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Overlooked Issues in the "Diligent Prosecution" Citizen Suit Preclusion

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SUMMARY

Congress sought to attain full compliance with environmental statutes.[1] It reasoned that multiple enforcers would provide more comprehensive and effective enforcement than one enforcer. Congress therefore empowered the Environmental Protection Agency (EPA), the states and private citizens as enforcers of the statutes. However, Congress worried that successive actions by multiple enforcers could bring disruption and conflict to enforcement litigation and remedies. It therefore included in the citizen suit provision of each statute a limited, three-element notice, delay, and bar preclusion device to manage successive citizens' enforcement against the violations already subject to government enforcement.[2] The device generally bars citizens from enforcing if the government "has commenced and is diligently prosecuting" an action involving the same violations "to require compliance."[3] However, Congress recognized that its goal of achieving full compliance by multiple enforcers and its

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1. The environmental statutes discussed in this article include: the Toxic Substances Control Act (TSCA), 15 U.S.C. §§ 2601-2692 (2000); the Clean Water Act (CWA), 33 U.S.C. §§ 1251-1387 (2000); the Marine Protection, Research, and Sanctuaries Act (MPRSA), 33 U.S.C. §§ 1401-1445 (2000); the Safe Drinking Water Act (SDWA), 42 U.S.C. §§ 300f-300j-26 (2000); the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6992k (2000); the Clean Air Act (CAA), 42 U.S.C. §§ 7401-7671q (2000); the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 (2000); and the Emergency Planning and Community Right-To-Know Act (EPCRA), 42 U.S.C. §§ 11001-11050 (2000).

2. Precluding successive citizen suits, of course, does not manage all conflict from successive enforcement, since government enforcers may also initiate successive enforcement. Part II of the author's unpublished manuscript, *see* Miller, *supra* note *, examines statutory preclusions of successive EPA enforcement.

3. The quoted language is from section 304(b)(1)(B) of the CAA, 42 U.S.C. § 7604(b)(1)(B) (2000). The corresponding language in the citizen suit provision of the other statutes is identical or virtually identical.

subordinate goal of avoiding disruption and conflict from successive enforcement are in conflict. Congress resolved that conflict by the balance it struck between them in the particular formulation of the preclusion device it used in each statute.

Courts have considered nearly a dozen legal issues arising from the bar element in the preclusion device.[4] While many of these issues have been heavily litigated, two have gone relatively unnoticed. First, what did Congress intend when it limited preclusive actions to actions the government "*is* diligently prosecut*ing*"? Does use of the present tense mean that only continuing prosecutions bar citizen suits? The plain reading of the verb suggests so, although that reading greatly limits the operation of the preclusions. Second, what did Congress intend when it limited preclusive actions to those the government brought to require compliance? Does the focus on compliance mean that only actions to require defendants to cease and desist from violating the statutes bar citizen suits? Again, the plain reading of the phrase suggests so, although that reading also greatly limits the operation of the preclusions. Most courts interpreting the preclusions have used plain meaning and *expressio unius*[5] approaches to interpret the provisions, thereby respecting the balance Congress established between its goal of achieving full compliance through the efforts of multiple enforcers and its desire to avoid disruption and conflict from successive enforcement. There is no reason to depart from that interpretation of the provisions for the two issues examined here. Indeed, the structure of the provisions and their legislative history supports that interpretation.

The conclusion that the statutory preclusions bar citizen suits only in the face of ongoing government actions for compliance, however, may not always allow citizen suits to enforce in the face of concluded government actions that have not

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4. What "Administrator" may act to bar a citizen suit? What "State" may act to bar a citizen suit? Where a statute specifies that only court actions bar a citizen suit, may other government actions bar it as well? Where a statute specifies that multiple government actions bar a citizen suit, may unspecified government actions bar it as well? Must the government commence an action prior to the citizen suit to bar it? When is a government action commenced? Must the government action be ongoing to bar a citizen suit? How diligently must the government prosecute an ongoing action to bar a citizen suit? How diligently must the government have prosecuted a concluded action to bar a citizen suit? What citizen actions may a government action bar? These and other questions, together with more than one hundred twenty-five decisions attempting to answer them, are examined in the author's two-part manuscript, cited in *supra* note *.

5. WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 323 (1994) (citing Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469 (1992) (plain meaning rule); EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991) (*expressio unius*); Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 132-33 (1989) (*expressio unius*); Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 732 (1989) (*expressio unius*); United States v. Providence Journal Co., 485 U.S. 693 (1988) (plain meaning rule)). Eskridge places the plain meaning and the *expressio unius* canons first and second on his list of the canons as enunciated by the Rehnquist Court, although he does not state that he lists them in their order of importance.

achieved or never sought compliance. Common law doctrines may supplement the statutory preclusions. Res judicata, abstention and other related common law doctrines are designed to promote finality and to prevent disruption and conflict from successive litigation. Courts have not yet determined the relationship between the statutory and common law preclusions. Moreover, they have applied the common law preclusions inconsistently and some of their applications may also shield violators from effective enforcement or even compliance with the law.[6]

INTRODUCTION

Pollution control initially was left largely to the states. The federal role was primarily to fund research and state regulatory programs and to assist states in setting standards. However Congress completely revamped the federal environmental statutes in the 1970s to: increase the federal role in pollution control, provide strong federal enforcement authorities, and authorize citizen participation at all levels of the pollution control programs.[7] Finally, Congress expanded its new emphasis on citizen participation in implementing and enforcing the statutes to assure the transparency, and hopefully the effectiveness, of government implementing actions. To assure more effective enforcement, it authorized citizen participation in enforcement through an ingenious new device, the citizen suit, adding members of the interested public, acting as "private attorneys general,"[8] to the existing federal and state environmental enforcement cadres.

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6. For an examination of the application of some of the doctrines in environmental enforcement cases beyond the scope of this article, see William Daniel Benton, *Application of Res Judicata and Collateral Estoppel to EPA Overfiling*, 16 B.C. ENVTL. AFF. L. REV. 199 (1988).

7. The House Report on the CWA bemoans the loss of public trust in government and posits that such trust may be regained by enabling citizen participation in the regulatory process. It lists a variety of measures taken in the CWA to assure public participation in all aspects of implementing the statute, including the creation of the citizen suit mechanism. H.R. REP. NO. 92-911, at 132 (1972), *reprinted in* A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 819 (1973) [hereinafter 1972 LEGISLATIVE HISTORY].

8. The House Report on the CWA alluded to the "private attorney general" doctrine developed in case law. *Id.* at 134, *reprinted in* 1972 LEGISLATIVE HISTORY at 821. The Court first referenced the "private attorney general" concept in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968), and has used the term in discussing private enforcement of environmental, antitrust, and civil rights statutes. Professor Bucy traces the term back to Judge Jerome Frank. *See* Pamela Bucy, Private Justice (unpublished manuscript, on file with Professor Miller at Pace University School of Law). *See also* Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 14 n.23 (1981) (stating that MPRSA's review provisions are open to "[a]ny person" acting as a "private attorneys general") (citations omitted); Westfarm Assocs. Ltd. P'ship v. Int'l Fabricare Inst., No. HM-92-9, 1992 WL 315188, at *4 (D. Md. May 6, 1992) (allowing plaintiffs to pursue a claim for injunctive relief under RCRA as a "private attorneys general").

More frequent enforcement by multiple enforcers, of course, carries with it the potential for successive, possibly disruptive and conflicting, enforcement. To manage potential disruption and conflict, Congress developed a limited statutory preclusion on successive enforcement by citizens, incorporating three elements: a notice of violation; a delay between the notice and the commencement of citizen enforcement; and a bar on citizen enforcement if a government has already commenced an action against the same violations. Congress developed a range of alternatives for each element. For instance, it developed at least five alternative limitations for the bar element, specifying: the governments whose actions could be a bar, [9] the types of government actions that could be a bar, [10] the degree of compliance required by a government action before it could be a bar, [11] how diligently a government must prosecute its action to be a bar, [12] and the particular successive actions a government action could bar.[13] Congress developed similar ranges of alternatives for the other elements. The many possible combinations of the alternatives for each of the three elements constitute a nuanced device with a wide spectrum of possible effects on successive citizen enforcement. The issues examined in this article arise out of two of the limitations on the bar element.

Although Congress developed five alternatives in the bar element, it never varied the wording in the citizen suit provisions of the "is...prosecuting" and "to require compliance" limitations in the bar. All of the statutes limit government actions that may bar a citizen suit to actions that the government: 1) "is...prosecuting" and 2) has brought and is prosecuting "to require compliance."[14] This strongly suggests that Congress intended the bar in each

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9. Citizen suit provisions in statutes that do not envision a state role in implementation do not bar a citizen suit because of state action. *See* TSCA § 20(b)(1)(B), 15 U.S.C. § 2620(b)(1)(B) (2000); MPRSA § 105(g)(2), 33 U.S.C. § 1415(g) (2000); EPCRA § 316(d)(2), 42 U.S.C. § 11046(d)(2) (2000).

10. In some provisions, citizen suits are barred by civil actions in court. *See* CAA § 304(b)(1)(B), 42 U.S.C. § 7604(b)(1)(B) (2000). In others, they are barred by civil or criminal actions in court. *See* CWA § 505(b)(1)(B), 33 U.S.C. § 1365(b)(1)(B) (2000). And, in still others, they are barred by administrative enforcement actions. *See* TSCA § 20(b)(1)(B), 15 U.S.C. § 2620(b)(1)(B).

11. Compare CWA § 309(g)(6)(A)(iii), 33 U.S.C. § 1319(g)(6)(A)(iii) (2000), which does not require the government to seek compliance in its action to bar a citizen suit, with the other preclusions examined in this article.

12. Compare CWA § 309(g)(6)(A)(iii), 33 U.S.C. § 1319(g)(6)(A)(iii) (2000), which does not require the government to diligently prosecute its action to bar a citizen suit, with the other preclusions examined in this article.

13. Compare CWA § 309(g)(6)(A)(iii), 33 U.S.C. § 1319(g)(6)(A)(iii) (2000), which bars citizen suits for civil penalties, with the other preclusions examined in this article.

14. Only in section 309(g) of the CWA, 33 U.S.C. § 1319(g) (2000), did Congress apply the bar element to completed government prosecutions not seeking compliance. However, § 309(g) is not in a citizen suit provision, emphasizing even more the uniformity of the citizen suit provisions

statute to mean exactly what it says: with each alternative of the bar having a different meaning and the two constant limitations in the bar always having the same meaning. It also suggests that the two limitations mean exactly what they say: only present, on-going government prosecutions can bar citizen suits and only government prosecutions to require compliance can bar citizen suits.

The Supreme Court has commented that the structure and wording of the citizen suit provisions of the statutes are so similar that Congress' use of the same or different terms in a particular provision is significant in interpreting it,[15] which is the proposition advanced in this article regarding limitations on the preclusion device. The consistent use of the device and the limitations on it suggest and strengthen the applicability of several canons of statutory construction. First, of course, it suggests *in pari materia*, i.e., "similar statutes should be interpreted similarly,"[16] but in a more sophisticated way. The similarities and differences in the wording of the device in the various provisions suggest that the similarities be interpreted in the same manner and that the differences be interpreted singularly. Beyond *in pari materia*, this pattern also suggests and strengthens the two most common canons of statutory construction, the plain meaning rule and *expressio unius*, i.e., "follow the plain meaning of the statutory text" and "expression of one thing suggests the exclusion of others."[17] Congress' consistent use of some terms in the preclusions and its varied use of others suggest that its use of words in the provisions was considered and expressive of its intent. Because the citizen suit provisions establish general enforcement jurisdiction and authorities and the preclusions establish exceptions to them, another over-arching canon of interpretation appears to be relevant to interpreting the preclusions, "[p]rovisos and statutory exceptions should be read narrowly."[18] This suggests the exception to the general jurisdiction for citizens

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in this regard.

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

16. ESKRIDGE, *supra* note 5, at 327 (citing Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992); Trans World Airlines, Inc. v. Indep. Fed'n of Flight Attendants, 489 U.S. 426 (1989); Communications Workers of Am. v. Beck, 487 U.S. 735 (1988); Wimberly v. Labor & Indus. Relations Comm'n of Mo., 479 U.S. 511 (1987)).

17. ESKRIDGE, *supra* note 5, at 323 (citing Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469 (1992) (plain meaning rule); EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991) (*expressio unius*); Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 132-33 (1989) (*expressio unius*); Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 732 (1989) (*expressio unius*); United States v. Providence Journal Co., 485 U.S. 693 (1988) (plain meaning rule)).

18. ESKRIDGE, *supra* note 5, at 324 (citing Comm'r v. Clark, 489 U.S. 726, 739 (1989)).

to enforce, the preclusion device, should be interpreted narrowly to protect the general jurisdiction. A corollary to this canon would be that exceptions to exceptions should be construed broadly. This, in turn, suggests that "is...prosecuting" and "to require compliance," limitations on the preclusion device, should be interpreted broadly, again, to protect the general jurisdiction.

I. THE CITIZEN SUIT PROVISIONS AND THEIR PRECLUSIONS.

A. Citizen Enforcement Provisions. All but one of the major statutes provide for citizen enforcement:[19] section 304 of the CAA,[20] section 505 of the CWA,[21] section 7002 of the RCRA,[22] section 310 of the CERCLA,[23] section 20 of the TSCA,[24] section 1419 of the SDWA,[25] section 105(g) of the MPRSA,[26] and section 326 of the EPCRA.[27] These statutes authorize citizens to sue the EPA to require it to perform a duty mandated by the statute, a statutory mandamus action. They also authorize citizens to sue violating members of the regulated public. This article focuses on how the preclusions apply to the latter authority. All of the statutes authorize courts to issue injunctions requiring compliance and most authorize courts to assess civil penalties against violators.[28] Section 7002 of the RCRA authorizes citizen suits to abate "imminent and substantial endangerment[s],"[29] a sort of statutory common law nuisance action, and authorizes citizens to enforce against some violations over which the EPA lacks authority.[30]

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19. The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136-136y (2000), contains no citizen suit authorization. This anomaly is probably explained by a difference in congressional authorizing committee. All of the other statutes have at least one Senate or House authorizing committee in common, e.g., the House Commerce Committee or the Senate Environment Committee. FIFRA's authorizing committee in both chambers is the Agriculture Committee.

20. CAA § 304, 42 U.S.C. § 7604 (2000).

21. CWA § 505, 33 U.S.C. § 1365 (2000).

22. RCRA § 7002, 42 U.S.C. § 6972 (2000).

23. CERCLA § 310, 42 U.S.C. § 9659 (2000).

24. TSCA § 20, 15 U.S.C. § 2620 (2000).

25. SDWA § 1419, 42 U.S.C. § 300j-8 (2000).

26. MPRSA § 105(g), 33 U.S.C. § 1415(g) (2000).

27. EPCRA § 326, 42 U.S.C. § 11046 (2000).

28. For two examples of statutes authorizing courts to assess civil penalties in citizen suits, see CWA § 505(a), 33 U.S.C. § 1365(a) (2000) and MPRSA § 105(g)(5), 33 U.S.C. § 1415(g)(5) (2000).

29. RCRA § 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B) (2000).

30. 42 U.S.C. § 6972(a)(1)(A) authorizes citizens to enforce against violations of the entire Act, while EPA's extensive enforcement powers under RCRA § 3008, 42 U.S.C. § 6928 (2000) authorize it to enforce only against violations of Subchapter III, the hazardous waste subchapter. EPA's enforcement authority in Subchapter IV, the solid waste subchapter, is considerably more

1. Statutory bars in citizen suit provisions. The citizen suit provisions of the various environmental statutes are modeled on section 304 of the CAA.[31] 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.[32] Section 304 of the CAA contains a statutory preclusion with all three elements in a form followed closely by the citizen suit provisions in the other statutes. It provides generally that:

> No action may be commenced . . . prior to 60 days after the plaintiff has given notice of the violation [to the EPA, the State, and the violator], or . . . if [the EPA] or [the] State has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the standard, limitation, or order [sought to be enforced by the citizen] . . . .[33]

Under the notice and delay elements, citizens must give the government the first opportunity to sue in court.[34] Under the bar element, citizens may not sue

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circumscribed in contrast to the citizen enforcement authority. *See* RCRA § 4005(c)(2)(A), 42 U.S.C. § 6945(c)(2)(A) (2000).

31. Both the Senate and House CWA Reports acknowledge this fact. *See* S. REP NO. 92-414, at 79 (1971), *reprinted in* 1972 LEGISLATIVE HISTORY at 1497 (stating that section 505 of the CWA is "modeled on the provision enacted in the Clean Air Amendments of 1970."); H.R. REP. NO. 92-911, at 133 (1972), *reprinted in* 1972 LEGISLATIVE HISTORY at 820 (stating that section 505 of the CWA "closely follows the concepts utilized in section 304 of the Clean Air Act."). 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. *Compare* S. REP. NO. 91-1196, at 36-39 (1970), *reprinted in* A LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS OF 1970, at 436-39 (1974), *with* S. REP. NO. 92-414, at 79-82 (1971), *reprinted in* 1972 LEGISLATIVE HISTORY 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. *See* H.R. REP. NO. 91-1783, *reprinted in* 1970 U.S.C.C.A.N. 5388.

32. *See* United States Dep't of Energy v. Ohio, 503 U.S. 607, 615-16 (1992) (providing comparable treatment to CWA and RCRA citizen suit provisions); Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 57 (1987) (comparing wording of section 505 of the CWA to citizen suit provisions of several other statutes); Hallstrom v. Tillamook County, 844 F.2d 598, 600 (9th Cir. 1987), *aff'd*, 493 U.S. 20 (1989) (comparing the citizen suit provisions of the CAA and RCRA); Friends of the Earth v. Consol. Rail Corp., 768 F.2d 57, 63 (2d Cir. 1985) (using the legislative history of the CAA citizen suit provision to interpret the CWA citizen suit provision); Natural Res. Def. Council, Inc. v. Train, 510 F.2d 692, 702 n.55 (D.C. Cir. 1974) (same as *Friends of the Earth*); Vernon Vill., Inc. v. Gottier, 755 F. Supp. 1142, 1147 (D. Conn. 1990) (referring to the language of the CWA in interpreting the SDWA citizen suit provision); Roe v. Wert, 706 F. Supp. 788, 791 (W.D. Okla. 1989); Student Pub. Interest Research Group of N.J., Inc. v. Fritzsche, Dodge & Olcott, Inc., 579 F. Supp. 1528, 1534 n.8 (D.N.J. 1984), *aff'd*, 759 F.2d 1131 (3d Cir. 1985).

33. CAA § 304(b)(1), 42 U.S.C. § 7604(b)(1) (2000).

34. A few variations on the notice and delay provision should be noted. All of the statutes require that citizens give notice to the EPA before suing it for failure to perform a mandatory duty.

if the government has taken that opportunity, i.e., has filed an action to require compliance and is diligently prosecuting it.[35] The alternatives Congress developed for the bar element are identified above.[36] The constant limitations on the bar, of course, are the "is . . . prosecuting" and the "to require compliance" phrases.[37]

Section 309(g) of the CWA, an EPA enforcement provision, also contains a preclusion on citizen and EPA enforcement. It is not a citizen suit authority, but its preclusion is a version of the same preclusion found in the citizen suit provisions. It is therefore examined after the following discussion of the legislative history of the citizen suit provisions.

B. Legislative History. Because the citizen suit provisions are modeled upon section 304 of the CAA, courts commonly cite the legislative history of that section to determine the legislative intent of citizen suits under subsequently enacted statutes.[38] Examination of the statutory preclusions in citizen suits therefore begins with the legislative history of section 304 of the CAA and then proceeds to the legislative histories of citizen suit sections in other statutes, to the extent they provide additional illumination. Taken together, they indicate the overwhelming intent of Congress for citizen enforcement to provide both more enforcement and more effective enforcement by prodding the government to enforce, and enabling others to enforce when the government has failed to do so. Qualifying that purpose was a desire to assure that citizen enforcement did not unduly disrupt or conflict with government enforcement or harass violators.

Although most of the statutes require a sixty-day delay after notice before a citizen may file suit against a violating polluter, section 7002(b)(2)(A) of the RCRA requires citizens to give the EPA a ninety-day delay before they may file a suit to abate an imminent and substantial endangerment. 42 U.S.C. § 6972(b)(2)(A) (2000). 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. For instance, section 7002(b)(2) of the RCRA requires prior notice but no delay period for citizens filing complaints alleging violations of Subchapter III, regulating the treatment, storage, and disposal of hazardous waste. *See* 42 U.S.C. § 6972(b) (2000). *See also* CWA § 505(b), 33 U.S.C. § 1365(b) (2000); CAA § 304(b), 42 U.S.C. § 7604(b) (2000).

35. If the government files a preclusive action in federal court, however, a citizen may intervene as a matter or right. *See, e.g.*, CAA § 304(b)(1)(B), 42 U.S.C. § 7604(b)(1)(B) (2000). Most of the citizen suit provisions in the other statutes include such intervention authority. Most allow "any citizen" to intervene, although section 20(b)(1)(B) of the TSCA and section 326(d)(2) of the EPCRA qualify those who may intervene. *See* 15 U.S.C. § 2619(b)(1)(B) (2000); 42 U.S.C. § 11046(h)(2) (2000).

36. *See supra* notes 10-14 and accompanying text.

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

38. *See supra* note 33.

Section 304 of the CAA originated in the Senate bill and the House bill had no comparable provision.[39] Throughout the legislative history in the Senate, a major goal of the provision was to encourage government enforcement[40] in the hope of more and better enforcement overall.[41] Indeed, the Senate Reports for both the CAA and CWA emphasized that in bringing such actions "citizens would be performing a public service."[42]

Opponents of section 304 of the CAA were generally restrained. Rather than emphasizing concerns about environmentalists suing industry, they worried more about "imposing such a burden on the judicial court system."[43] However, they did speculate that plaintiffs would bring vexatious lawsuits against industry to get attorney fee awards and that multiple citizen suits against the EPA would dissipate agency resources and divert its attention from its appointed tasks.[44] Reflecting these concerns, the Conference Committee strengthened the notice and delay elements of the preclusion, added the diligent government prosecution bar, and amended the attorney fee provision to allow an award to defendants as well as plaintiffs, when appropriate.

Congress intended citizen suits as a goad to government enforcement. The very purpose of the notice requirement was to "prod" or "trigger" government enforcement.[45] However, for some violations, although the provisions require

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39. H.R. REP. NO. 91-1783, at 55, *reprinted in* 1970 U.S.C.C.A.N. 5388.

40. This was the case with the original Senate bill, which provided only 30 days prior notice and had no enforcement bar if the government did commence suit. The Senate Report accompanying this bill stated that "[a]uthorizing citizens to bring suits . . . should motivate governmental agencies . . . to bring enforcement and abatement proceedings." S. REP. NO. 91-1196, at 36-37 (1970), *reprinted in* A LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS OF 1970, at 436-37 (1974). The thirty-day notice requirement was intended to "further encourage and provide for agency enforcement" by giving the government agency "an opportunity to act on the alleged violation." *Id.* at 37. It was the rationale for expanding the required notice to 60 days and imposing a bar on citizen suits if the government did enforce within that period. "[T]o further encourage and provide for agency enforcement, the Committee has added [the notice and delay requirement]." *Id.* Senator Muskie commented that the notice might "trigger" administrative action. 116 CONG. REC. 32,927 (1970). Senator Hart commented that the notice would have the "effect of prodding" government enforcement. 116 CONG. REC. 33,104 (1970) (statement of Sen. Hart).

41. Again, Senator Muskie remarked, "Citizens can be a useful instrument for detecting violations and bringing them to the attention of the enforcement agencies and courts alike." 116 CONG REC. 32,927 (1970). He also commented that, "Although the Senate did not advocate these suits as the best way to achieve enforcement, it was clear that they should be an effective tool." 116 CONG. REC. 42,382 (1970).

42. S. REP. NO. 91-1196, at 38, *reprinted in* A LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS OF 1970, at 438 (1974); S. REP. NO. 92-414, at 81 (1972), *reprinted in* 1972 LEGISLATIVE HISTORY at 1499.

43. 116 CONG. REC. 32,926 (1970).

44. *Id.*

45. Senator Muskie remarked that the purpose of notice was to "trigger" government action

citizens to give notice, they do not require a delay period before citizens may file their complaints.[46] Under those circumstances, the citizen suit notice is less likely to prod government enforcement. The legislative history also emphasizes that not all government enforcement actions will bar a citizen suit. "[I]f the citizen believed efforts initiated by the agency to be inadequate, the citizen might choose to file the action. . . . [I]f the court viewed the agency action as inadequate, it would have jurisdiction to consider the citizen action notwithstanding any pending agency action."[47] If an agency does commence enforcement actions during the delay period, it "must prosecute them in good faith and with deliberate speed . . . or the citizen is free to initiate his action."[48] Thus, Congress did not intend that the preclusions eliminate all successive enforcement by citizens.[49]

The legislative history of section 505 of the CWA is similar to that of the CAA. Indeed, the Senate CWA Report commentary followed the Senate CAA Report almost paragraph-by-paragraph and line-by-line.[50] The CWA Report added, "[i]t is the Committee's intent that . . . citizens should be unconstrained to bring these actions, and that the courts should not hesitate to consider them."[51] It is in the legislative history of the CWA provision that Congress anointed a citizen enforcer as a "private attorney general," believing the citizen suit provision "provides an open door for those who have legitimate interests in the courts, and encourages more meaningful participation in the administrative processes."[52]

A later Senate Committee Report commented:

> Citizen suits are a proven enforcement tool. They operate as Congress intended-to both spur and supplement to government enforcement actions. They have deterred violators and achieved significant compliance gains. In the past two years, the number of citizen suits to enforce [CWA] permits has surged so that such suits

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to bring about compliance. 116 CONG. REC. 32,927 (1970). Senator Hart remarked that notice will have the "effect of prodding" government enforcement. 116 CONG. REC. 33,104 (1970). The delay between the citizen's notice and when the citizen can file suit should give the government enforcer "an opportunity to act on the alleged violation." S. REP. NO. 91-1196, at 37, *reprinted in* A LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS OF 1970, at 437 (1974).

46. *See supra* note 34.

47. S. REP. NO. 91-1196, at 37, *reprinted in* A LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS OF 1970, at 437 (1974).

48. *Id.* at 65, *reprinted in* A LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS OF 1970, at 465 (1974).

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

50. *Compare* S. REP. NO. 91-1196, at 36-39, *reprinted in* A LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS OF 1970, at 436-39 (1974), *with* S. REP. NO. 92-414, at 79-82 (1971), *reprinted in* 1972 LEGISLATIVE HISTORY at 1497-1500.

51. S. REP. NO. 92-414, at 80, *reprinted in* 1972 LEGISLATIVE HISTORY at 1498.

52. H.R. REP. NO. 92-911, at 134, *reprinted in* 1972 LEGISLATIVE HISTORY at 821.

> now constitute a substantial portion of all enforcement actions filed in Federal court under this Act.[53]

Others have commented that the legislative history of the provisions is in conflict, on the one hand expansive, favoring citizen enforcement, and on the other hand, restrictive, fearing it.[54] However, the legislative history is more complex. It suggests Congress did not have a single intent in enacting the citizen suit provisions, but rather it intended the provisions to serve several purposes. One clear purpose was to be a vehicle for citizen participation in government, with its broader goals of providing transparency and openness in government in turn promoting public ownership of and trust in government. Another purpose was to assure compliance with environmental statutes by encouraging government enforcement. Another was to provide default enforcers when the government chose not to enforce or lacked the resources to do so. Indeed, Congress came to see citizen suits as an effective tool in that regard, performing a substantial role in the total enforcement effort. It admonished courts to be receptive to citizen suits, recognizing that citizen enforcers performed a public service. Qualifying these purposes was the congressional desire that citizen suits not unduly interfere or conflict with government actions or unduly harass violators. Concluding that Congress had a single intent in enacting the provisions ignores much of their legislative history. Elevating the desire that citizen suits not unduly interfere or conflict with government actions from a limited after thought to a primary purpose of the provisions ignores the very purpose of the provisions.

C. Statutory Preclusions in Section 309(g) of the CWA. Congress added section 309(g) to the CWA in 1987, authorizing the EPA to assess administrative penalties against violators of the statute. It was one of three amendments intended to strengthen the EPA enforcement provision.[55] However, the authority was a limited one. Whereas courts may order compliance and assess penalties of up to $25,000 for each violation per day, the EPA may only assess penalties and may do so in amounts totaling only $25,000 or $125,000, depending on the formality of the administrative process it uses.[56] To prevent duplicative penalties for the same violations, Congress included a preclusion provision. It provides that "any violation . . . shall not be subject of a civil penalty action" by the EPA or a citizen if:

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53. S. REP. NO. 99-50, at 28 (1985), *reprinted in* CLEAN WATER ACT AMENDMENTS OF 1985, at 28 (1985).

54. Robert D. Snook, *Environmental Citizen Suits and Administrative Discretion: When Should Government Enforcement Bar a Citizen Suit?* NAT. ENVTL ENFORCEMENT J., 3 n.64, 4-6.

55. *See* Federal Water Pollution Control Act Amendments, PUB. L. NO. 100-4, §§ 312-314, 101 Stat. 7, 42-46 (1987) (increasing the amounts of civil penalties courts may assess, adding a new and severe criminal sanction for violations the actor knows place people in danger of serious injury, and adding EPA's administrative penalty authority).

56. CWA § 309(d), (g)(2), 33 U.S.C. § 1319(d), (g)(2) (2000).

> (i) . . . [theEPA] 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) . . . [the 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 . . . .[57]

The subsection contains a version of the same three-element preclusion device found throughout the statutes. Many of the terms it uses are identical to terms used in the other provisions, i.e., "is diligently prosecuting." Significantly, however, it adds a preclusion for actions that are final and does not limit the preclusion to actions being prosecuted "to require compliance," as do the preclusions in the citizen suit provisions. The Supreme Court suggested section 309(g) wording that differs from wording in the citizen suit sections warrants a different interpretation.[58]

The legislative history of section 309(g) emphasizes that it is to be used for minor violations not warranting serious enforcement effort.[59] It recounts that Congress built explicit citizen participation authorities into the penalty assessment process, including intervention and judicial review, to assure that EPA did not misuse the provision.[60] It's fear of misuse was not that EPA would assess too many penalties, but that it would assess minor penalties for serious violations more appropriate for injunctive relief and large penalties. The legislative history indicated the purpose for the preclusion was to prevent the assessment of duplicative penalties for the same violation, with no mention of preserving the government's authority to enforce without the hindrance of a simultaneous citizen suit.[61] That is in great contrast to the purpose of the preclusion in the citizen suit provisions, enunciated in their legislative history, to preserve the government's authority to do just that.[62]

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57. CWA § 309(g)(6)(A), 33 U.S.C. § 1319(g)(6)(A) (2000). EPA may assess penalties up to $25,000 using informal proceedings, and up to $125,000 using formal adjudicative proceedings, under the Administrative Procedure Act, 5 U.S.C. §§ 551-706 (2000).

58. Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 57 (1987) (stating that because section 505 of the CWA authorizes citizens to sue those alleged to "be in violation" of the Act, while section 309(g) authorizes the EPA to assess penalties against a person who "has violated" the Act, violations must be continuing to support a citizen suit, while the EPA may "target[ ] wholly past violations").

59. S. REP. NO. 99-50, at 27 (1985), *reprinted in* CLEAN WATER ACT AMENDMENTS OF 1985, at 27 (1985).

60. *Id.* at 26-29.

61. *Id.* at 28.

62. *See* discussion *supra* Part I.B.

II. INTERPRETING THE BARS AGAINST SUCCESSIVE ENFORCEMENT IN CITIZEN SUIT PROVISIONS

There is considerable literature on citizen suits, with pioneering efforts dating back to the mid-1980s.[63] Some of the more recent literature focuses on the statutory bars to citizen suits generally,[64] although much of it focuses on the statutory bars in sections 309(g) and 505 of the CWA. None of the literature examines the two issues discussed here.

The preclusion provisions answer most questions directly and explicitly. They specify which government entities may act to bar citizen suits, and which government actions may bar citizen suits. They also specify that the government must commence one of those actions before the commencement of the citizen suit to bar it. The preclusion provisions do not define "is diligently prosecuting," but they illuminate its meaning by linking it to requiring compliance. Finally, they indicate that government actions may bar citizen suits insofar as they seek compliance with the same requirements. Legislative history supports interpreting the provisions in accordance with their plain language. Congress' development of the preclusion device with many nuanced variations for all three of its elements, but constant use of the "is . . . prosecuting" and "to require compliance" limitations on the bar is a strong indication that Congress meant the words it used to be given their plain meaning. Most courts interpret the provisions in accordance with their plain language.

A. Must the Government's Action be Ongoing to Preclude a Citizen Suit? The meaning of "is diligently prosecuting" raises two general issues. First, must prosecution of the action be ongoing to bar a citizen suit? Second, what is required for the prosecution to be diligent? While the second issue is beyond the

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63. *See, e.g.*, Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 BUFF. L. REV. 833 (1985); Jeffrey G. Miller, *Private Enforcement of Federal Pollution Control Laws Part I*, 13 ENVTL. L. REP. 10,309 (1983), Jeffrey G. Miller, *Private Enforcement of Federal Pollution Control Laws Part II*, 14 ENVTL. L. REP. 10,063 (1984); Jeffrey G. Miller, *Private Enforcement of Federal Pollution Control Laws Part III*, 14 ENVTL. L. REP. 10,407 (1984). Treatises on environmental law commonly devote considerable attention to citizen suits. *See, e.g.*, 4 WILLIAM H. ROGERS, JR., ENVIRONMENTAL LAW: HAZARDOUS WASTES AND SUBSTANCES (1992). There have been at least two treatises on citizen suits: MICHAEL D. AXLINE, ENVIRONMENTAL CITIZEN SUITS (3d ed. 1995); JEFFREY G. MILLER & ENVTL. LAW INST., CITIZEN SUITS: PRIVATE ENFORCEMENT OF FEDERAL POLLUTION CONTROL LAWS (1987).

64. *See* Derek Dickinson, Note, *Is "Diligent Prosecution of an Action in a Court" Required to Preempt Citizen Suits Under the Major Federal Environmental Statutes?*, 38 WM. & MARY L. REV. 1545 (1997); Ross Macfarlane & Lori Terry, *Citizen Suits: Impacts on Permitting and Agency Enforcement*, 11 NAT. RESOURCES & ENV'T 20 (1997); Barry S. Neuman & Jeffrey A. Knight, *When Are Clean Water Act Citizen Suits Precluded by Government Enforcement Actions?*, 30 ENVTL. L. REP. 10,111 (2000); Heather L. Maples, Note, *Reforming Judicial Interpretation of the Diligent Prosecution Bar: Ensuring an Effective Citizen Role in Achieving the Goals of the Clean Water Act*, 16 VA. ENVTL. L.J. 195 (1996).

scope of this article, the answer to the first issue may affect the answer to the second.[65]

Preclusion comes about if the government "*has* commenc*ed* and *is* diligently prosecut*ing* a[n] . . . action . . . to require compliance."[66] "Has commenced," in the past tense, is separated by one word from "is . . . prosecuting," in the present tense. The close proximity and juxtaposition of the verbs, only a conjunction apart, is strong evidence that Congress intended the tense difference and hence that a prosecution must be commenced before the citizen suit is filed and must be on-going when the citizen suit is filed to bar to the citizen suit. This interpretation is supported by the plain meaning and *expressio unius* canons of interpretation; by specifying that continuing prosecutions may be preclusive, the provisions provide that concluded prosecutions may not be.[67] "To require compliance" reinforces this conclusion, for it suggests that a preclusive government action is one in which compliance has yet to be achieved and hence that a concluded government action is not preclusive, for concluded government enforcement actions should lead to compliance.[68] Modifying "is . . . prosecuting" with "diligently" adds to the strength of this interpretation. "Diligent" means "characterized by steady, earnest, and energetic effort."[69] Asking whether a prosecution is diligent inquires more into the energy put into an ongoing process than into the results or success of a concluded process; once the case is concluded, no more energy is put into it.

The structure of the CWA suggests that Congress intentionally used the present tense "is diligently prosecuting" in the citizen suit provision. When Congress added section 309(g)(6)(A) to the statute in 1987, it barred successive EPA and citizen actions for penalties both when the EPA or a state "*is* diligently prosecut*ing*" a section 309(g) penalty action and also when one of them "*has* issu*ed*" a final penalty order and the violator "*has paid*" a penalty.[70] This juxtaposition of tenses in a similar context re-emphasizes that Congress knows the difference between ongoing and completed actions, that it used different verb tenses deliberately, and that it meant the differences to have meaning. This re-

65. For instance, if concluded actions could bar citizen suits, whether an action was diligently prosecuted might suggest an examination of the results of the prosecution. If only on-going actions can bar a citizen suit however, whether an action is diligently prosecuted suggests an inquiry into the energy put into the prosecution and the speed with which the prosecutor seeks to move the action through the courts.

66. *See, e.g.*, CAA § 304(b)(1)(B), 42 U.S.C. § 7604(b)(1)(B) (2000) (emphasis added).

67. *See supra* notes 17-18 and accompanying text.

68. For instance, section 309(a)(1) and (a)(3) of the CWA authorizes the EPA to issue administrative orders against a violator "requiring such person to comply."Although the Supreme Court held in Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982), that courts exercise their traditional equitable powers in deciding whether to issue prohibitory injunctions under section 309 of the CWA for violations of the Act, they are nevertheless to assure that violators comply.

69. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 325 (10th ed. 1999).

70. CWA § 309(g)(6)(A), 33 U.S.C. § 1319(g)(6)(A) (2000) (emphasis added).

emphasis is underscored by congressional knowledge of the linkage between sections 309(g) and 505, for it cross-referenced each section in the other. When Congress amended section 505 to cross reference the preclusion in section 309(g), it did not disturb the juxtaposed tenses in section 505(b), indicating its intent to let the meaning of the different tenses stand.

Indeed, the legislative history underlines the deliberate nature of the congressional choice to use the present tense in the citizen suit preclusion provisions. The CAA Conference Committee Report and the House CWA Report both stated that a citizen suit is barred if a government "abatement action *is pending* and *is being diligently pursued*."[71] The Senate CAA and CWA Reports both contain similar language.[72] This, of course, reinforces that the legislative intent in using the present tense "is diligently prosecuting" was to denote on-going prosecution. The Senate Report had the same notion in mind when it stated that government agencies must prosecute enforcement actions "in good faith and with deliberate speed . . . or the citizen is free to initiate his action."[73]

Application of the preclusion provisions only when there is an on-going government prosecution makes policy sense, for the likelihood of disruption and conflict from successive prosecution is greatest when two enforcement actions for prospective relief are proceeding simultaneously. Once the government's action is concluded, the potential for disruption and conflict in judicial proceedings is over. The likelihood that resolution of successive citizen suits will disrupt or conflict with the resolution of the earlier government action is minimal for several reasons. First, the doctrines of mootness or *res judicata* may dominate.[74] Second, courts believing that the continuing citizen action is duplicative and of no benefit may inform plaintiffs they will not award attorney fees if they persist in pursuing their cause of action.[75] Third, courts may take the resolution of the earlier government action into account when framing a remedy in the subsequently resolved citizen suit. Indeed, penalties the defendant has already paid for the same violations in the concluded case are one of such

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71. H.R. REP. NO. 91-1783, at 56 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5388 (emphasis added); H.R. REP. NO. 92-911, at 133 (1972), *reprinted in* 1972 LEGISLATIVE HISTORY at 820 (emphasis added).

72. "[I]f the court viewed the agency action as inadequate, it would have jurisdiction to consider the citizen action notwithstanding any *pending* agency action." S. REP. NO. 91-1196, at 37 (1970), *reprinted in* A LEGLISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS OF 1970, at 437 (1974) (emphasis added); S. REP. NO. 92-414, at 80, *reprinted in* 1972 LEGISLATIVE HISTORY at 1498 (emphasis added).

73. S. REP. NO. 91-1196, at 65, *reprinted in* A LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS OF 1970, at 465 (1974).

74. *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167 (2000); Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998); Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49 (1987).

75. *See* Atl. States Legal Found., Inc. v. Koch Ref. Co., 681 F. Supp. 609 (D. Minn. 1988).

"matters as justice may require"[76] the court must take into account in assessing penalties in the citizen suit.[77] If the penalties settled for or awarded in the concluded government action were insufficient to deter future violations by the defendant or others, the award of additional penalties in the successive citizen action serves the statutory deterrence purpose and does not rob the government from the benefit of its settlement. Similarly, compliance measures the defendant has already been ordered to take for the same violations in the concluded case are equitable factors the court must take into account in framing a compliance injunction in the citizen action. Of course, if the resolution of the concluded government action did not require compliance, a compliance injunction in the successive citizen action serves the statutory purpose and does not rob the government of the benefit of its settlement.[78]

Although citizen suits do not rob the government of the benefit of its previous settlements, violators argue the ability of citizens to "overfile" government actions will deter violators from settling with the government, making it harder for the government to enforce.[79] That argument is empirically unsound, for violators settle cases daily with federal and state enforcers without knowing whether citizen plaintiffs will subsequently file suit. The argument presupposes that citizen enforcement threatens violators as much as government enforcement, which is not the case. When citizens take action against a violator, they can seek only civil penalties and an injunction. When the government takes actions against a violator, it too can seek civil penalties and an injunction, but it can also can take many other actions, including but not limited to: subjecting the violator to frequent and intrusive inspections, revoking or denying the violator's permits or making them subject to difficult conditions, proceeding criminally against the violator, its officers and employees, and barring the violator from government contracts.[80] To suggest that violators will not reach administrative and civil settlement with the government because of possible action by citizens is preposterous in light of the draconian power the government has over violators who do not settle with it.

Not surprisingly, courts have routinely interpreted the citizen suit provisions in general and their preclusion bar elements in particular to give meaning to the tenses Congress used in them. Many of them note that the Supreme Court, in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*,[81] based its decision that section 505 of the CWA conferred no jurisdiction for a citizen suit to enforce

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76. This is one of the factors courts are to consider in determining the amount of penalties to assess. See for instance, section 309(d) of the CWA, 33 U.S.C. 1319(d) (2000).

77. See, for example, CWA § 309(d), 33 U.S.C. § 1319(d) (2000), under which CWA citizen suit penalties are assessed.

78. Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982).

79. *See* Snook, *supra* note 54, at 11; Macfarlane & Terry, *supra* note 64, at 25.

80. See, for instance, CWA sections 308, 309(c), 401(b)(1)(c) and 508.

81. 484 U.S. 49 (1987).

against wholly past violations on the present tense "alleged to be in violation" in section 505(a)(1). The Court's primary method of interpreting the phrase was the plain meaning of the tense Congress used in it.

> The most natural reading of "to be in violation" is a requirement that citizen-plaintiffs allege a state of either continuous or intermittent violation—that is, a reasonable likelihood that a past polluter will continue to pollute in the future. Congress could have phrased its requirement in language that looked to the past ("to have violated"), but it did not choose this readily available option.
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> [T]he prospective orientation of that phrase could not have escaped Congress' attention. . . . Congress has demonstrated in yet other statutory provisions that it knows how to avoid this prospective implication by using language that explicitly targets wholly past violations.[82]

The Court's admonition to give meaning to the tenses used in section 505(a)'s limitation on citizen enforcement authority applies equally to interpreting section 505(b)'s preclusion on that authority and to interpreting comparable citizen suit provisions in other statutes. Almost all of the many courts considering the "has commenced and is diligently prosecuting" language have reasoned that Congress' use of the past tense "*has* commenc*ed*" was deliberate, is significant, and should be interpreted in accordance with its plain meaning to hold that only government actions filed before citizen suits will bar them.[83] Similarly, all but one of the few

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82. *Gwaltney*, 484 U.S. at 57 (citations omitted).

83. Chesapeake Bay Found. v. Am. Recovery Co., 769 F.2d 207, 208-09 (4th Cir. 1985) (refusing to bar a citizen suit where state action was filed three and a half hours after the citizen suit was filed); Old Timer, Inc. v. Blackhawk-Cent. City Sanitation Dist., 51 F. Supp. 2d 1109, 1114-15 (D. Colo. 1999) (refusing to bar a citizen suit brought under section 309(g)(6)(ii) of the CWA where a state administrative penalty assessment was commenced after commencement of CWA citizen suit); Long Island Soundkeeper Fund, Inc. v. New York City Dep't of Envtl. Prot., 27 F. Supp. 2d 380, 383 (E.D.N.Y. 1998) (refusing to bar a citizen suit where a state action was filed half an hour after the citizen suit was filed); Briggs & Stratton Corp. v. Concrete Sales & Servs., 20 F. Supp. 2d 1356, 1373-74 (M.D. Ga. 1998) (refusing to bar a citizen suit under the RCRA where the citizen suit was commenced before a state consent order); Glazer v. Am. Ecology Envtl. Servs. Corp., 894 F. Supp. 1029, 1034-35 (E.D. Tex. 1995) (indicating that a state action must be pending when a citizen suit is filed to bar it); Natural Res. Def. Council, Inc. v. Loewengart & Co., 776 F. Supp. 996, 1000 (M.D. Pa. 1991) (finding CWA citizen suit not preempted by later government initiative against defendant); Pub. Interest Research Group v. Yates Indus., 757 F. Supp. 438, 444 (D.N.J. 1991) (stating that subsequent administrative action does not preempt a citizen suit); Sierra Club v. United States Dep't of Energy, 734 F. Supp. 946, 950, 952 (D. Colo. 1990) (finding a citizen suit under RCRA not precluded by an administrative compliance order that was "indefinite in many respects"); Chesapeake Bay Found., Inc. v. Bethlehem Steel Corp., 652 F. Supp. 620, 625-26 (D. Md. 1987); Conn. Fund for the Env't v. Job Plating Co., 623 F. Supp. 207, 215 (D. Conn. 1985) (finding a CWA citizen suit not precluded by state agency enforcement action started after the citizen suit was filed); Sierra Club v. Simkins Indus., Inc., 617 F. Supp. 1120, 1126 (D. Md. 1985), *aff'd*, 847 F.2d 1109 (4th Cir. 1988); Brewer v. City of Bristol, 577 F. Supp. 519, 527-28 (E.D. Tenn. 1983).

courts considering the language have reasoned that Congress' use of the present tense "*is* prosecut*ing*" was deliberate, is significant, and should be interpreted in accordance with its plain meaning to hold that only government actions on-going at the time citizen suits are filed will bar them.[84]

The district court in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*,[85] is the only court to explicitly reach a contrary result. It doubted that Congress intended the meanings of the tenses it used, for doing so would allow the preclusion against citizen suits erected by an on-going diligently prosecuted government action to dissolve once the prosecution was concluded, thus allowing citizens to evade the preclusion by simply waiting until the government's action is concluded, a result it considered senseless.[86] The court failed to note that its conclusion led to a senseless result. Why would Congress authorize citizens to file suit when the government had already commenced an action but was not diligently prosecuting it, only to later bar the citizens from concluding their action because the government had concluded its action in an non-diligent and unsatisfactory manner? The most likely answer to these two questions is that Congress intended an on-going government action to bar citizen suits only if the government is diligently prosecuting the action and for a settled government action to bar citizen suits only if the government settled for compliance or a penalty adequate to provide deterrence.

The court admitted its decision was contrary to the plain meaning of the statutory language.[87] The court did not examine the legislative history, discussed above, that supports the plain meaning of the statutory language. The only justification the court gave for its decision was that it thought an opposite result was senseless.[88] The opposite result, however, is supported by the policy reasons examined above. They indicate Congress was more concerned with avoiding conflict between two on-going court proceedings than with avoiding conflicting resolutions of two enforcement actions. As explained above, successive citizen suits have only a small chance of interfering with the results the government obtained in a concluded action. Moreover, if successive citizen suits interfere

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84. Citizens for a Better Env't-Cal. v. Union Oil Co., 83 F.3d 1111, 1118 (9th Cir. 1996) (construing section 309(g) of the CWA); A-C Reorganization Trust v. E.I. DuPont De Nemours & Co., 968 F. Supp. 423, 432 (E.D. Wis. 1997); Glazer v. Am. Ecology Envtl. Servs. Corp., 894 F. Supp. 1029, 1034 (E.D. Tex. 1995) (construing section 304 of the CAA and section 7002 of the RCRA); Pub. Interest Research Group, Inc. v. GAF Corp., 770 F. Supp. 943, 949 (D.N.J. 1991) (construing section 309(g) of the CWA); Conn. Fund for the Env't v. Contract Plating Co., 631 F. Supp. 1291, 1293 (D. Conn. 1986) (construing section 505 of the CWA); Conn. Fund for the Env't v. I. & W Indus., Inc., 631 F. Supp. 1289, 1291 (D. Conn. 1986) (construing section 505 of the CWA).

85. 890 F. Supp. 470 (D.S.C. 1995), *vacated by* 149 F.3d 303 (4th Cir. 1998), *rev'd*, 528 U.S. 167 (2000).

86. *Id.* at 485.

87. *Id.*

88. *Id.*

with the ability of violators to carry out their obligations under concluded government actions, courts may apply a variety of common law doctrines to prevent the conflict.[89] Indeed, the court in *Laidlaw* noted that if the statutory bar ceased when the government action was concluded, duplicative suits might still be avoided under the doctrine of *res judicata*. But that could not be considered in the case, because the defendant had not plead *res judicata* as a defense and both parties argued it did not apply.[90] Congressional awareness of common law preclusions[91] to prevent disruptive successive suits could explain why it used the present tense "is . . . prosecuting." But that would lead to the question, why would Congress intend that citizen suits be allowed to proceed while the government pursued its action without dilligency, only to be barred by common law preclusions once the government concluded its action in an equally unsatisfactory manner? Congress could not have intended that result. In any event, the court's interpretation was dicta, because the court found the government's prosecution had not been diligent in settling for too small a penalty and therefore did not preclude a citizen suit.

Few courts have addressed this issue. Perhaps the citizen plaintiffs did not argue the present tense of "is . . . prosecuting" means the preclusion stop operating once a prosecution ends. Perhaps the argument did not occur to them. Or perhaps they did not want to raise it, fearing common law *res judicata* or issue preclusion defenses would follow.

Assuming that "is diligently prosecuting" requires that the government prosecution be ongoing to bar a citizen suit, what is an ongoing prosecution? The most obvious answer is that an action that has been commenced by filing a complaint and not yet concluded by a dispositive ruling, decision on the merits, or court-entered consent decree (or under some statutes their administrative analogues) and is not on appeal, is in the adjudication process and therefore is ongoing. The difficult question is whether an action that has been concluded by an order is still ongoing when the order contains a schedule requiring the defendant to perform actions in the future. If the court has issued an injunction or approved a negotiated consent decree requiring compliance in accordance with a schedule, it is tempting to say the action is still pending and the citizen is barred

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89. *See* United States v. Cargill, Inc., 508 F. Supp. 734 (D. Del. 1981).

90. *Laidlaw*, 890 F. Supp. at 485-86 n.7. Indeed, the court asked the parties to brief the issue, raising two intriguing questions: (i) why did the court ask the parties to brief the issue when the defendant had not plead res judicata as a defense under FED. R. CIV. P. 8(c); and (ii) why did the defendant argue the order the state had gone to considerable trouble to get didn't support res judicata?

91. The Senate Reports on both the CAA and CWA note that if courts found government enforcement adequate, they could suspend, dismiss, or consolidate the citizen suit, evidently referencing stays, abstention, res judicata, and other common law preclusions. *See* S. REP. NO. 91-1196, at 37, *reprinted in* A LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS OF 1970, at 437 (1974); S. REP. NO. 92-414, at 80 (1971), *reprinted in* 1972 LEGISLATIVE HISTORY at 1498.

from suing if the prosecutor is diligently monitoring compliance with the order and seeking to enforce it when the defendant fails to do so. Indeed, many,[92] but not all,[93] courts considering the matter have so held. The minority view, however, appears to have more merit. Monitoring compliance with a decree is not action in court. When the prosecutor seeks court help to enforce a decree, she really is enforcing against a violation of the court's order in a contempt proceeding, not against a violation of the statute in an enforcement action; that prosecution has been completed.[94] Indeed, Congress recognized the distinction by authorizing citizen enforcement against violations of both the statute and orders enforcing the statute.[95] The issue becomes considerably murkier when the order is administrative rather than judicial and was reached by agreement rather than as a result of administrative process. The typical pattern of administrative action in which the issue arises is the issuance of an administrative compliance order by consent, followed by several extensions of the compliance date at the request of the violator, all without any administrative adjudication. As

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92. For instance, when a twenty page consent decree established, in detail, work to be performed and standards to be met by the work, the state agency's monitoring of compliance with the work schedule was held to be continuing and diligent prosecution in *City of Heath v. Ashland Oil, Inc.*, 834 F. Supp. 971, 983 (S.D. Ohio 1993). *See also* Cmty. of Cambridge Envtl. Health & Cmty. Dev. Group v. City of Cambridge, 115 F. Supp. 2d 550, 557 (D. Md. 2000) (holding late compliance of consent decree to be diligent prosecution under section 309(g) of the CWA).

93. Coalition for Health Concern v. LWD, Inc., 834 F. Supp. 953, 956 (W.D. Ky. 1993), *rev'd on other grounds*, 60 F.3d 1188 (6th Cir. 1995); Pub. Interest Research Group, Inc. v. Witco Chem. Corp., CIV. No. 89-3146, 1990 WL 66178 at *4-5 (D.N.J. May 17, 1990) (finding state participation in overseeing the implementation of remedial action by the defendant, under a stipulation ending administrative enforcement, was not diligent prosecution under section 309(g) of the CWA); Student Pub. Interest Research Group, Inc. v. Georgia-Pacific Corp., 615 F. Supp. 1419, 1431-32 (D.N.J. 1985) (finding a post-consent decree of administrative surveillance was not action in court that would bar a citizen suit); Love v. N.Y. State Dep't of Envtl. Conservation, 529 F. Supp. 832, 843-44 (S.D.N.Y. 1981) (refusing to bar a citizen suit where the state failed to enforce an order to comply with a permit).

94. In *Connecticut Fund for the Environment v. L & W Industries, Inc.*, 631 F. Supp. 1289, 1291 (D. Conn. 1986), the court commented that modification of a consent decree was not evidence of diligent prosecution.

95. The citizen suit provisions generally authorize suit against violation of the statute or an order enforcing the statute. For example, section 505(a)(1)(B) of the CWA, 33 U.S.C. § 1365(a)(1)(B) (2000), authorizes suit against violation of a standard or limitation under the statute or "an order issued by the [EPA] or [the] State with respect to such a standard or limitation." Further, section 7002(a)(1)(A) of the RCRA, 42 U.S.C. § 6972(a)(1)(A) (2000), authorizes citizen suits against violation of an "order which has become effective" under the RCRA. This statute has been held to authorize citizen enforcement of administrative and judicial orders. *See* O'Leary v. Moyer's Landfill, Inc., 677 F. Supp. 807, 815 n.5 (E.D. Pa. 1988). *But see* Culbertson v. Coats Am., Inc., 913 F. Supp. 1572, 1582 (N.D. Ga. 1995) (stating that citizens may not enforce against violations of administrative orders under section 309(g) of the CWA).

"prosecuting" denotes an ongoing adjudication, this pattern of administrative behavior does not fit it.

B. Must the Government Action Require Compliance? Does it? To bar a citizen suit, the provisions specify that the government action must be commenced and diligently prosecuted "to require compliance." The plain meaning of the term is to coerce the defendant to cease violating the requirement being enforced. Actions of a non-coercive nature or directed at simply penalizing past violations, as opposed to addressing or deterring present and future violations do not fit within this plain meaning. When Congress intended non-coercive actions to bar successive enforcement, it did not include "to require compliance," i.e., in section 309(g) of the CWA. This emphasizes not only the significance of including "to require compliance" where it appears, but also of the different nature of the preclusion in section 309(g), which authorizes only modest penalties that are not enough in many cases to deter violations.

The legislative history affirms Congress used the term "to require compliance" intentionally and with meaning. The House and Senate Reports accompanying the CAA and CWA citizen suit provisions stated that commencement and diligent prosecution of "abatement actions" by the government would preclude citizen suits.[96] Indeed, the Senate CAA bill, containing the prototype citizen suit provision,[97] required prior notice by the citizen to "afford [the government the opportunity] . . . to institute enforcement proceedings . . . to abate such alleged violation . . . ."[98] "Abate" is defined as "to put an end to . . . ."[99] The plain meaning of abatement in the legislative history is the cessation of the violation. The Senate Report made it clear that the citizen plaintiff and ultimately the court were to make a judgment whether a government action met this test.

> [I]f the citizen believed efforts initiated by the agency to be inadequate, the citizen might choose to file the action. In such case, the courts would be expected to consider the petition against the background of the agency action and could determine that such action would be adequate to justify suspension, dismissal, or consolidation of the citizen petition. On the other hand, if the court viewed the agency action as inadequate, it would have jurisdiction to consider the citizen action notwithstanding any pending agency action.[100]

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96. H.R. REP. NO. 92-911, at 133 (1972), *reprinted in* 1972 LEGISLATIVE HISTORY at 820 (stating that a citizen suit may be precluded "if an abatement action is pending and is being diligently pursued"); S. REP. NO. 92-414, at 80 (1971), *reprinted in* 1972 LEGISLATIVE HISTORY at 1498 (stating that a citizen suit may not be precluded "if the agency had not initiated abatement proceedings").

97. *See supra* notes 71-72 and accompanying text.

98. S. 4358, 91st Cong. at 84-85 (1970), *reprinted in* A LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS OF 1970, at 614-15 (1974).

99. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1 (10th ed. 1999).

100. S. REP. NO. 91-1196, at 37 (1970), *reprinted in* A LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS OF 1970, at 437 (1974).

Legislative history equated the adequacy or inadequacy of the government action with whether it was capable of requiring compliance. The Conference Committee changed the language of the Senate bill requiring the government "to institute enforcement proceedings . . . to abate such alleged violation" to the language of the enacted provision requiring the government to have "commenced and [be] diligently prosecuting a[n] . . . action . . . to require compliance . . . ."[101] We already have seen that when Congress spoke of abating a violation, it meant requiring compliance with the statute. The ultimate congressional language was more elegant than the Senate language from which it was derived, but the meaning of both is comparable and the Senate Report explains both.[102] The legislative history demonstrates congressional intent that the trial court determine a government action is adequate before it can bar a citizen suit, i.e., whether the government action is one capable of and calculated to require compliance.

The Supreme Court seized on this in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*[103] as one justification for holding that section 505 of the CWA authorized citizen suits only to address continuing violations. It noted that the "provisions specifically provide that citizen suits are barred only if the Administrator . . . has commenced an action '*to require compliance.*'" This language supports our conclusion that the precluded citizen suit is *also* an action *for compliance*, rather than an action solely for civil penalties for past, nonrecurring violations."[104] The Seventh Circuit seized on similar language in section 7002 of the RCRA to support its holding that an EPA suit to abate violations barred a citizen suit to abate the same violations, although directed against different defendants.[105]

There are two aspects to the issue of whether a government action is one to require compliance. Oddly, few courts have considered either issue, probably because citizen plaintiffs have not focused on them. The first is the straightforward question of whether the government action is the type of action that can require compliance. If the government action is one seeking an

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101. For the language of the enacted provision, see section 304 of the CAA, 42 U.S.C. § 7604(b)(1)(B) (2000).

102. The Senate Report accompanying the Senate CWA bill contains the same language as the Senate Report accompanying the Senate CAA bill. *Compare* S. REP. NO. 91-1196, at 37, *reprinted in* A LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS OF 1970, at 437 (1974), *with* S. REP. NO. 92-414, at 80 (1971), *reprinted in* 1972 LEGISLATIVE HISTORY at 1498. Since the language contained in the Senate CWA bill is the same as the language contained in the CAA Conference Committee bill, the quoted language from the Senate Report explains both versions.

103. 484 U.S. 49 (1987).

104. *Id.* at 60 n.3 (second and third emphasis added) (citation omitted).

105. *See* Supporters to Oppose Pollution, Inc. v. Heritage Group, 973 F.2d 1320, 1323 (7th Cir. 1992) ("Notice that this statute refers to an action to 'require compliance with such permit [or] regulation'-not an action against the private party's chosen adversary, but an action to require compliance.") (alteration in original).

injunction against the continued violation, the procedure is appropriate to preclude a citizen suit. The Court reminds us in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*[106] that penalties as well as injunctive relief may be used to coerce compliance. Of course, to deter violations, a penalty must recover from a violator more than the economic benefit it has realized from the violations.[107] Unless the government action is a traditionally recognized coercive device, it probably isn't one to require compliance. For instance, one court had little trouble holding that a memorandum of understanding between two state agencies was not an action to require compliance.[108] Such an agreement is not coercive. Indeed, because it was an agreement between two parts of the same sovereign, it may not even have been enforceable as a contract.

The second question is whether a government enforcement action is in fact being used to require compliance. The action must not only be capable of requiring compliance, it must be calculated to do so. Although the Court in *Weinberger v. Romero-Barcelo*[109] reminds us that there may be several forms of injunction that can lead to compliance,[110] not all injunctions will do so. The Second Circuit implicitly recognized this when determining that a citizen suit could continue after a subsequently filed state action was settled purportedly ending the violations alleged in the citizen suit. The court remanded the case for a determination of whether the settlement "caused the violations alleged by [plaintiff] to cease and eliminated any realistic prospect of their recurrence."[111] If so, the citizen suit should be dismissed, if not, it should go forward. The decision was implicitly based on mootness. But it required the trial court on

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106. 528 U.S. 167 (2000).

107. The district court in *Laidlaw* aptly noted that to serve as a deterrent, civil penalties must be in an amount "high enough to insure that polluters cannot simply absorb the penalty as a cost of doing business." Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 890 F. Supp. 470, 491-92 (D.S.C. 1995), *vacated by* 149 F.3d 303 (4th Cir. 1998), *rev'd*, 528 U.S. 167 (2000).

108. Pub. Interest Research Group of N.J., Inc. v. N.J. Expressway Auth., 822 F. Supp. 174, 184 (D.N.J. 1992) (finding that a memorandum of understanding between the state environmental enforcement agency and the state expressway authority was not an enforcement action and could not preclude a citizen suit).

109. 456 U.S. 305 (1982).

110. The Court held that the district court was not mandated to issue an injunction requiring the Navy to cease discharging practice bombs into the waters of the United States without a CWA permit, but could instead order the Navy to apply for a permit. It concluded that the CWA provided several means for a court to assure compliance. "An injunction is not the only means of ensuring compliance." *Id.* at 314.

> Rather than requiring a district court to issue an injunction for any and all statutory violations, the [CWA] permits the district court to order that relief it considers necessary to secure prompt compliance with the Act. That relief can include, but is not limited to, an order of immediate cessation.

Id. at 320.

111. Atl. States Legal Found., Inc. v. Eastman Kodak Co., 933 F.2d 124, 128 (2d Cir. 1991).

remand to determine not only whether the state's settlement rendered the citizen suit moot, but also whether the settlement was complied with and whether it covered all of the violations alleged in the citizen suit.[112] Other courts have held that administrative actions do not bar citizen suits when they do not purport to or do not in fact prevent the continuance of violations alleged in the citizen actions.[113] States may use a common enforcement mechanism, such as an administrative compliance order, not as a compulsion to comply but as a means of extending a compliance date. Mere compliance extensions do not coerce compliance, even though they are contained in compliance orders.[114] Of course, it may not be clear from the face of an order whether the state intends to compel compliance or merely extend a compliance date. Some courts may be hostile to such an inquiry.[115] Penalties also can coerce compliance, but only if they are punitive; for example, sufficient to do more than remove the economic benefits of non-compliance.[116]

A government action may bar a citizen suit only for the common violations that the two actions seek to abate. For the government action to bar a citizen suit, the government action must seek "to require compliance with *the* standard, limitation, or order."[117] "[*T*]*he* standard, limitation, or order," to which section 304(b)(1)(B) refers, is the standard, limitation or order the citizen alleges the defendant is violating under section 304(a)(1), the only prior use of the three terms in the section. It follows from the plain meaning of these terms and the *expressio unius* canon of statutory construction[118] that the government action precludes a citizen suit only for the violations of the standard, limitation or order that they both allege and seek to abate. Moreover, this result is consistent with the policy of the provision. The prior notice and the delay period elements of the preclusion were intended to give the government the opportunity to enforce against the violations of the standard, limitation or order alleged by the citizen, unencumbered by a citizen suit. Where the government has enforced against some, but not all of such violations alleged by the citizen, it has foregone its opportunity to foreclose the citizen from enforcing against the violations the

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112. *Eastman Kodak*, 933 F.2d at 128.

113. Culbertson v. Coats Am., Inc., 913 F. Supp. 1572, 1579 (N.D. Ga. 1995); Love v. N.Y. State Dep't of Envtl. Conservation, 529 F. Supp. 832, 843-44 (S.D.N.Y. 1981).

114. *See, e.g.*, Bishop v. Water Works & Sanitary Sewer Bd., No. CIV.A. 00-A-527-N, 2001 WL 46973 (M.D. Ala. Jan. 16, 2001); Culbertson v. Coats Am., Inc., 913 F. Supp. 1572, 1579 (N.D. Ga. 1995).

115. Indeed, one court suggested a citizen plaintiff's argument that an administrative compliance order was merely a compliance date extension came close to warranting a sanction under FED. R. CIV. P. 11. *See* Atl. States Legal Found., Inc. v. Tyson Foods, Inc., 682 F. Supp. 1186, 1188 (N.D. Ala. 1988), *rev'd on other grounds*, 897 F.2d 1128 (11th Cir. 1990).

116. *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 890 F. Supp. 470, 491-95 (D.S.C. 1995), *vacated by* 149 F.3d 303 (4th Cir. 1998), *rev'd*, 528 U.S. 167 (2000).

117. CAA § 304(b)(1)(B), 42 U.S.C. § 7604(b)(1)(B) (2000) (emphasis added).

118. *See supra* note 5.

government chose to ignore. Most, but not all courts considering the issue have so held.[119]

A variant of this issue arises when the defendant in a citizen suit under one statute argues a government action under another statute bars the citizen suit. Such government actions generally are not brought to require compliance with the same standards the citizen is enforcing against and generally will not bar the citizen suit,[120] although there are decisions to the contrary.[121] Another variant is

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119. Berry v. Farmland Indus., Inc., 114 F. Supp. 2d 1150, 1156 (D. Kan. 2000) (finding that citizen suit claims that were not mentioned in an EPA consent decree were not resolved by decree's entry and not precluded under the CWA); Citizens Legal Envtl. Action Network, Inc. v. Premium Standard Farms, Inc., No. 97-6073-CV-SJ-6, 2000 WL 220464, at *5 (W.D. Mo. Feb. 23, 2000) (finding that the state's claim regarding defendant's permitted facility does not bar a claim against defendant's non-permitted facilities under the CWA and the CAA); Briggs & Stratton Corp. v. Concrete Sales & Servs., 20 F. Supp. 2d 1356, 1373-74 (M.D. Ga. 1998) (finding the terms of a state agency's consent decree did not affect a plaintiff's right to pursue a claim under the RCRA); Neighbors for a Toxic Free Cmty. v. Vulcan Materials Co., 964 F. Supp. 1448, 1451-52 (D. Colo. 1997) (finding that an EPA action for violations of the reporting requirements of the CERCLA does not bar a citizen action for violations of the reporting requirements of the EPCRA); Frilling v. Vill. of Anna, 924 F. Supp. 821, 836 (S.D. Ohio 1996) (finding that citizen suits are "barred only if the State commences a civil action to require compliance with *the same standard* . . . referenced in the plaintiff's 60-day notice"); Glazer v. Am. Ecology Envtl. Servs. Corp., 894 F. Supp. 1029, 1036 (E.D. Tex. 1995) (finding violations of the CAA and the RCRA, which were addressed in the citizen suit but not in the state's suit, were not barred in the citizen suit); Pub. Interest Research Group, Inc. v. Witco Chem. Corp., CIV. No. 89-3146, 1990 WL 66178, at *4 (D.N.J. May 17, 1990) (finding that the defendant must establish a state action for "identical claims" a citizen suit alleges to preclude the citizen suit); Hudson River Fishermen's Ass'n v. County of Westchester, 686 F. Supp. 1044, 1053 (S.D.N.Y. 1988) (finding that citizen suits are not precluded when an on-going government enforcement effort "does not address the factual grievances asserted by [the] private attorneys general."); Md. Waste Coalition v. SCM Corp., 616 F. Supp. 1474, 1483 (D. Md. 1985) (finding that section 304 of the CAA bars a citizen suit where a previously filed government enforcement action seeks compliance "with the same standard[s]" and at the same emission sources, although the two actions were based on violations on different dates); Love v. N.Y. State Dep't of Envtl. Conservation, 529 F. Supp. 832 (S.D.N.Y. 1981) (finding that on-going administrative action against a defendant does not constitute a bar to a citizen suit under the CWA). *But see* Ark. Wildlife Fed'n v. ICI Americas, Inc., 842 F. Supp. 1140, 1144 (E.D. Ark. 1993) (finding that the state agency's actions and penalties against the defendant "cover all violations of which plaintiff could possibly complain" and so, preclude the citizen suit), *aff'd*, 29 F.3d 376 (8th Cir. 1994); Atl. States Legal Found., Inc. v. Tyson Foods, Inc., 682 F. Supp. 1186 (N.D. Ala. 1988) (finding that an administrative order requiring future action covered prospective violations under section 309(g) of the CWA), *rev'd on other grounds*, 897 F.2d 1128 (11th Cir. 1990); Conn. Fund for the Env't v. Contract Plating Co., 631 F. Supp. 1291 (D. Conn. 1986) (finding a citizen suit was precluded by the state's diligent prosecution of its enforcement suit against the same alleged polluter).

120. Briggs & Stratton Corp. v. Concrete Sales & Servs., 20 F. Supp. 2d 1356, 1373-74 (M.D. Ga. 1998); Neighbors for a Toxic Free Cmty. v. Vulcan Materials Co., 964 F. Supp. 1448 (D. Colo. 1997) (finding that an EPA CERCLA action doesn't bar a RCRA citizens suit); Murray v. Bath Iron Works Corp., 867 F. Supp. 33 (D. Me. 1994) (finding that a state suit to enforce its hazardous waste

whether a citizen suit may go forward when both the citizen suit and the government action seek to enforce the same requirement, but the actions allege violations of the requirement at different times. Courts generally hold that the citizen suit may proceed on continuing violations not enforced against by the government action.[122]

CONCLUSION

Congress enacted broad authority for citizen suits to promote compliance with environmental law and to provide for citizen participation in environmental protection. It qualified this broad authority with the preclusion device, one element of which is the diligent prosecution bar. The purposes of the authority and the qualification to it are not altogether complimentary, and are the result of compromise. While the best indicia of congressional intent is normally the words it wrote, that is particularly true when the provision, such as the citizen suit provision, is the result of compromising multiple divergent goals. This conclusion is reinforced by the theme and variations nature of the preclusion device, a device that Congress repeated in the citizen suit provisions of each of the environmental statutes, but repeated with variations to express different balances between its purposes and qualifications. The citizen suit provisions, then, are best interpreted by reference to their plain English meaning.

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law didn't bar a CWA citizen suit); Hudson River Fishermen's Ass'n v. County of Westchester, 686 F. Supp. 1044, 1053 (S.D.N.Y. 1988) (finding that a federal enforcement of the Refuse Act consent decree, requiring proper operation and closure of landfills, didn't require compliance with the CWA prohibition of addition of leachate through a point source to navigable water without a permit).

121. United States v. Gurley Ref. Co., 43 F.3d 1188 (8th Cir. 1994); Hudson Riverkeeper Fund, Inc. v. Harbor at Hastings Assocs., 917 F. Supp. 251 (S.D.N.Y. 1996); Sierra Club v. Colo. Ref. Co., 852 F. Supp. 1476 (D. Colo. 1994).

122. See Atl. States Legal Found., Inc. v. Tyson Foods, Inc., 682 F. Supp. 1186 (N.D. Ala. 1988), *rev'd on other grounds*, 897 F.2d 1128 (11th Cir. 1990); Chesapeake Bay Found., Inc. v. Bethlehem Steel Corp., 652 F. Supp. 620 (D. Md. 1987); Md. Waste Coalition v. SCM Corp., 616 F. Supp. 1474, 1483 (D. Md. 1985). *But see* Atl. States Legal Found., Inc. v. Eastman Kodak Co., 933 F.2d 124 (2d Cir. 1991). There, the Second Circuit reads *Gwaltney* to bar citizen suits for penalties "the government has elected to forego." *Id.* at 127. This is a clear misreading of *Gwaltney*, which held only that citizens could not sue for wholly past violations. The Court in *Gwaltney* used an ill-conceived hypothetical of a citizen suit seeking penalties against a violator when the government had earlier foregone penalties in exchange for the violator installing controls beyond those required by the statute, to justify its holding that citizens could only sue for wholly past violations. *See* Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 60-61 (1987). The hypothetical was not the holding of the case. Indeed, it did not support the holding because even under that holding, the citizen suit could have been brought against continuing violations while the violator was installing the agreed upon controls. *See* Love v. N.Y. State Dep't of Envtl. Conservation, 529 F. Supp. 832 (S.D.N.Y. 1981).

Most courts have used a plain English meaning interpretation of most issues arising under the provisions, with straightforward and compatible results. A plain English interpretation of the issues examined here prevents citizens from filing suit only if the government has already taken action to require compliance and that action is pending and being diligently prosecuted. This interpretation flows directly from the words used by Congress in the citizen suit provisions and is supported by their legislative history. The interpretation assures a vibrant use of citizen suits to secure compliance with pollution control statutes. It also preserves the unfettered ability of government enforcers to prosecute any violator, and do it free of whatever complications citizen suits may cause, as long as the prosecutor moves with reasonable dispatch to secure compliance.