pub. L. No. 98-616, § 232(a)(2), 98 Stat. 3221, 3256 (1984). *United States v. MacDonald & Watson Waste Oil Co.* rejected the contention that when Congress dropped the reference to state-issued permits in subsection 3008(a)(1), it decriminalized the action in states with approved programs. 933 F.2d 35, 44-45 (1st Cir. 1991).

<sup>395</sup> 42 U.S.C. § 6926(b) (2000). Subchapter VII contains the citizen suit provision. RCRA § 7002, 42 U.S.C. § 6972 (2000).

<sup>396</sup> *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-44 (1984). Because EPA's interpretation is embodied in its rulemakings, deference under *Chevron* survives *United States v. Mead Co.*, 533 U.S. 218 (2001). For examples of judicial defer-



ings to continue EPA enforcement authority after it has approved the state programs.<sup>397</sup> EPA has also repeatedly interpreted RCRA in formal adjudications to continue EPA enforcement authority after it has approved state programs.<sup>398</sup>

Not surprisingly, courts universally hold that when EPA approves a state hazardous waste program, subsection 3006(b) suspends operation of the "Federal program."<sup>399</sup> Also, most courts considering the question have held that EPA's approval of the state program does not suspend EPA and citizen enforcement authorities over violations of the approved state program.<sup>400</sup> Most courts have held that the wording and structure of the stat-

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ence to EPA's interpretation that RCRA's federal enforcement authorities—both of EPA and citizens—operate in states with approved programs as well as in other states, see *United States v. Elias*, 269 F.3d 1003, 1010 (9th Cir. 2001), and *Wyckoff Co. v. EPA*, 796 F.2d 1197, 1201 (9th Cir. 1986).

<sup>397</sup> 40 C.F.R. § 271.16(c) (2004) provides that penalties assessed by states for violations of approved RCRA programs be "appropriate to the violation," and, in a note to the subsection, EPA warns that it may commence an enforcement action for additional penalties when it believes the state has assessed inadequate penalties. In 40 C.F.R. § 271.19(e) (2004), EPA notes it may take action to suspend violated state-issued permits under RCRA subsection 3008(a)(3). In approving the Idaho RCRA program, EPA stated that it "retains the authority under [section 3008] of RCRA to undertake enforcement actions in authorized States" and that, for such actions, it "will rely on Federal sanctions, Federal inspections authorities . . . rather than the authorized State analog." Hazardous Waste Management Program Codification of Approved State Hazardous Waste Program for Idaho, 55 Fed. Reg. 50,327, 50,327–28 (Dec. 6, 1990) (to be codified at 40 C.F.R. pt. 272), *quoted in Elias*, 269 F.3d at 1010 n.14. In approving the Texas program, EPA reiterated its interpretation that both EPA and citizen suit enforcement authorities survived approval of the state program. See *Texas*; Decision on Final Authorization of State Hazardous Waste Management Program, 49 Fed. Reg. 48,300, 48,304 (Dec. 12, 1984) (to be codified at 40 C.F.R. pt. 271), *quoted in Lutz v. Chromatex, Inc.*, 725 F. Supp. 258, 261–62 (M.D. Pa. 1989). EPA also used similar language in approving Colorado's program. See *Texas*; Final Authorization of State Hazardous Waste Management Program, 49 Fed. Reg. 41,036, 41,037 (Oct. 19, 1984) (to be codified at 40 C.F.R. pt. 271), *quoted in United States v. Power Eng'g Co.*, 10 F. Supp. 2d 1145, 1148 (D. Colo. 1998), *aff'd on other grounds*, 191 F.3d 1224, 1229 (10th Cir. 1999).

<sup>398</sup> *Bil-Dry Corp.*, 9 E.A.D. 575 (2001); *Gordon Redd Lumber Co.*, 5 E.A.D. 301, 308 (1994); *S. Timber Prod., Inc.* 3 E.A.D. 371, 378 (1990); *Martin Elecs.*, 2 E.A.D. 381, 385 (1987).

<sup>399</sup> *Harmon Indus., Inc. v. Browner*, 191 F.3d 894 (8th Cir. 1999); *AM Int'l, Inc. v. Datacard Corp.*, 106 F.3d 1342, 1350 (7th Cir. 1997); *Dague v. City of Burlington*, 935 F.2d 1343, 1353 (2d Cir. 1991), *rev'd on other grounds*, 505 U.S. 557 (1992); *United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35 (1st Cir. 1991); *U.S. v. Power Eng'g Co.*, 125 F. Supp. 2d 1050 (D. Colo. 2000), *aff'd*, 303 F.3d 1232 (10th Cir. 2000); *Glazer v. Am. Ecology Envtl. Servs. Corp.*, 894 F. Supp. 1029, 1039–40 (E.D. Tex. 1995); *Murray v. Bath Iron Works Corp.*, 867 F. Supp. 33, 43 (D. Me. 1994); *Orange Env't, Inc. v. County of Orange*, 860 F. Supp. 1003, 1021 (S.D.N.Y. 1994); *Clorox Co. v. Chromium Corp.*, 158 F.R.D. 120, 123–24 (N.D. Ill. 1994); *City of Heath v. Ashland Oil, Inc.*, 834 F. Supp. 971, 979 (S.D. Ohio 1993); *Coalition for Health Concern v. LWD, Inc.*, 834 F. Supp. 953, 958–59 (W.D. Ky. 1993); *Lutz v. Chromatex, Inc.*, 725 F. Supp. 258, 261 (M.D. Pa. 1989); *Williamsburg-Around-the-Bridge Block Ass'n v. Jorling*, No. 98-CV-471, 1989 WL 98631 (N.D.N.Y. Aug. 21, 1989); *Thompson v. Thomas*, 680 F. Supp. 1, 3 (D.D.C. 1987).

<sup>400</sup> *Elias*, 269 F.3d at 1003; *Power Eng'g Co.*, 191 F.3d at 1229; *Ashoff v. City of Ukiah*, 130 F.3d 409, 411 (9th Cir. 1997); *United States v. Marine Shale Processors*, 81 F.3d 1361 (5th Cir. 1996); *MacDonald & Watson Waste Oil Co.*, 933 F.2d at 35; *Wyckoff Co.*, 796 F.2d at 2000–01; *United States v. Flanagan*, 126 F. Supp. 2d 1284, 1286–90 (C.D.

ute indicate the approved state “program” operating in lieu of the federal program is the set of state regulations establishing requirements and standards applicable to the regulated public handling hazardous waste and, correspondingly, the federal “program” that is suspended by the approval of the state program is not RCRA itself, but the set of EPA regulations promulgated under Subchapter III to do the same.<sup>401</sup> The courts have not defined the superseded Subchapter III regulations with any precision, but the logic of the decisions leads to the conclusion that EPA approval of a state hazardous waste permit program does not suspend all EPA Subchapter III regulations. Several types of federal Subchapter III regulations cannot be suspended. First, Subchapter III charges EPA and other federal agencies with some responsibilities that continue after EPA approves state programs.<sup>402</sup> Second, Congress authorized EPA to approve only part of the state’s RCRA hazardous waste program when it meets some but not all of the federal requirements.<sup>403</sup> When EPA does so, the federal regulations corresponding to the approved portions of the state program are suspended, but the remainder of the federal regulations continue to operate.<sup>404</sup> Third, federal RCRA regulations relating to EPA oversight of approved state programs cannot be suspended, for the statute authorizes oversight of approved permit programs, which can begin only after they are approved. Of course, the conclusion that regulated entities cannot violate federal regulations when EPA has approved a comparable state program is little help to violators if EPA and citizens can enforce against violations of the approved state regulations, a question that is considered in the next Section.

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Cal. 2000); *L.E.A.D. v. Exide Corp.*, No. CIV. 96-3030, 1999 WL 124473 (E.D. Pa. Feb. 19, 1999); *Glazer*, 894 F. Supp. at 1029; *Acme Printing Co. v. Menard, Inc.*, 881 F. Supp. 1237, 1244 (E.D. Wisc. 1995); *Clorox Co.*, 158 F.R.D. at 124; *Murray*, 867 F. Supp. at 33; *Coalition for Health Concern*, 834 F. Supp. 953, 958–59 (W.D. Ky. 1993); *Sierra Club v. Chem. Handling Corp.*, 824 F. Supp. 195, 197 (D. Colo. 1993); *Lutz*, 725 F. Supp. at 261.

<sup>401</sup> *Elias*, 269 F.3d at 1012; *AM Int’l, Inc.*, 106 F.3d at 1350; *Power Eng’g Co.*, 125 F. Supp. 2d at 1059–60; *Orange Env’t, Inc.*, 860 F. Supp. at 1020–21; *Coalition for Health Concern*, 834 F. Supp. at 958–59; *Clorox Co.*, 158 F.R.D. at 123.

<sup>402</sup> For instance, RCRA section 3017 charges EPA with the responsibility to control the export of hazardous waste, a responsibility that is peculiarly federal since it involves foreign relations and working with the Secretary of State. 42 U.S.C. § 6938 (2000). RCRA subsection 3016(a) requires all federal agencies to report to EPA every two years the inventory of sites on which they treat, store or dispose of hazardous waste, and section 3021 requires the Department of Energy to make a series of reports with regard to its generation and disposition of mixed hazardous and radioactive waste. 42 U.S.C. §§ 6937(a), 6939c (2000).

<sup>403</sup> This seeming anomaly came about because states with approved programs met RCRA’s requirements as it was enacted in 1976, but not as it was amended substantially in 1984, prompting Congress to authorize the continued operation of the pre-1984 portion of RCRA by states with already approved programs and the operation of the post-1984 portions of the program by EPA until it approves new parts of the state’s program developed to meet the new federal requirements. See RCRA § 3006(g), 42 U.S.C. § 6926(g) (2000).

<sup>404</sup> See *Murray*, 867 F. Supp. at 43; *City of Heath*, 834 F. Supp. at 979.

A few courts have concluded that the approved state programs supersede all of RCRA or all of Subchapter III, as well as EPA's implementing regulations.<sup>405</sup> They have done so with little analysis. The decisions are wrong, for the reasons discussed above. The most considered opinion in this respect is *Harmon Industries, Inc. v. Browner*.<sup>406</sup> *Harmon* is usually cited as an "overfiling" decision, holding that EPA may not enforce against a RCRA violation once a state has done so,<sup>407</sup> an issue discussed below.<sup>408</sup> The opinion, however, initially concludes that the "in lieu of" language "reveals a congressional intent for an authorized state program to supplant the federal hazardous waste program *in all respects* including enforcement."<sup>409</sup> "[I]n all respects," of course, includes the statute and its EPA enforcement provisions, as well as the regulations. The court admits, however, that the "in lieu of" language "refers to the program itself," rather than to enforcement, but finds federal enforcement to be superseded because "the administration and enforcement of the program are inexorably intertwined," without explaining what that means.<sup>410</sup> The court later admits that EPA may enforce against a violation of an EPA approved state program under subsection 3008(a)(2) if EPA gives the state prior notice and the state fails to enforce.<sup>411</sup> However, administration and enforcement do not appear any less "inexorably intertwined" in that circumstance.

The only support the *Harmon* court provides for its initial conclusion that approval of the state program suspends the federal statute as well as the federal regulations is that, under subsection 3006(b), EPA may revoke its approval of a state's program if the state fails to enforce it adequately. This, it concludes, confirms that states "have the primary role of enforcing their own hazardous waste program."<sup>412</sup> This is a non sequitur. The court then "harmonizes" EPA's program revocation authority in subsection 3006(e) with the requirement of subsection 3008(a)(2) that EPA notify a state with an approved program before taking enforcement ac-

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<sup>405</sup> *Harmon Indus., Inc. v. Browner*, 191 F.3d 894 (8th Cir. 1999); *Dague v. City of Burlington*, 935 F.2d 1343, 1353 (1st Cir. 1991), *rev'd on other grounds* 505 U.S. 557 (1992); *Pape v. Menominee Paper Co.*, 911 F. Supp. 273, 276 (W.D. Mich. 1994); *Williamsburg-Around-the-Bridge Block Ass'n v. Jorling*, No. 89-CV-471, 1989 WL 98631, at \*3 (N.D.N.Y. Aug. 21, 1989).

<sup>406</sup> 191 F.3d at 894.

<sup>407</sup> Indeed, courts seeking an easy way to distinguish it as not applying to the issue at hand comment that it is only an overfiling decision, addressing not whether but when EPA may enforce in a state with an approved program. *United States v. Elias*, 269 F.3d 1003, 1011-12 (9th Cir. 2001); *United States v. Flanagan*, 126 F. Supp. 2d 1284, 1289 (C.D. Cal. 2000) (explaining that *Harmon* "is not about if, but about when, the United States can bring a civil action in federal court after it has authorized a state program.").

<sup>408</sup> See *infra* Part III.C.

<sup>409</sup> 191 F.3d at 899 (emphasis added).

<sup>410</sup> *Id.* Subsection 3006(b) does not actually mention "administration."

<sup>411</sup> This is an erroneous reading of subsection 3008(a)(2) which requires EPA to give notice to the state in these circumstances, but does not bar EPA from enforcing if the state enforces.

<sup>412</sup> 191 F.3d at 899.

tion, concluding that EPA may take enforcement action in a state with an approved program only if EPA has withdrawn its approval of the state program or the state has failed to enforce. The court's conclusions are internally inconsistent, incomplete, and incorrect.

First, the decision is internally inconsistent. In the same paragraph it concludes both that an "authorized state program . . . supplant[s] the federal hazardous waste program *in all respects* including enforcement," and that EPA also may enforce against a violation of an approved state requirement if EPA first gives the state notice and the opportunity to enforce against the violation and the state fails to do so.<sup>413</sup> It later concludes that EPA may enforce if it first revokes its approval of the state program.<sup>414</sup> These two exceptions to the court's assumption that EPA has no enforcement authority in a state with an approved program subsequently recur in its contention that EPA has no authority to "overfile" once the state has commenced an enforcement action. This Article subsequently considers the two exceptions in that context.<sup>415</sup>

Second, the decision is incomplete. It "harmonizes" its conclusion with the authorization in subsection 3008(a)(2) for EPA to enforce against violations in such a state, but fails to recognize that subsection 3008(a)(3), (c), and (d) also authorize EPA to enforce against violations in states with approved programs and to reconcile those authorities with its conclusion.

Furthermore, the decision is incorrect. Its "harmonization," that EPA has enforcement authority if the state fails to enforce, reads the prior notice requirement of subsection 3008(a)(2) as if it were a three-element notice, delay and bar preclusion device, whereas the device includes only the notice element. Its "harmonization" that EPA has no enforcement authority if it first withdraws its approval of the state's program reads something into the statute that simply is not there. There are fatal problems with these harmonization arguments that the court did not recognize. These are explored subsequently.<sup>416</sup>

The decision did not recognize the pattern Congress developed in the environmental statutes of varying the strength of the preclusion device in EPA and citizen enforcement provisions in accordance with the balance Congress intended to strike between federal and state authorities. If Congress had intended a different balance in RCRA subsection 3008(a)(2), it would have included either or both of the delay or bar elements as it did in RCRA subsection 7002(b) and in other environmental statutes or it would have given EPA limited enforcement authority as it did in RCRA subsection 4005(c).<sup>417</sup> The government does not appear to have made this argument. It did, however, make the lesser argument that Congress's in-

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<sup>413</sup> *Id.* (emphasis added).

<sup>414</sup> *Id.*

<sup>415</sup> See *infra* Part III.C.

<sup>416</sup> See *infra* Part III.C.

<sup>417</sup> See *supra* Parts I.B.1–2.

clusion of the notice, delay and bar in RCRA's citizen suit preclusion device, subsection 7002(b), and its omission of the delay and bar in subsection 3008(a)(2) preclusion device is evidence it intended not to include them in section 3008. The court dismissed this by stating that the "mere fact that Congress did not choose to employ the exact same language as contained in an unrelated part of the act" had no bearing on the interpretation of subsection 3008(a)(2).<sup>418</sup> The two sections, of course, are not unrelated. They both authorize federal enforcement of RCRA: section 3008 authorizes enforcement by EPA and section 7002 authorizes enforcement by citizens acting in EPA's stead as private attorneys general. Section 7002 cross-references section 3008, authorizing courts to assess section 3008 civil penalties in citizen suits. The preclusions in the two sections are part of the same grand pattern of preclusion devices Congress developed in the EPA and citizen enforcement authorities in all the environmental statutes. The court did not recognize that its interpretation of the statute would leave citizen enforcers with considerably greater authority than EPA to enforce against violations in states with approved programs. Under the Court's theory, EPA approval of a state program suspends Subchapter III statutory authority, which includes EPA but not citizen enforcement authority. In short, the court substituted its preferred balance between EPA and state enforcement authority for the balance that Congress intended and wrote into the statute.

The court makes one last attempt to justify its conclusions with legislative history. It quotes three passages from the House Report accompanying the 1976 enactment of RCRA. The first two are to the effect that states with approved programs have "primary enforcement authority" and may "take the lead in the enforcement."<sup>419</sup> These observations are compatible with EPA retaining the power to enforce after a state's program is approved. Indeed, they imply that EPA has at least a secondary enforcement role in states with approved programs. The final House Report passage the court cites states, "EPA 'after giving the appropriate notice to a state that is authorized to implement the state hazardous waste program, that violations of this Act are occurring and the state [is] failing to take action against such violations, is authorized to take appropriate action against those persons in such state.'"<sup>420</sup> This passage does not mention a delay period for the state to take action and it does not assert that EPA is barred from taking an enforcement action if the state has done so. In discussing subsection 3008(a)(2), the Committee report merely stated that before taking an enforcement action in a state with an approved program, EPA "must give notice to the state 30 days prior to" enforcing.<sup>421</sup> Again,

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<sup>418</sup> 191 F.3d at 900.

<sup>419</sup> *Id.* at 901.

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

<sup>421</sup> Indeed, this passage does not occur in the Committee's discussion of section 3008, but rather in its discussion of section 3006. H. REP. NO. 94-1491, at 31 (1976), *reprinted in*

this is no support for the court's conclusion that EPA's enforcement authority is displaced by its approval of a state program. In fact, the passage supports the conclusion that EPA retains its enforcement authority after approving a state program. In any event, the history of what Congress actually did indicates that Congress intended for EPA to enforce against violations in a state with an approved program.

The *Harmon* court is wrong: EPA's approval of a state hazardous waste program does not suspend operation of the federal RCRA in the state any more than its approval of a CAA or CWA permitting program suspends operation of the CAA and CWA in the state. The same result appears to follow under RCRA Subchapter IV, governing non-hazardous solid waste. Indeed, the Ninth Circuit held in *Ashoff v. City of Ukiah*<sup>422</sup> that citizens could enforce against federal criteria for sanitary landfills regardless of whether EPA had approved a state's solid waste landfill program.<sup>423</sup>

*B. May EPA and Citizens Enforce State Law After EPA Approves a State Program?*

The second argument that defendants use to infer preclusions against EPA enforcement is that once a state program has been approved, neither EPA nor citizens may enforce the approved state law. As discussed above, EPA's approval of a state program does not suspend operation of the federal statute or its enforcement authorities in the state. Nevertheless, the requirements governing the behavior of the regulated public at that point may be state regulations or state permits. Defendants argue that EPA and citizens cannot use federal enforcement authorities to enforce against violations of state law. There are three approaches to addressing this assertion. One is that EPA's approval of a state program "federalizes" it, so that the approved state law becomes federal law. Another is that the federal statutes make violations of the approved state law violations of federal law, without resort to the concept of "federalizing" state law. The final approach is that the federal enforcement provisions authorize enforcement against violations of approved state programs.

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1976 U.S.C.C.A.N. 6238, 6269.

<sup>422</sup> 130 F.3d 409 (9th Cir. 1997).

<sup>423</sup> The decision seems to enunciate the theory that upon EPA approval of the state program, it "becomes effective" under RCRA and therefore enforceable under it. *Id.* at 411–12. The court, however, held that if the approved state program has a requirement that is more stringent than the federal criteria, the citizen may only enforce to the limits of the federal criteria. *Id.* at 413. See *infra* Part III.D. for a discussion of this issue. It also cites RCRA subsection 4005(a), authorizing citizens to enforce against violations of the federal criteria, "even after EPA has approved a state program." 130 F.3d at 411 n.3. Although subsection 4005(a) does not contain the quoted language, that is the import of the subsection, which prohibits "open dumping" except under a schedule for compliance established by states with approved programs. "Open dumps" are landfills not meeting the federal criteria for sanitary landfills. RCRA § 4005(a), 42 U.S.C. § 6945(a) (2000).

The first approach, as noted above, considers a federally approved state program to be federal law, at least for the purposes of federal enforcement provisions. The idea is articulated in a number of judicial decisions in various contexts,<sup>424</sup> though the statutes do not explicitly incorporate this “federalization” concept. Perhaps the courts embrace it as shorthand for a combination of the latter two approaches. It has been suggested that the Supreme Court rejected the “federalization” concept in *United States Department of Energy v. Ohio*,<sup>425</sup> but the Court in that case was interpreting specific wording in an unrelated part of the statute<sup>426</sup> in the context of a waiver of sovereign immunity.<sup>427</sup> Waivers of sovereign immunity are interpreted narrowly under their own set of doctrine and precedents.<sup>428</sup> Regardless, the concept of federalization is sufficiently amorphous to encourage looking elsewhere for justification of federal enforcement against violations of approved state programs.

The second approach, that the federal statutes make violations of the approved state law violations of federal law without “federalizing” the state law, flows from the structures of the statutes. The CWA, CAA and RCRA prohibit air and water pollution or the treatment, storage and disposal of hazardous waste except in compliance with a permit issued by EPA or a state with an approved program. These prohibitions make the specified actions illegal regardless of whether they occur in states with approved programs. In essence, in states with approved programs, the prohibitions make violations of a permit issued under EPA-approved state law also violations of federal law. The basic prohibition of CWA subsection 301(a), for instance, makes it illegal to discharge a pollutant “[e]xcept as in compliance with” various sections, including the permitting section.<sup>429</sup> Subsection 402(k), in the permitting section, provides that compliance with a permit “issued pursuant to this section” is deemed compliance with section 301 for the purposes of EPA and citizen enforcement provisions.<sup>430</sup>

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<sup>424</sup> See *La. Envtl. Action Network v. Browner*, 87 F.3d 1379, 1384 (D.C. Cir. 1996) (reviewing regulations delegating CAA section 112 implementation authority to states).

<sup>425</sup> 503 U.S. 607 (1992). The defendant in *United States v. Flanagan* made this argument, but the court rejected it. 126 F. Supp. 2d 1284, 1288 n.1 (C.D. Cal. 2000); see also *United States v. Elias*, 269 F.3d 1003, 1012 n.29 (9th Cir. 2001).

<sup>426</sup> 503 U.S. at 609 (interpreting “arising under Federal Law” in CWA section 313, 33 U.S.C. § 1323 (2000)).

<sup>427</sup> *United States Dep’t of Energy*, 503 U.S. at 615.

<sup>428</sup> There is a long history of attempts by Congress to waive the sovereign immunity of federal facilities in order to make them subject to federal and state environmental laws and to allow citizens and states to enforce them. The Court has found one attempt after another not explicit enough to accomplish a full waiver. *Id.* at 607 (holding that RCRA section 601 and CWA section 313 do not waive sovereign immunity for assessment of federal or state civil penalty); *EPA v. California ex rel. State Water Res. Control Board*, 426 U.S. 200 (1976) (holding that CWA section 313 did not waive sovereign immunity for state water permitting requirements); *Hancock v. Train*, 426 U.S. 167 (1976) (holding that CAA § 118 did not waive sovereign immunity for state air pollution permitting fee requirements).

<sup>429</sup> 33 U.S.C. § 1311(a) (2000).

<sup>430</sup> 33 U.S.C. § 1342(k) (2000).

Section 402 governs EPA's approval of state permit programs as well as the requirements of permits, whether issued by EPA or a state with an approved program. Therefore, permits issued either by EPA or states with approved programs are "issued pursuant to" section 402. If permits issued by states with approved programs were not "issued pursuant to" section 402, compliance with those permits would not immunize their holders from suit for violating subsection 301(a).

Similarly, CAA subsection 502(a) prohibits violation of a permit "issued under this subchapter," a subchapter that authorizes EPA both to approve state permit programs meeting the federal criteria and to issue permits in states without approved programs.<sup>431</sup> RCRA subsection 3005(a) prohibits the treatment, storage or disposal of hazardous waste "except in accordance" with a RCRA permit "issued pursuant to this section."<sup>432</sup> Section 3005 also authorizes EPA and states with programs approved by EPA under RCRA section 3006 to issue permits.<sup>433</sup> Section 3006 governs state programs "pursuant to this subchapter."<sup>434</sup> RCRA subsection 3008(a) authorizes EPA to enforce against violations of "this subchapter," which includes subsection 3005(a) and its prohibition.<sup>435</sup> Thus, all three statutes make it illegal to undertake the proscribed actions except in compliance with a permit issued by EPA or by a state with an approved program. Federal statutes making violations of state law also violations of federal law have been upheld in other contexts as well.<sup>436</sup>

The third approach, that federal enforcement provisions authorize enforcement against violations of approved state programs, flows from the structures of the statutes' enforcement provisions. The EPA enforcement provisions of all three statutes authorize EPA to enforce against violations in states with approved programs. CWA subsections 309(a)(1) and (3) authorize EPA to enforce civilly and administratively against violations of "a permit issued by a State under an approved permit program," and subsection 309(c) makes such negligent and knowing violations criminal offenses.<sup>437</sup> CAA subsection 113(a) authorizes EPA to enforce civilly and administratively against violations of "an applicable implementation plan or permit," and subsection 113(c) makes such knowing violations criminal offenses.<sup>438</sup> RCRA subsection 3008(d) authorizes EPA to enforce civilly and administratively against "a violation of any requirement of this subchapter," and subsection 3008(c) makes knowing violations criminal

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<sup>431</sup> 42 U.S.C. § 7661a(a) (2000).

<sup>432</sup> 42 U.S.C. § 6925(a) (2000).

<sup>433</sup> 42 U.S.C. §§ 6925(c), 6926 (2000).

<sup>434</sup> 42 U.S.C. § 6926(c).

<sup>435</sup> 42 U.S.C. § 6928(a) (2000).

<sup>436</sup> The Lacey Act, for instance, makes it a federal offense to violate specified state laws regulating fish and wildlife. 16 U.S.C. § 3372 (2000); *see also* *United States v. Bryant*, 716 F.2d 1091, 1093 (6th Cir. 1983).

<sup>437</sup> 33 U.S.C. § 1319(a)(1), (a)(3), (c) (2000).

<sup>438</sup> 42 U.S.C. § 7413(a), (c) (2000).



offenses in states with approved programs.<sup>439</sup> While it could be argued that a “violation of this subchapter” means only violations of federal regulations to the extent they are not superseded by approved state programs, subsection 3008(a)(2) requires EPA to give notice to a state with an approved program before undertaking civil or administrative enforcement against violations in the state. If EPA cannot enforce in such states, that paragraph would be superfluous. Moreover, subsections 3008(a)(3) and (c) authorize EPA to issue administrative orders to revoke a violator’s permit, whether issued by EPA or by a state, again authorizing EPA to enforce in states with approved programs, as only states with approved programs may issue permits under the statute. Moreover, subsection 3005(d) gives EPA authority to suspend or revoke violators’ permits where EPA is administering the program, making the permit suspension and revocation authorities in subsections 3008(a)(3) and (c) superfluous unless they include the authority to suspend or revoke state-issued permits. Several of the RCRA criminal offenses also specifically include violations of regulations promulgated by states with approved programs,<sup>440</sup> provisions that also would be superfluous if EPA could not enforce state requirements that operate in lieu of the federal program after EPA approves a state program. The citizen suit provisions of all three statutes also authorize citizen enforcement against violations of the statutes regardless of whether they are administered by EPA or states.<sup>441</sup> Thus, all three statutes specifically authorize federal enforcement in states with approved programs.

*C. May EPA Enforce Against a Violation of an Approved State Program  
When the State Has Already Enforced Against the Violation, i.e.,  
May EPA “Overfile?”*

The question addressed in this Section is whether the statutes preclude EPA from enforcing against a violation that the state has already enforced against (commonly known as “overfiling”).<sup>442</sup>

In statutes or parts of statutes where Congress was most deferential to state administration and enforcement, it either entirely withheld enforcement authority from EPA, or used the preclusion device with all three ele-

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<sup>439</sup> 42 U.S.C. § 6928(a), (d).

<sup>440</sup> RCRA § 3008(d)(3)–(5), 42 U.S.C. § 6928(d)(3)–(5).

<sup>441</sup> CWA subsection 505(a) authorizes suit against violations of “an effluent standard or limitation,” and subsection 505(f) defines that term to include violations of section 301 or of permits “issued under” section 402. 33 U.S.C. § 1365(a), (f) (2000). As discussed above in this section, these include discharges without or violating permits issued by either EPA or a state with an approved program.

<sup>442</sup> The related question of whether common law doctrines may preclude such successive action though its answer may be affected by the statutory question, is not addressed here. If the statutes preclude overfiling, the common law preclusions are irrelevant. On the other hand, if the statutes explicitly permit overfiling, they may override common law preclusions.

ments to bar EPA enforcement if the state had already taken “appropriate” enforcement action. Congress used the preclusion device with all three elements in the citizen suit provisions of all of the statutes, but never precluded all successive citizen actions.<sup>443</sup> In most statutes or parts of statutes, Congress used the preclusion device in EPA enforcement provisions with only one or two elements. In a few statutes, it created no role for state implementation and did not use any form of the preclusion device in the EPA enforcement provisions.

Congress’s constant and varying use of the preclusion device unmistakably demonstrates that it explicitly addressed overfiling in the EPA and citizen enforcement provisions, precluding or limiting overfiling in them when it intended and allowing overfiling when it intended.

The presence of a limited preclusion device in an EPA enforcement provision demonstrates congressional intent to limit overfiling but not bar it altogether. The particular wording of the preclusion device in each provision demonstrates the “precise conditions” of preclusion Congress intended to operate under that provision.<sup>444</sup> The absence of the preclusion device in an EPA enforcement provision demonstrates Congress intended not to limit overfiling. This is perhaps most evident in EPA enforcement provisions where Congress precluded or limited EPA overfiling against some types of violations, but not others.<sup>445</sup>

Not surprisingly, EPA interprets the statutes to give it overfiling authority, except where clearly precluded or limited by a particular statute.<sup>446</sup> At the same time, EPA is cognizant of the prerogatives of the states and the implicit criticism of the state’s enforcement that overfiling implies.<sup>447</sup> EPA seeks to avoid controversies with states by encouraging them to undertake more aggressive enforcement so that EPA need not consider overfiling or by declining to overfile where the state action is marginally effective although not as aggressive as EPA action would be.<sup>448</sup>

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<sup>443</sup> See Miller, *supra* note 1, at 416–20. Under CWA section 505, for instance, Congress did not preclude citizens from suing if the government did not act first, did not enforce judicially to seek compliance and did not prosecute vigorously to secure compliance.

<sup>444</sup> Cal. Sportfishing Protection Alliance v. City of Sacramento, 905 F. Supp. 792, 801 (E.D. Cal. 1995).

<sup>445</sup> This is particularly pronounced in CWA section 309. Congress specifically precluded EPA from overfiling under the CWA for penalties when the state had assessed penalties for the same violation, 33 U.S.C. § 1319(g)(6) (2000), and from overfiling if EPA chose to issue a notice of violation to the state at the onset of EPA action and the state commenced an “appropriate enforcement action.” 33 U.S.C. § 1319(a)(1). Congress did not preclude EPA from overfiling under any other circumstances in the section. 33 U.S.C. § 1319(a)(3).

<sup>446</sup> See *supra* notes 442–443 and accompanying text; *infra* notes 458–467 and accompanying text.

<sup>447</sup> Indeed, it has a number of policy documents restricting the instances in which it will overfile and requiring its regional offices to enter into memoranda of understanding with states to coordinate their enforcement efforts, with the objective, among other things, to minimize overfiling. See *infra* notes 468–472; *supra* note 10.

<sup>448</sup> The most extensive commentary on the issue investigated the frequency of EPA

Except under RCRA, there are few reported decisions on overfiling, perhaps because defendants recognize that the statutes grant EPA overfiling authority and because EPA avoids overfiling in many cases.<sup>449</sup> Not surprisingly, in cases where overfiling has been challenged, courts have had little trouble holding that the statutes authorize EPA to overfile.<sup>450</sup>

Under RCRA, however, the issue is more clouded by the congressional declarations in the state program approval provision that an approved state program operates “in lieu of” the federal program and that the actions of an approved state have the “same force and effect” as actions by EPA.<sup>451</sup> These declarations led the Eight Circuit to hold in *Harmon Industries, Inc. v. Browner* that EPA did not have authority to overfile under RCRA.<sup>452</sup> As discussed above, the opinion also contains contradictory conclusions on whether the “in lieu of” language suspends federal enforcement authority when EPA approves a state program.<sup>453</sup>

The *Harmon* court held that if EPA may enforce in a state with an approved program when the state takes no action, the “same force and effect” language precludes EPA from enforcing when the state takes an enforcement action. Its analysis depends entirely on its contention that the “same force and effect” language in subsection 3006(d) covers enforcement actions by the state, although the heading of the subsection is “Effect of State permit.”<sup>454</sup> If that heading has any meaning, it can only be that the state’s action in issuing a permit has the same force and effect as EPA’s action in issuing a federal permit. The court’s interpretation of the subsection renders the heading meaningless, an interpretation to be avoided.<sup>455</sup> In an earlier era when printers added section and subsection headings to congressionally written statutory text, it made sense to disregard headings as a meaningful part of the statute. Here, however, because Congress wrote the “Effect of State permit” heading and enacted it as

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overfiling and found it to be very infrequent. Ellen R. Zahren, *Overfiling Under Federalism: Federal Nipping at State Heels to Protect the Environment*, 49 EMORY L.J. 373, 375 n.18 (2000) (noting the testimony of an assistant administrator before a Congressional Committee that EPA overfiled in only a handful of cases a year); see also Joel A. Mintz, *Enforcement “Overfiling” in the Federal Courts: Some Thoughts on the Post-Harmon Cases*, 21 VA. ENVTL. L.J. 425, 427 (2003).

<sup>449</sup> See *infra* notes 468–472; *supra* note 10.

<sup>450</sup> *United States v. Power Eng’g Co.*, 303 F.3d 1232 (10th Cir. 2001) (RCRA); *United States v. Smithfield Foods, Inc.*, 191 F.3d 516 (4th Cir. 1999) (CWA); *S. Ohio Coal Co. v. Office of Surface Mining*, 20 F.3d 1418 (1994) (CWA); *United States v. ITT Rayonier, Inc.*, 627 F.2d 996, 1001 (9th Cir. 1980) (CWA); *United States v. Murphy Oil USA, Inc.*, 143 F. Supp. 2d 1054 (W.D. Wis. 2001) (CAA); *United States v. LTV Steel Co., Inc.*, 118 F. Supp. 2d 827 (N.D. Ohio 2000) (CAA); *United States v. City of Youngstown*, 109 F. Supp. 2d 739, 741 (N.D. Ohio 2000) (CWA); *United States v. SCM Corp.*, 615 F. Supp. 411 (D. Md. 1985) (CAA); *United States v. Harford Sands, Inc.*, 575 F. Supp. 733 (D. Md. 1983) (CAA); *United States v. Cargill, Inc.*, 508 F. Supp. 734, 741–42 (D. Del. 1981) (CWA).

<sup>451</sup> RCRA § 3006(b), (d), 42 U.S.C. § 6926(b), (d) (2000).

<sup>452</sup> 191 F.3d 894 (8th Cir. 1999).

<sup>453</sup> See *supra* Part III.B.

<sup>454</sup> 42 U.S.C. § 6926(d).

<sup>455</sup> See ESKRIDGE, *supra* note 134, at 324.

part of the statute, it is entitled to consideration when interpreting the meaning of the subsection.<sup>456</sup> An often-cited precedent suggests otherwise,<sup>457</sup> but it is easily distinguished.<sup>458</sup>

The *Harmon* court found support for its conclusion in RCRA subsection 3006(e), authorizing EPA to withdraw its approval of a state program if EPA determines the state is “not administering and enforcing” the program “in accordance with the requirements of” the section.<sup>459</sup> The court evidently believed this provision was the remedy Congress intended EPA to use when a state enforced against a violation, but did so inadequately. Thus, the court concluded that EPA could enforce in a state with an approved program only if the state “took no action” or if EPA first withdrew its approval of the state program.<sup>460</sup>

The court may have thought this an optimal solution, assuring adequate enforcement of RCRA, while preserving the supremacy of the state in administering and enforcing its approved program. Unfortunately, it preserves state supremacy but does not assure adequate enforcement. Under the court’s analysis, as long as the state takes some enforcement action, EPA can take no enforcement action unless it revokes its approval of the state program.<sup>461</sup> The court did not recognize that this leaves several holes

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<sup>456</sup> 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47.14 (5th ed. 1992).

<sup>457</sup> *Bd. of R.R. Trainmen v. Baltimore & Ohio R.R. Co.*, 331 U.S. 519, 526–29 (1947).

<sup>458</sup> While the section heading in the *Trainmen* statute and the subsection heading in subsection 3006(d) both appear to narrow the following text, they have nothing else in common. The Court in *Trainmen* interpreted one of seventeen subsections in a section of the Interstate Commerce Act entitled “Commission procedure; delegation of duties; rehearings.” *Id.* at 527. One of those subsections dealt with intervention. Read alone, the subsection applied to intervention both in administrative proceedings before the Commission and in judicial proceedings in which the Commission was a party. The appellees contended that the section heading limited the reach of the intervention subsection to administrative proceedings before the Commission. *Id.* The Court disagreed, reasoning that: the section was a long and complicated collection of many authorities; the section heading was nothing more than an incomplete summary of its contents; several of the subsections included authorities beyond administrative proceedings before the Commission; and the intervention subsection was one of a number of latter-day amendments to the section. *Id.* at 527–28. Moreover, the Court cited legislative history demonstrating Congress was aware that some of the subsections did not deal with administrative procedures, making clear that it did not intend the section heading to narrow any of the subsection authorities to only administrative proceedings. *Id.* at 528.

The relationship between subsection 3006(d) and its heading is entirely different. It is not a section heading followed by seventeen disparate subsections. It is a subsection heading followed by a thirty-one word, single sentence subsection. In *Trainmen*, the administrative proceeding description in the section heading referred to much of the section, but not all of it, and in particular not to the intervention subsection. In subsection 3006(d), the subsection heading can refer only to the sentence that follows it. Congress wrote “[e]ffect of State permit” to have some meaning. The only meaning it could have is that the state actions in the subsection that have the same effect of federal actions are permit actions. Nothing in the legislative history of subsection 3006(d) suggests otherwise. Neither the reasoning nor the facts of *Trainmen* suggest a contrary interpretation.

<sup>459</sup> 42 U.S.C. §§ 6901–6992k (2000).

<sup>460</sup> See *supra* Part III.B.

<sup>461</sup> “If the state fails to initiate *any* action, then the EPA may institute its own action.”

in the compliance/enforcement net. First, the court held that if the state took *any* action against a violator, it would bar all EPA enforcement against the same violator.<sup>462</sup> In other words, state enforcement against one violation by a defendant would foreclose EPA from enforcing against entirely different violations by that defendant, perhaps even at different facilities. Worse, if the state issued an administrative order deferring compliance indefinitely, reducing the substantive requirements with which the violator must comply, or simply penalizing a continuing violation at one dollar a day, such actions would foreclose EPA from ever seeking compliance. This, of course, would enable the state to shield RCRA violators from EPA enforcement and from compliance with RCRA. Carried to an extreme, it could allow a state to render RCRA inoperative within its borders.

The court would likely reply that Congress gave EPA a remedy for that eventuality: revocation of EPA's approval of the state program. Yet the court did not fully consider the nature of revocation of state program approval. Revocation of a state's program is a shotgun rather than a rapier remedy in the context of federalism. Revocation of program approval would run counter to the Congressional preference for state implementation of the program. Worse, from EPA's perspective, it would require an immediate injection of federal personnel to conduct implementation tasks previously performed by state personnel. It is the sort of remedy that EPA would use only if it was clear the state was incapable of administering or was systematically undercutting the program. The rapier remedy of EPA overfiling is much less disruptive. Moreover, the only court considering this issue, albeit under the CWA, expressed "skepticism whether a state authority's unsatisfactory handling of a single permit would ever warrant EPA revocation."<sup>463</sup> In all probability, that court would have reached the same conclusion if the state had failed to enforce adequately against only one violator.

EPA revocation of approval of a state program may be a remedy in a situation in which a state renders RCRA entirely inoperative within its borders by issuing inconsequential enforcement orders against all violators, thus shielding them from successive EPA enforcement for compliance with RCRA. Revocation is an inappropriate remedy, however, in situations of serious but not pervasive instances of the practice.<sup>464</sup> Moreover,

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Harmon Indus., Inc. v. Browner, 191 F.3d 894, 899 (8th Cir. 1999) (emphasis added).

<sup>462</sup> *Id.*

<sup>463</sup> *Save the Bay, Inc. v. Adm'r, EPA*, 556 F.2d 1282, 1290 (5th Cir. 1977). By contrast to RCRA, Congress gave EPA a remedy under the CWA when a state issues a permit that fails to meet the requirements of the CWA: EPA can veto the state permit and issue a federal permit. CWA § 402(d)(4), 33 U.S.C. § 1342(d)(4) (2000); *see also* *United States v. Cargill, Inc.*, 508 F. Supp. 734, 740 (D. Del. 1981); ESKRIDGE, *supra* note 134, at 326 (noting the "[r]ule against interpreting statutes to be retroactive" and citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988)).

<sup>464</sup> EPA has on occasion raised the specter of states sabotaging the federal program by similar means. In *United States v. General Motors Corp.*, it argued that states could thwart

even if EPA did revoke its approval of the state's program in such a situation, it is not clear under the *Harmon* court's analysis that revocation of approval would remove the shield against EPA enforcement that the earlier state order had conferred on the violator. Unless the revocation of approval is retrospective, an order made by the state prior to revocation would still have the same force and effect as if EPA had issued the order itself; it would preclude EPA from further enforcement. The Court's general presumption against retrospective application of government action, unless it is clearly intended, might assure this result.<sup>465</sup> RCRA subsection 3006(e) does not specify that revocation of approval of a state program is retrospective. Indeed, the provision requires EPA to notify the state and allow it to take appropriate corrective action within a reasonable time before revoking approval of the program.<sup>466</sup> This suggests that revocation would not be retrospective.

Moreover, the consequences of retrospective revocation of approval would be problematic. The state program approval could not have been void from the beginning, since the inadequate enforcement action justifying revocation occurred later. If revocation is retrospective to the time that the inadequate enforcement action was taken, actions taken by the state after that time but in conformity with RCRA also would be ineffective. That would yield a counterproductive and chaotic result.

The *Harmon* court did not defer to EPA's interpretation of the statute. EPA has long interpreted the statute to allow it to overfile. This interpretation was enunciated in an opinion of its General Counsel in 1986.<sup>467</sup> Soon thereafter the opinion was attached to a policy statement, "Guidance on RCRA Overfiling," which instructed that "[r]egions should continue to overfile RCRA enforcement actions when the state fails to take timely and appropriate action."<sup>468</sup> EPA's Environmental Appeals Board ("EAB") and, before the EAB's creation, EPA's Chief Judicial Officer ("CJO"), adopted this interpretation in rejecting challenges to RCRA administrative penalty assessments.<sup>469</sup> EPA has also incorporated this interpretation

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enforcement of the CAA by flooding EPA with revisions to their state implementation plans. 876 F.2d 1060, 1067 (1st Cir. 1989).

<sup>465</sup> *E.g.*, *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280–86 (1994).

<sup>466</sup> *See* 42 U.S.C. § 6926(e) (2000).

<sup>467</sup> *Effect on EPA Enforcement Action Taken by State With Approved RCRA Program*, Memorandum from Francis S. Blake, EPA General Counsel, to Lee M. Thomas, EPA Administrator (May 9, 1986), available at <http://www.epa.gov/Compliance/resources/policies/civil/rcra/rcraoverfiling-mem.pdf> (last visited Dec. 5, 2004) (on file with the Harvard Environmental Law Review).

<sup>468</sup> Memorandum from A. James Barnes, Deputy Administrator (May 19, 1986), available at <http://www.epa.gov/Compliance/resources/policies/civil/rcra/rcraoverfiling-mem.pdf> (last visited Dec. 5, 2004) (on file with the Harvard Environmental Law Review).

<sup>469</sup> *Bil-Dry*, 9 E.A.D. 575 (2001); *Harmon Elecs., Inc.*, 7 E.A.D. 1, 9–10 (1997); *Gordon Redd Lumber Co.*, 5 E.A.D. 301, 308 (1994); *S. Timber Prods., Inc.*, 3 E.A.D. 371, 378 (1990); *Martin Elecs., Inc.*, 2 E.A.D. 381, 385 (1987).

into its rulemakings.<sup>470</sup> Thus, EPA's interpretation is entitled to *Chevron*<sup>471</sup> deference, even under *Mead*.<sup>472</sup> The Eighth Circuit's opinion not only completely ignores EPA's longstanding interpretation, but it reads a subsection heading out of the statute. Not only is the decision ill-conceived, but its result allows states effectively to modify the application of national standards by inadequate enforcement, thereby undermining national uniformity of regulatory standards and protection of public health.

Assuming, *arguendo*, that the *Harmon* court is correct in concluding that subsection 3006(d) deems a state's enforcement action to have the same force and effect as an EPA enforcement action, the impact of that conclusion on EPA overfiling depends on the force and effect an EPA enforcement action would have on a successive EPA enforcement action. The court does not ask whether an EPA enforcement action would bar a subsequent EPA enforcement action or the extent to which it would do so. While the court used *res judicata* as a separate basis of its analysis,<sup>473</sup> it did not do so as part of its subsection 3006(d) analysis.<sup>474</sup> Nothing in the text of RCRA section 3008, the EPA enforcement section, bars EPA from subsequent enforcement if EPA has already enforced. Because the section's goal is compliance, it would be contrary to the section's purpose to bar EPA from sub-

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<sup>470</sup> The note following 40 C.F.R. § 271.16(c) (2003) cautions that when a state with an approved program assesses inadequate penalties against a violation, EPA may bring an action for additional penalties.

<sup>471</sup> *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

<sup>472</sup> *United States v. Mead Corp.*, 533 U.S. 218 (2001). Even if EPA's interpretation is not entitled to *Chevron* deference, it is entitled to respect in accordance with the formality of the procedures in which it developed the interpretation, the longevity and consistency of its interpretation, and the persuasiveness of the interpretation. *Id.* at 235–38. If EPA's procedures were not formal enough to warrant *Chevron* deference, they were open, formal, subject to notice and comment, and judicial review. The interpretation has been in force and followed consistently since at least 1986, and it is a persuasive and reasonable interpretation.

EPA's CJO ruled in *BKK Corp.* that EPA is precluded from enforcing in a state with an approved plan if the State had taken reasonable and appropriate enforcement action against the same violations. No. RCRA-IX-84-0012, 1984 WL 50073 (Apr. 13, 1984), *vacated*, No. IX-84-0012, 1985 WL 57150 (Oct. 23, 1985). His decision was based on the same rationale as the decision in *Harmon*: the "in lieu of" language of RCRA subsection 3006(b) and the language in subsection 3006(d) that actions of states with approved programs are "deemed to be the actions" of EPA. He came to a substantially different conclusion than *Harmon*, however, for the Eighth Circuit held that EPA was precluded from enforcement when the state had taken any enforcement action, not just a reasonable and appropriate one. In response to a petition for reconsideration by EPA staff, the Administrator dismissed the complaint and vacated the final order of the CJO and the initial decision of the Administrative Law Judge, rendering them without value as precedent in the Agency. RCRA § 3008, 84–85 (Oct. 23, 1985). EPA did not object to the policy enunciated in the CJO's opinion or even to its application to the facts. It objected to enshrining the interpretation of the statute in a formal agency interpretation of the statute. Because of concessions by the staff, the Administrator was able to declare the controversy over and dismiss the case without addressing the legal issue. Shortly after this event, EPA issued its policy on overfiling under RCRA. *See supra* note 450.

<sup>473</sup> *Harmon Indus., Inc. v. Browner*, 191 F.3d 894, 902–03 (8th Cir. 1999).

<sup>474</sup> *Id.* at 899–901 (citing 42 U.S.C. § 6926 (2000)).

sequent enforcement if its initial enforcement against a violator was ineffective in securing compliance. Not surprisingly, if EPA issues a compliance order to a violator and the order does not secure compliance, nothing in the text of the section bars EPA from issuing a subsequent order, seeking an injunction, or seeking a criminal sanction.<sup>475</sup> Indeed, the section explicitly contemplates such subsequent enforcement,<sup>476</sup> as do citizen suits.<sup>477</sup> The other statutes have similar provisions contemplating successive enforcement by EPA against the same or different violations.<sup>478</sup> Indeed, nothing in any of the statutes precludes the government from taking both civil and criminal actions against the same violations.<sup>479</sup> Furthermore, EPA would be expected to take successive actions against the same violator if its violations continued after the first action. If subsequent EPA enforcement in this context is barred, it is barred by common law, not by RCRA.

*Harmon* spawned a burst of commentary, much of which is critical of the decision and argues that it does not apply under other statutes.<sup>480</sup> Courts have rejected attempts to invoke *Harmon* under other statutes,<sup>481</sup> and have also rejected further attempts to invoke it under RCRA, but often because it was distinguishable.<sup>482</sup> Moreover, the EAB has rejected it, though also

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<sup>475</sup> RCRA § 3008, 42 U.S.C. § 6928.

<sup>476</sup> See RCRA § 3008(c), 42 U.S.C. § 6928(c).

<sup>477</sup> See *supra* Part I.C.

<sup>478</sup> CWA subsection 309(d) and CAA subsection 113(b)(2) authorize a court to assess penalties for violations of EPA compliance orders. 33 U.S.C. § 1319(d) (2000); 42 U.S.C. § 7413(b)(2) (2000).

<sup>479</sup> See LAND & NATURAL RESOURCES DIVISION, U.S. DEP'T OF JUSTICE, DIRECTIVE NO. 5-87: GUIDELINES FOR CIVIL AND CRIMINAL PARALLEL PROCEEDINGS (1987), available at <http://www.sprlaw.com/html/guidelines.htm> (last visited Dec. 5, 2004) (on file with the Harvard Environmental Law Review); Steven A. Herman, Assistant Administrator, *Parallel Proceedings Policy* (June 22, 1994), reprinted in ENVIRONMENTAL LAW INSTITUTE, ENVIRONMENTAL CRIMES DESKBOOK 199 (1996).

<sup>480</sup> *Cristiana Coop, Harmon Industries, Inc. v. Browner*, 28 ECOLOGY L.Q. 253 (2001); Lisa Dittman, Comment, *Overfiling: Policy Arguments in Support of the Gorilla in the Closet*, 48 U.C.L.A. L. REV. 375 (2000); Bryan S. Miller, *Harmonizing RCRA's Enforcement Provisions: RCRA Overfiling in Light of Harmon Industries v. Browner*, 5 ENVTL. L. 585 (1999); Bryan S. Miller, *Understanding Overfiling: The Impact of Two Recent Federal Cases on EPA Overfiling*, 15 J. ENVTL. L. & LITIG. 21 (2000); Mintz, *supra* note 448; Zahren, *supra* note 448. The Miller articles favor the *Harmon* decision; the others criticize it, presenting legal and policy reasons to justify overfiling.

<sup>481</sup> See *United States v. Bryant*, 716 F.2d 1091 (6th Cir. 1983).

<sup>482</sup> *United States v. Elias*, 269 F.3d 1003, 1011 (9th Cir. 2001); *United States v. Flanagan*, 126 F. Supp. 2d 1284, 1289 (C.D. Cal. 2000) ("*Browner* is not about if, but about when, the United States can bring a civil enforcement action in federal court after it has authorized a state program."); *United States v. Power Eng'g Co.*, 125 F. Supp. 2d 1050 (D. Colo. 2000), *aff'd on other grounds*, 303 F.3d 1232 (10th Cir. 2002) (offering a detailed and analytic rejection of *Harmon*).



in a case that was distinguishable.<sup>483</sup> Not surprisingly, EPA has announced it will not follow *Harmon*, even under RCRA, except in the Eighth Circuit.<sup>484</sup>

*D. May EPA and Citizens Enforce Against Violations of Approved State Program Requirements that Are More Stringent Than or Beyond the Scope of the Superseded Federal Program?*

The final imputed preclusion promoted by defendants would bar EPA and citizens from enforcing against violations of approved state programs that are either more stringent or beyond the scope of existing federal regulations on the subject. Unlike the spurious arguments heretofore discussed in this Section, this imputed preclusion has merit in some cases, but not others, depending on the enforcement mechanism used in each statute. This Section will examine the different possible approaches to resolving this complex issue, then discuss the application of the imputed preclusion in each statute.

A state requirement that is more stringent than a federal requirement regulates a pollutant or an activity already subject to a federal requirement, but regulates it more than the corresponding federal regulation. A state requirement that is beyond the scope of a federal requirement regulates a pollutant or an activity that is not regulated at all by the federal program. A federally approved state program might include both state requirements that are more stringent than the corresponding federal requirements and state requirements that are beyond the scope of the federal requirements.

The statutes establish minimum criteria that state programs must meet to gain EPA approval<sup>485</sup> and explicitly preserve the rights of the states to provide requirements more stringent but not less stringent than the federal requirements.<sup>486</sup> EPA, therefore, could not disapprove part of a state program because it was more stringent than the federal program.<sup>487</sup> EPA, how-

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<sup>483</sup> *Bil-Dry Corp.*, 9 E.A.D. 575 (2001). Although the EAB took pains to reject *Harmon*, the appeal it decided was of an EPA penalty assessment for a violation in a state with an approved program, but not in a case where the state had already taken enforcement action. EPA simply had not overfiled.

<sup>484</sup> "In the wake of the Eighth Circuit's opinion, EPA's General Counsel has reaffirmed that while *Harmon* is final and binding on EPA in that particular case, the Agency would not adopt the Eighth Circuit's interpretation of RCRFA nationwide." *Bil-Dry Corp.*, 9 E.A.D. 575, 590 (2001) (citing Letter from Gary S. Guzy to Congressman David M. McIntosh, at 3 (May 22, 2000)).

<sup>485</sup> CWA § 402(b), 33 U.S.C. § 1342(b) (2000); RCRA § 3006(b), 42 U.S.C. § 6926(b) (2000); CAA § 110(a), 42 U.S.C. § 7410(a) (2000). *See supra* Part III.C.

<sup>486</sup> CWA § 510, 33 U.S.C. § 1370 (2000); CAA § 116, 42 U.S.C. § 7416 (2000); RCRA § 3009, 42 U.S.C. § 6929 (2000).

<sup>487</sup> This may not be true for RCRA, which requires EPA to approve state programs that are "equivalent to the Federal program" and "not [in]consistent" with the Federal or State programs applicable in the other States. 42 U.S.C. § 6926(b) (2000). This would give EPA authority to disapprove a state program, for example, that went so far beyond the federal program as to effectively remove the state as a repository of hazardous wastes. If all states did so, of course, interstate movement of hazardous waste would be threatened and inter-

ever, could disapprove of part of a state program because it was beyond the scope of the federal program, i.e., it was not responsive to the statutory criteria for approving the program. Such disapproval would not invalidate the state requirements; they would remain in effect under state law, but would not become effective under federal law. None of the statutes explicitly address whether state requirements more stringent than or beyond the scope of federal requirements are federally enforceable. As an abstract proposition, it may be argued that neither should be federally enforceable, for both are beyond the requirements that EPA and citizens could enforce in the absence of an approved state program. As a practical matter, however, many of the more stringent state requirements are inseparable from the corresponding federal requirements. As to these requirements, the underlying federal requirement could not be achieved without enforcing the more stringent state equivalents. The same cannot be said for state requirements that are beyond the scope of the federal requirements. This suggests that state requirements that are more stringent than federal requirements should be federally enforceable while state requirements that are beyond the scope of federal requirements should not be. Of course, these general propositions may be overridden by the wording of the particular statutes.

### *1. Three Approaches to the Question*

Confronted with attempts to enforce against violations of federally approved state programs that are more stringent than their corresponding federal requirements, courts could rule either that the more stringent state standards: (1) are not federally enforceable; (2) are federally enforceable, but only up to the level of the corresponding federal requirements; or (3) are enforceable in their entirety. The first alternative leaves the corresponding federal requirements unenforceable. A state, thus, could insulate all its sources from federal standards simply by submitting a state program slightly more stringent than every requirement in the federal program and then not enforcing the state requirements. If EPA and citizens could not enforce the federal requirements because they were supplanted by the state requirements,<sup>488</sup> and could not enforce the approved state requirements because they were more stringent than the federal requirements, pollution sources in the state would be effectively insulated from the federal requirements. This first alternative, therefore, is unacceptable, as it thwarts the very purposes of the federal statutes.

The second alternative appears to meet exactly the purposes of the federal statutes and to be the correct alternative. As a practical matter, however, it is feasible only when both the state and federal standards are stated

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state manufacturing would be imperiled from lack of places to treat and dispose of hazardous waste. *See Hazardous Waste Treatment Council v. Reilly*, 938 F.2d 1390 (D.C. Cir. 1991).

<sup>488</sup> *See supra* Part II.B.

in numerical units of measurement. To demonstrate, assume a pollution source emits 1.5 ppm of the organic pollutant subject to a 1.0 ppm federal limitation and a 0.5 ppm state limitation. The pollution source violates both requirements. EPA or citizens could obtain a federal injunction requiring the source to comply with the 1.0 ppm federal standard, thus leaving the source in violation of the more stringent 0.5 ppm state standard. The state, if it chose, would still be able to obtain a state injunction to comply with its more stringent standard. There is no problem with separable enforcement as long as the federal and state requirements are stated in quantitative units of measurement.

Federal and state requirements that are not stated in quantitative units of measurement, however, may not be separable. For instance, requirements that are narrative and qualitative may not be separable from requirements that are stated in quantitative units of measurement. The number and location of groundwater monitoring wells surrounding a facility, for example, must be "sufficient" and "appropriate" to indicate the quality of groundwater affected by the permitted facility.<sup>489</sup> Many RCRA regulatory requirements are established by the professional judgment of the permit writer.<sup>490</sup> Since there is no objective standard useful for comparison of the federal and state standard, any attempt to draw a line where the federal standard ends and the state standard begins will be in vain.

Enforceability by EPA and citizens only up to the level of the federal requirement could be effective in instances in which state and federal limitations are separable, leaving the first or third alternatives to apply in other instances. However, that scheme brings with it the undesirable results inherent in the first and third alternatives, albeit on a more limited basis than if either alternative applied in all cases. Moreover, it does not help to determine whether the first or third alternatives apply in such circumstances.

That conclusion leaves only the third alternative, that state requirements are enforceable in their entirety. While federal enforcement of the more stringent state standard may be overkill in terms of the environmental-

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<sup>489</sup> See, e.g., 40 C.F.R. § 264.97(a) (2004):

The ground-water monitoring system must consist of a sufficient number of wells, installed at appropriate locations and depths to yield ground-water samples from the uppermost aquifer that: (1) represent the quality of background water that has not been affected by leakage from the regulated unit . . . and (2) Represent the quality of ground-water passing the point of compliance.

<sup>490</sup> If the state's regulation adds after "appropriate" in the federal regulation "but at least every 25 feet," the state requirement is a more stringent state requirement when it requires more monitoring wells than an EPA permit writer would require under the federal regulation. It is impossible, however, to determine whether the state requirement is more stringent than the federal requirement in a particular permit without a parallel federal permit issuance in order to determine whether the federal requirement would allow more than twenty-five feet between the wells.

protection purpose of the federal statute, it is consistent with the policy and goals of the federal statutes to allow states to establish pollution abatement standards more stringent than the federal standards.<sup>491</sup> Courts that have rejected the third alternative have done so because federal enforcement of the more stringent state standard removes from the state its prosecutorial discretion to determine if and when the more stringent part of the state standard may be enforced.<sup>492</sup> This rationale allows the state discretion to insulate sources from the federal standard, unacceptably defeating the environmental-protection purpose of the federal statute.

This holding should not be followed because the state can preserve its discretion not to enforce its more stringent state standard, while preserving the federal enforceability of the federal standard. It can do so by not submitting the more stringent portion of the state standard as part of the state program to be approved by EPA. For instance, in the monitoring well example,<sup>493</sup> the state could simply submit a clone of the federal regulation to EPA for approval and, after approval, amend the state regulation to make it more stringent. This leaves a less stringent standard as part of the approved and federally enforceable state program, and the more stringent portion of the standard enforceable by the state but not part of the approved and federally enforceable state program. Such part-approval amendments could trigger federal review to determine whether the state program still qualifies for federal approval. This requires a statute-specific analysis, but generally the statutes preserve the states' authority to have requirements more stringent than the federal requirements.<sup>494</sup>

Because the objectionable result of the third alternative can be avoided by the state, it is the preferable alternative, either alone or in combination with the second alternative. Moreover, it is preferable alone rather than in combination with the second alternative because applying it alone results in a single rule for the federal enforceability of more stringent state standards in approved state programs.

## 2. Statute-by-Statute Analysis

This abstract analysis, however, may be greatly affected by differences between the federal statutes. The CWA, for instance, requires state water

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<sup>491</sup> These statutes generally have state administration as a policy. *See, e.g.*, CWA § 101(b), 33 U.S.C. § 1251(b). At the same time, they preserve the rights of states to have standards more stringent than the federal standards. *See, e.g.*, CWA § 510, 33 U.S.C. § 1370 (2000). Stricter state standards provide more environmental protection than less stringent federal standards, thus furthering the environmental protection goals of the statutes. *See, e.g.*, CWA § 101(a), 33 U.S.C. § 1251(a).

<sup>492</sup> *Ashoff v. City of Ukiah*, 130 F.3d 409, 413 (9th Cir. 1997) (holding that RCRA does not authorize citizen suits based on more stringent state standards).

<sup>493</sup> *See supra* note 490.

<sup>494</sup> *See, e.g.*, CWA § 510, 33 U.S.C. § 1370 (2000); RCRA § 3009, 42 U.S.C. § 6929 (2000); CAA § 116, 42 U.S.C. § 7416 (2000).

pollution standards that are more stringent than federal standards to be included as conditions in permits and to be complied with.<sup>495</sup> It also requires EPA to include in permits all conditions that a state in which the permitted discharge is located deems necessary to meet state requirements relating to water.<sup>496</sup> The Supreme Court held in *PUD No. 1 of Jefferson County v. Washington Department of Ecology* that federal agencies issuing permits have no choice but to include such conditions in permits, even though they do not originate in federal requirements.<sup>497</sup> These conditions could include state standards that are either more stringent than their corresponding federal standards or beyond the scope of the federal program. The CWA also authorizes both EPA and citizens to enforce against violations of permits, whether issued by EPA or states.<sup>498</sup> It follows that both may enforce against violations of permit conditions derived from state standards that are more stringent than the corresponding federal standards. EPA's regulations, however, establish that provisions of approved state programs beyond the scope of the CWA are not federally enforceable, although the regulations do not specifically address the enforceability of permit conditions based on such state provisions.<sup>499</sup>

Relying on EPA's regulations and misapplying other Supreme Court precedent, one court has held that citizens may not enforce against violations of conditions in state-issued permits that are beyond the scope of the CWA.<sup>500</sup> It does not make sense, however, for EPA and citizens to enforce state provisions beyond the scope of the CWA in EPA-issued permits, but not in state-issued permits. The court did not consider this. It issued its

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<sup>495</sup> CWA subsection 301(b)(1)(C) requires compliance with more stringent state standards. 33 U.S.C. § 1311(b)(1)(C) (2000). CWA subsection 402(a)(1)(A) requires EPA to include section 301 requirements in permits, 33 U.S.C. § 1342(a)(1)(A) (2000), and CWA subsection 402(b)(1)(A) requires states with approved programs to do so as well, 33 U.S.C. § 1342(b)(1)(A). Finally, CWA subsection 309(a) authorizes EPA to enforce against violation of "any condition" based on section 301 in a permit issued by EPA or a state with an approved program. 33 U.S.C. § 1319(a) (2000).

<sup>496</sup> CWA §§ 302(b)(1)(C), 401(a), 401(d), 33 U.S.C. §§ 1312(b)(1)(C), 1341(a), 1341(d) (2000).

<sup>497</sup> 511 U.S. 700 (1994).

<sup>498</sup> CWA §§ 309(a)(1), 505(a)(1), 33 U.S.C. §§ 1319(a)(1), 1365(a)(1) (2000).

<sup>499</sup> 40 C.F.R. § 123.1(i)(2) (2004).

<sup>500</sup> *Atl. States Legal Found. v. Eastman Kodak Co.* held that requirements in a permit issued by a state with an approved program broader in scope than the federal standards were not enforceable by citizens. 12 F.3d 353, 359–60 (2d Cir. 1994) The court relied on *United States Dep't of Energy v. Ohio* which held that citizens could not enforce the penalty provisions in an approved state program because they did not arise under federal law. 503 U.S. 607, 624–25 (1992). In that case, Ohio, suing the Department of Energy ("DOE") under the citizen suit provisions of the CWA and RCRA, was thwarted in its attempt to have penalties assessed under the penalty provisions of the federal statutes because the Court held the statutes did not waive sovereign immunity in that regard. *Id.* at 620. Ohio then tried to have penalties assessed under the state statute, but the Court held that that was beyond the jurisdiction of the citizen suit provisions. *Id.* at 625–26. The decision, of course, does not deal with state standards or requirements, but with state procedures. It also involved an asserted waiver of federal sovereign immunity, subject to a long history of narrow interpretation. *See supra* note 428.

opinion before *PUD No. 1* and might well have come to a different conclusion in light of that decision. Under the peculiar structure and wording of the CWA, conditions of permits derived from state requirements that are either more stringent or beyond the scope of their federal counterparts are enforceable by both EPA and citizens.<sup>501</sup>

The CAA contains no provision comparable to CWA subsection 301(b)(1)(C), which requires EPA to include state requirements more stringent or beyond the scope of the corresponding federal requirements in EPA-issued permits. The conceptual basis of the CAA program is substantially different in this regard. EPA promulgates national ambient air quality standards for individual pollutants, and states develop implementation plans to achieve the federal standards.<sup>502</sup> The implementation plans include emission limitations on air pollution sources designed to reduce pollution sufficiently to achieve the federal ambient air quality standards. For any source of a pollutant for which EPA has promulgated a standard, it is difficult to determine whether the state requirements in the implementation plan are more or less stringent than federal requirements, for they are just part of the mix of controls on all sources that must, in the aggregate, achieve the federal standard. Indeed, the Court has held that EPA must approve a state implementation plan that goes beyond and is more stringent than federal requirements.<sup>503</sup> The structure of the CAA, therefore, suggests that state requirements in an approved implementation plan for an individual pollutant that are more stringent than federal requirements are federally enforceable. On the other hand, state requirements beyond the scope of the CAA may not fit this rationale. For instance, state requirements for controlling a pollutant for which EPA has not promulgated a standard are beyond the scope of the federal program and need not be federally enforceable to achieve the goals of the CAA.<sup>504</sup> Courts have generally held that such requirements are not federally enforceable.<sup>505</sup>

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<sup>501</sup> *United States v. Smithfield Foods, Inc.*, 965 F. Supp. 769, 795–96 (E.D. Va. 1997), *aff'd in part, rev'd in part on other grounds*, 191 F.3d 516, 526 (4th Cir. 1999) (holding that EPA may enforce stricter state requirement included in permit issued by state with approved program); *Chesapeake Bay Found. v. Bethlehem Steel Corp.*, 652 F. Supp. 620 (D. Md. 1987) (applying stricter state upset and bypass defense in citizen suit for violation of permit issued by state with approved program.).

<sup>502</sup> CAA §§ 109–110, 42 U.S.C. §§ 7409–7410 (2000).

<sup>503</sup> *Union Elec. Co. v. EPA*, 427 U.S. 246 (1976).

<sup>504</sup> Both the EPA and citizen enforcement provisions authorize enforcement against “an applicable implementation plan.” 42 U.S.C. §§ 7413(a)(1), 7604(a)(1), 7604(f) (2000). The CAA defines “applicable implementation plan” to mean a plan or portion of a plan approved by EPA “which implements the relevant requirements for this chapter.” 42 U.S.C. § 7602(q) (2000). State requirements beyond the scope of the CAA do not implement its requirements, while state requirements more stringent than the CAA’s requirements do implement its requirements.

<sup>505</sup> *But see Glazer v. Am. Ecology Envtl. Servs. Corp.*, 894 F. Supp. 1029, 1041 (E.D. Tex. 1995) (holding that citizens may enforce requirements in State Implementation Plans (“SIP”) that are more stringent than federal standards, but not SIP standards that are beyond the scope of the CAA). The Seventh Circuit discussed but did not decide the issue in

Under RCRA, EPA may not approve a state program unless it is “equivalent to” and “consistent with” the federal program under Subchapter III.<sup>506</sup> A state may impose requirements on the handling of hazardous waste that are “more stringent” than those under Subchapter III,<sup>507</sup> but may not impose requirements that are “less stringent.”<sup>508</sup> Therefore, once EPA approves a state RCRA program, the state may impose more stringent requirements on the regulated public than are required by RCRA. Most such requirements, of course, are contained in permits issued by the state. Because the requirements imposed by RCRA are fairly stringent and most state programs are virtual clones of RCRA, this is not often the case, but it does occur on occasion. EPA may enforce civilly against violations of “any requirement of this subchapter.”<sup>509</sup> Its authority to enforce criminally is detailed more explicitly, but includes treatment, storage and disposal of hazardous waste without or in violation of a “permit under this subchapter.”<sup>510</sup> Citizens may enforce against violations of “any permit, standard, regulation, condition, requirement, prohibition or order that has become effective pursuant to this chapter.”<sup>511</sup> At least with regard to the common violations of treatment, storage and disposal of hazardous waste without or in violation of a RCRA permit, the plain wording of the statute makes it illegal for anyone to treat, store or dispose of hazardous waste without or in violation of an EPA issued RCRA permit.<sup>512</sup> Once EPA approves a state program, the state issues permits “in lieu of” EPA and the effect of a state permit is deemed to have the “same force and effect” as an EPA-issued permit.<sup>513</sup> Insofar as they are incorporated in a state-issued permit, “more stringent state” requirements operate in lieu of EPA requirements and have the same force and effect as EPA requirements. EPA and citizens, therefore, may enforce them as if they were EPA requirements. Indeed, EPA’s regulations provide that more stringent standards in an approved state plan are enforceable under RCRA,<sup>514</sup> while state requirements that are beyond the scope of RCRA are not part of the approved plan and therefore are not federally enforceable.<sup>515</sup> The sole decision of which the author is aware, addressing the issue under RCRA Sub-

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*Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 964 (7th Cir. 1994). It did indicate that federal enforcement of SIP requirements more stringent than federal requirements was conceivable, for they might be counterbalanced by other SIP requirements that were less stringent than federal requirements, in a balance meeting the desired air quality. *Id.*

<sup>506</sup> RCRA § 3006(b), 42 U.S.C. § 6926(b) (2000).

<sup>507</sup> *But see supra* note 487.

<sup>508</sup> RCRA § 3009, 42 U.S.C. § 6929 (2000).

<sup>509</sup> RCRA § 3008(a)(1), 42 U.S.C. § 6928(a)(1) (2000).

<sup>510</sup> RCRA § 3008(d)(2)(A)–(B), 42 U.S.C. § 6928(d)(2)(A)–(B).

<sup>511</sup> RCRA § 7002(a)(1)(A), 42 U.S.C. § 6972(a)(1)(A) (2000).

<sup>512</sup> RCRA § 3005(a), 42 U.S.C. § 6925(a) (2000).

<sup>513</sup> RCRA § 3006(b), (d), 42 U.S.C. § 6926(b), (d) (2000).

<sup>514</sup> 40 C.F.R. § 271.1(h)(i)(1) (2003).

<sup>515</sup> 40 C.F.R. § 271.1(h)(i)(2).

chapter III, cited these regulations as authoritative, but found the defendant had not adequately briefed its contention that the state requirements it allegedly violated were beyond the scope of RCRA.<sup>516</sup>

The Ninth Circuit held in *Ashoff v. City of Ukiah*<sup>517</sup> that citizens could enforce the minimum federal standard under RCRA Subchapter IV, regulating non-hazardous waste landfills, but not the more stringent state standard, in essence allowing EPA and citizen enforcement only to the limit of the federal standards. Because the suit was to enforce against Subchapter IV violations rather than Subchapter III violations, the statutory analysis suggested above does not apply, although the practical difficulties with alternative two remain. Although the court did not notice it,<sup>518</sup> the substantial differences between Subchapters III and IV support the court's conclusion. There is no federal program under Subchapter IV. EPA is to promulgate "sanitary landfill" criteria for non-hazardous waste landfills. Landfills not meeting the federal criteria are declared "open dumps." States are to develop permit programs to close open dumps or make them conform to the federal criteria and submit them to EPA for approval. Thereafter, states are supposed to implement and enforce the programs and permits. If a state's program is approved, EPA has no enforcement authority. If a state does not have an approved permit program, EPA does not develop one or issue permits, although it may enforce the federal criteria against individual open dumps.<sup>519</sup> The court's conclusion appears to be grounded in its implicit observation that RCRA invests considerably less importance in the effective implementation and enforcement of the Subchapter IV program than it does in the Subchapter III program. The court could have reached the opposite conclusion, however, by finding that the more stringent state standard and the permit requirement based on it had "become effective" pursuant to RCRA upon EPA's approval of the state program and thus enforceable under the citizen suit provision, subsection 7002(a)(1) (A). But since EPA could not enforce the more stringent state standard in a state with an approved program, to allow citizens to do so seems anomalous. EPA cannot enforce even its own solid waste standards in a state with an approved program, while citizens may, which also seems anomalous.<sup>520</sup>

In conclusion, analysis of the statutes suggests that requirements in federally approved state programs that are more stringent than corre-

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<sup>516</sup> *Glazer v. Am. Ecology Envtl. Servs. Corp.*, 894 F. Supp. 1029, 1040–41 (E.D. Tex. 1995). The court in *United States v. Flanagan* came to the same conclusion, although it was not squarely faced with the issue. 126 F. Supp. 2d 1284, 1290 (C.D. Cal. 2000).

<sup>517</sup> 130 F.3d 409 (9th Cir. 1997).

<sup>518</sup> The court instead noted differences between RCRA section 7002, 42 U.S.C. § 6972 (2000), on the one hand and CWA section 505, 33 U.S.C. § 1365 (2000), and CAA section 304, 42 U.S.C. § 7404 (2000), on the other. It noted that the CWA and CAA provisions authorized citizens to enforce against state-issued orders, while the RCRA provision did not. *Ashoff*, 130 F.3d at 412–13.

<sup>519</sup> RCRA § 4005(c), 42 U.S.C. § 6945(c) (2000).

<sup>520</sup> See *supra* Part I.A.3.



sponding federal requirements generally are federally enforceable, particularly if they are incorporated into permits. Conversely, requirements in federally approved state programs that are beyond the scope of the federal programs are generally considered not to be part of the federally approved programs and hence generally are not federally enforceable. Under the unique certification provision of the CWA,<sup>521</sup> however, such requirements are enforceable when incorporated into EPA-issued permits.

#### IV. DOCTRINAL SCHISM IN INTERPRETING PRECLUSIONS

Part One observed that courts split dramatically when interpreting some parts of the preclusion device in citizen suit provisions, particularly on the meaning of “is diligently prosecuting.”<sup>522</sup> While most courts are content to interpret the device in accordance with the plain meaning, others depart from its plain meaning to thwart citizen enforcement in favor of the prosecutorial discretion of the earlier government enforcer, usually a state government. Those courts find encouragement to disregard the plain meaning of the statutes in the Supreme Court’s observation in *Gwaltney of Smithfield, Inc. v. Chesapeake Bay Foundation*<sup>523</sup> that citizen enforcement supplements rather than supplants government enforcement. Part One analyzed *Gwaltney* and found it to be a deeply flawed opinion in this regard. Although *Gwaltney* did not interpret the preclusion device,<sup>524</sup> every decision interpreting the device to defeat citizen suits has relied heavily on it. Their reliance on *Gwaltney*’s observation is ironic, for the Court’s primary interpretive technique in the decision was to apply the plain meaning of the tenses Congress used in the statute. Part One concluded that Congress intended exactly what it wrote in the citizen suit preclusion device: that courts should interpret the device in accordance with its plain meaning, and that those courts refusing to do so have ignored both congressional intent and dominant canons of statutory interpretation.

The same split in courts interpreting the preclusion device in citizen suit provisions is evident in courts interpreting the preclusion device in EPA enforcement provisions, particularly in CWA subsection 309(g). The device in that provision partially precludes both citizen and EPA enforcement and most decisions interpreting it have been in citizen suits. Courts thwarting subsequent enforcement under CWA subsection 309(g) do not merely support prosecutorial discretion by broadly interpreting “is diligently prosecuting,” but do so by disregarding several limitations Congress carefully drafted into subsection 309(g)’s preclusion device.<sup>525</sup> While

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<sup>521</sup> CWA § 401, 33 U.S.C. § 1341 (2000).

<sup>522</sup> Miller, *supra* note 1, at 463–73, 479–84.

<sup>523</sup> 484 U.S. 49 (1987).

<sup>524</sup> Instead, it interpreted “in violation” to mean that the citizen suit provision granted jurisdiction for citizens to sue only for ongoing violations. *Id.* at 57.

<sup>525</sup> See *supra* Part II.A.2.

these courts continue to rely on *Gwaltney* for a general policy direction, they rely specifically on *North and South Rivers Watershed Assn., Inc. v. Town of Scituate*,<sup>526</sup> one of the first circuit court decisions interpreting subsection 309(g) and a decision that is even more flawed than *Gwaltney*.<sup>527</sup>

The division between the courts is not as evident in decisions interpreting the preclusion device in other EPA enforcement provisions, in part because there are fewer decisions under them and in part, because deference to governmental prosecutorial discretion is blurred when EPA overfiles, for the enforcement discretion of both EPA and state enforcers are involved.

Considering the judicial divide in the context of EPA as well as citizen enforcement makes its implications more disturbing. On the one hand, most courts faithfully apply the plain wording of the preclusion to allow EPA or citizens to enforce when initial state enforcement has not achieved compliance or has not assessed a sufficient penalty to provide deterrent value. On the other hand, some courts ignore the plain wording of the preclusion to prevent EPA or citizens from enforcing under these circumstances. While most of the latter decisions interpret the preclusion device only in citizen suit provisions, the similarity of the device in both EPA and citizen provisions suggests it has the same meaning in both sets of enforcement provisions. The end result of ignoring the preclusion device's plain wording is that state enforcement insulates the violator from enforcement by EPA or citizens regardless of the effectiveness of state enforcement. Unfortunately, the factual settings of many of the reported decisions suggest that state enforcement is often far from effective.<sup>528</sup> To allow states to insulate their regulated public from compliance with federal environmental requirements can thwart and potentially eviscerate federal law. To interpret the preclusion device in either EPA or citizen enforcement provisions to allow this, ignores the text of the provisions, the major canons of statutory construction, and the balance Congress struck between federal and state enforcement.

#### V. INTEGRATED INTERPRETATION OF THE STATUTORY BARS TO EPA AND CITIZEN ENFORCEMENT

Congress enacted broad authority for EPA and citizen enforcement actions to promote compliance with environmental laws. It intended the citizen suit provisions also to promote citizen participation in environmental enforcement. It enacted these enforcement authorities against a backdrop of cooperative federalism in the implementation of environmental programs. For many of the most important programs, Congress envisioned

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<sup>526</sup> 949 F.2d 552 (1st Cir. 1992).

<sup>527</sup> See *supra* Parts II.A.3.b.(ii).–(iii)., II.A.3.e.

<sup>528</sup> See *supra* notes 349–360 and accompanying text.

that states would assume the primary implementation role, including primary enforcement, subject to EPA oversight, and with EPA as the default implementer and enforcer if states did not assume the primary role. Congress foresaw that unfettered citizen enforcement could result in successive citizen enforcement actions against the same violations, potentially conflicting with government enforcement. It also foresaw that, in programs with federalized implementation, unfettered EPA and citizen enforcement could result in successive federal enforcement actions against the same violations, potentially conflicting with state enforcement. It therefore included in the broad EPA and citizen enforcement authorities variants of the three-element notice, delay and bar preclusion device to limit conflicts from successive enforcement.

The preclusion device is not absolute; it is limited. Moreover, Congress used somewhat different versions of the device in different EPA and citizen enforcement provisions. Each preclusion device incorporates its own set of qualifications, allowing and preventing varying sets of successive enforcement actions. The purposes of the broad enforcement authorities and of the limited preclusions are not entirely complementary, but are the result of legislative compromise. For this reason, EPA and citizen enforcement provisions and their preclusion devices cannot be interpreted through the lens of a single legislative purpose. Congressional intent is better understood by recognizing that Congress, in different ways in different provisions, made compromises among opposing desires for (1) achieving full compliance through enforcement; (2) avoiding interference with government enforcement by limiting successive citizen enforcement; and (3) avoiding federalism conflicts by limiting successive federal enforcement. While the best indicia of congressional intent is normally the plain meaning of the words it uses, this is particularly true when the provision interpreted is the result of compromising divergent goals. The preclusion devices in EPA and citizen suit provisions, then, are best interpreted by reference to their plain English meaning, unless that interpretation causes internal inconsistencies, renders clauses redundant or meaningless, or reaches absurd results.

Most courts have used a plain-English meaning interpretation of most issues arising under the provisions with straightforward results compatible with the statute's goals of full compliance. Some 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—particularly the state's—enforcement discretion. They elevate a provision's exception over its purpose, contrary to the canon of construction that exceptions be interpreted narrowly. Worse, they threaten judicial amendment of the underlying statutes by effectively allowing violators to shield themselves from compliance with federal law by soliciting ineffective enforcement actions from state enforcers who may not be zealous guardians of federal law. These interpretations and their re-

sults are not true to—indeed, they do violence to—the purpose, wording and history of the provisions and should be disregarded.

The preclusion device appears no less than sixteen times in the EPA and citizen enforcement provisions of the nine statutes implemented by EPA. The author is aware of no other device that Congress used as often in these statutes. The preclusion device is sophisticated; while it establishes an exception for successive actions to the broad enforcement authorities conferred by the statutes, it creates exceptions to that exception. Congress crafted sophistication into the device by creating it from three elements, each of which it could vary to achieve the exact preclusion it intended in each statutory provision. Viewed from this perspective, it is clear that when Congress intended to preclude successive enforcement, it did so by placing a variant of the preclusion device in the relevant enforcement provision, not by obliquely implying preclusion from another provision. It is also clear that Congress intended to preclude successive enforcement under a particular provision to the extent, and only to the extent, of the words it included in the provision's preclusion device. Courts thus need look no further than the wording of a particular preclusion to determine the extent to which it allows or forbids successive enforcement.