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# NOTES

## IS "DILIGENT PROSECUTION OF AN ACTION IN A COURT" REQUIRED TO PREEMPT CITIZEN SUITS UNDER THE MAJOR FEDERAL ENVIRONMENTAL STATUTES?

During the late 1960s and early 1970s, mainly in reaction to political pressures stemming from concerns about the degrading environment, Congress began to address the environmental and human health problems caused by growing urbanization and industrial development.<sup>1</sup> By enacting new and amending existing national environmental statutes using novel implementation and enforcement strategies,<sup>2</sup> Congress hoped to protect the environment and human health better than it had under previous laws.<sup>3</sup> Congress gave authority to private citizens to assume the government's enforcement position in order to help realize the desired goals.<sup>4</sup> The statutory provisions conferring this private

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1. See JEFFREY G. MILLER, ENVIRONMENTAL LAW INSTITUTE, *CITIZEN SUITS: PRIVATE ENFORCEMENT OF FEDERAL POLLUTION CONTROL LAWS* 3-4 (1987).

2. Congress's various implementation and enforcement strategies in the federal environmental statutes are considered through a taxonomic approach and analyzed at length in ZYGMUNT J.B. PLATER ET AL., *ENVIRONMENTAL LAW AND POLICY: A COURSEBOOK ON NATURE, LAW, AND SOCIETY* 537-975 (1992). The authors use a taxonomy of environmental statute types so that readers may understand better the issues addressed by the environmental statutes and may analyze the statutes with improved depth, breadth, and speed. See *id.* at 535.

3. See MILLER, *supra* note 1, at 3-4; Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 *BUFF. L. REV.* 833, 837-38 (1985); see generally Clean Air Act of 1955 § 101, 42 U.S.C. § 7401 (1994) (stating the congressional finding that "pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare," and listing as one purpose of the law "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare").

4. See MILLER, *supra* note 1, at 4; Robert F. Blomquist, *Rethinking the Citizen As Prosecutor Model of Environmental Enforcement Under the Clean Water Act: Some Overlooked Problems of Outcome-Independent Values*, 22 *GA. L. REV.* 337, 366-67

enforcement authority are called "citizen suit provisions."<sup>5</sup>

Since 1970, Congress has included citizen suit provisions in almost all of the new national environmental statutes and major amendments.<sup>6</sup> Congress used the language of the first modern provision, section 304 of the Clean Air Act,<sup>7</sup> as a model for subsequent provisions.<sup>8</sup> Citizen suit provisions have provided an important and frequently used enforcement tool, allowing private parties to have significant influence in environmental enforcement actions and providing assistance to agencies that have limited resources.<sup>9</sup> The initiation of a citizen suit, however, may create problems for enforcement agencies by interfering with the agency's enforcement efforts and discretion.<sup>10</sup> Congress foresaw this problem. In fact, opponents of the provisions succeeded in including statutory limitations that restrict a private party's ability to bring a citizen suit under certain circumstances.<sup>11</sup> One statutory restriction, precluding citizen suits when an agency has already brought and is diligently prosecuting its own action, has

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(1988); Robert D. Snook, *Environmental Citizen Suits and Administrative Discretion: When Should Government Enforcement Bar a Citizen Suit?*, NAT'L ENVTL. ENFORCEMENT J., Apr. 1995, at 3.

5. See Boyer & Meidinger, *supra* note 3, at 835; see also, e.g., Clean Air Act of 1955 § 304, 42 U.S.C. § 7604 (1994) (permitting citizen suits against both private and governmental parties for emissions violations).

6. The only major national environmental statutes that do not authorize citizen suits are the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370(d) (1994), and the Federal Insecticide, Fungicide, and Rodenticide Act of 1947, 7 U.S.C. §§ 136-136(y) (1994). See MILLER, *supra* note 1, at 5-6; Blomquist, *supra* note 4, at 367; Stephen Fotis, Comment, *Private Enforcement of the Clean Air Act and the Clean Water Act*, 35 AM. U. L. REV. 127, 136 (stating that, since their inclusion in the Clean Air Act of 1970, "citizen suit provisions have become routine features of federal environmental laws").

7. 42 U.S.C. § 7604 (1994).

8. Since the enactment of the Clean Air Act, "Congress [has] exhibited a tendency to literally 'lift' [the] section" and place it in all new statutes and major amendments. Snook, *supra* note 4, at 4 (quoting Jeffrey G. Miller, *Private Enforcement of Federal Pollution Control Law, Part I*, 13 Env'tl. L. Rep. (Env'tl. L. Inst.) 10,309, 10,311 (1983)).

9. See Snook, *supra* note 4, at 3.

10. See *id.*

11. See *infra* text accompanying notes 42-54; see also, e.g., Clean Air Act Amendments of 1970 § 304, 42 U.S.C. § 7604(b) (1994) (requiring citizen suit plaintiffs to give notice 60 days before filing a citizen suit and precluding citizen suits if an agency has commenced and is prosecuting its own action).

generated much litigation<sup>12</sup> and is the focus of this Note.

After examining the current interpretations of the diligent prosecution restrictions and their respective strengths and weaknesses, this Note considers alternatives and then proposes a solution. This Note first briefly discusses the background and history of private enforcement, including the current statutory language and legislative history of the modern national environmental statutes and their citizen suit provisions. Next, this Note describes the confusion that exists among the various United States Courts of Appeals over the proper interpretation of the terms "in a court" and "diligence" contained in the diligent prosecution limitation on citizen suits. This Note then proposes that Congress amend the current statutory language so that courts are more clearly directed to permit diligent prosecution of agency actions to preempt citizen suits. This Note explains how such an approach effectively meets the overall goals of the statutes and protects important policy considerations. Alternatively, in the absence of a statutory amendment, this Note proposes a judicial standard for determining when diligent prosecution of agency actions suffices to preempt citizen suits. The proposed standard optimally balances the beneficial policy goals of preemption by agency actions and the arguments regarding statutory language.

#### BACKGROUND AND HISTORY OF PRIVATE PARTY ENFORCEMENT

"Private enforcement of federal statutes is not a new concept, unique to environmental law."<sup>13</sup> In the Anglo-American legal system, the concept of shared enforcement responsibilities between public officials and private citizens can be traced back over

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12. See Boyer & Meidinger, *supra* note 3, at 901. Although the citizen suit provision was invoked infrequently during the 1970s, *see id.* at 835, hundreds of lawsuits have been filed nationwide since 1980 under the Clean Water Act alone, typically by environmentally conscious groups such as the Sierra Club. See RUSSELL S. FRYE, *THE CLEAN WATER ACT COMPLIANCE HANDBOOK* 80-81 (1989); MILLER, *supra* note 1, at vii.

13. MILLER, *supra* note 1, at 1. For a thorough discussion of the history of private enforcement in both the American and English legal systems, see Boyer & Meidinger, *supra* note 3, at 946-57, and Note, *The History and Development of Qui Tam*, 1972 WASH. U. L.Q. 81.

600 years.<sup>14</sup> In 1388, England passed a water pollution statute in response to the public health problem created by the uncontrolled dumping of garbage into "Ditches, Rivers, and other Waters."<sup>15</sup> The 1388 statute had a dual enforcement system empowering both public officials and others who felt "grieved" to commence enforcement proceedings.<sup>16</sup> This practice of sharing enforcement power continued through the years in England by allowing private parties to bring *qui tam* actions.<sup>17</sup> Despite limited practicality,<sup>18</sup> the custom continued throughout the development of English law and well into the nineteenth century.<sup>19</sup> Eventually, English citizens began to abuse their private enforcement authority; this abuse, combined with the action's limited usefulness, led England ultimately to abolish *qui tam* actions.<sup>20</sup>

"[T]he American experience with *qui tam* proceedings generally paralleled that of England."<sup>21</sup> In fact, the American colonies adopted the concept and it continued well into the twentieth century;<sup>22</sup> however, some states experienced problems similar to those that occurred in England and some eventually passed procedural curbs on the commencement of *qui tam* suits.<sup>23</sup> Nonetheless, in general, American judicial attitudes toward *qui tam*

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14. See Boyer & Meidinger, *supra* note 3, at 947.

15. 12 Rich. 2, ch. 13 (1388) (Eng.). The medieval English statute is quoted at length in Boyer & Meidinger, *supra* note 3, at 947 n.279.

16. See Boyer & Meidinger, *supra* note 3, at 947 n.279.

17. See Blomquist, *supra* note 4, at 363. *Qui tam* is an abbreviation of the Latin phrase *qui tam pro domino rege quam pro si ipso in hac parte sequitur*, which means, "[w]ho sues on behalf of the King as well as for himself." BLACK'S LAW DICTIONARY 1251 (6th ed. 1990).

18. See Blomquist, *supra* note 4, at 364.

19. See *id.*

20. See *id.* The private enforcers in England came to be viewed not as "legitimate spokespersons for the public interest but rather as 'unprincipled pettifoggers' whose office [was] a nuisance and 'an instrument of individual extortion, caprice and tyranny.'" *Id.* (quoting Boyer & Meidinger, *supra* note 3, at 954, quoting 2 L. RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750, at 139 (1982)).

21. *Id.* at 364-65 (citing Note, *supra* note 13, at 97).

22. See Note, *supra* note 13, at 91-101.

23. See *id.* at 97-99. One technique for limiting *qui tam* suits was to label certain actions "criminal" and then refuse to allow private parties to bring those actions. See *id.* at 99.

actions were mixed,<sup>24</sup> and the prevailing view by the middle of the twentieth century was that “[a]s the public agencies became more effective, the need for qui tam actions diminished.”<sup>25</sup>

A resurgence of qui tam actions occurred during the 1970s when concerned citizens and environmentalists attempted to bring such actions<sup>26</sup> under the provisions of the Rivers and Harbors Act of 1899.<sup>27</sup> Although the courts generally were not receptive to the argument that the Rivers and Harbors Act implicitly authorized private enforcement actions,<sup>28</sup> “the political climate in the early 1970s . . . fostered strong Congressional interest in encouraging citizen participation in enforcement of federal environmental laws.”<sup>29</sup> Congress eventually codified this interest through the citizen suit provisions of the modern environmental statutes.<sup>30</sup>

## CITIZEN SUIT STATUTORY LANGUAGE AND LEGISLATIVE HISTORY

### *Statutory Language*

Growing from the tradition of qui tam actions,<sup>31</sup> the first modern citizen suit provision in an environmental statute<sup>32</sup> was

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24. *See id.* at 100.

25. *Id.* at 101.

26. *See* PLATER ET AL., *supra* note 2, at 324; Fotis, *supra* note 6, at 132 n.20. The citizens were concerned primarily about the increasing levels of water pollution and the failure of the environmental laws of the time to stop or control the increase. *See* PLATER ET AL., *supra* note 2, at 322-27. The proponents of Rivers and Harbor Act qui tam suits argued that the suits were proper because modern water pollution was within the statutory reference to “refuse.” *See id.* at 324-25; *see also, e.g.*, Bass Angler Sportsman Soc’y v. United States Steel Corp., 324 F. Supp. 412 (1971) (commencing a qui tam action against a defendant corporation for depositing refuse in navigable waters).

27. 33 U.S.C. §§ 407, 411 (1994).

28. *See* Blomquist, *supra* note 4, at 366 (citations omitted).

29. *Id.*; *see also* PLATER ET AL., *supra* note 2, at 324 (stating that although most qui tam suits were dismissed, some courts permitted such cases to be brought); *compare* United States *ex rel.* Mattson v. Northwest Paper Co., 327 F. Supp. 87 (D. Minn. 1971) (dismissing a Refuse Act qui tam suit), *with* Alameda Conservation Ass’n v. California, 437 F.2d 1087 (9th Cir. 1971) (allowing a Refuse Act qui tam suit).

30. *See* Blomquist, *supra* note 4, at 366-67.

31. *See* Sierra Club v. Chevron U.S.A., Inc., 834 F.2d 1517, 1522 (9th Cir. 1987) (“Citizen enforcement actions greatly resemble government enforcement and qui tam actions.”); Boyer & Meidinger, *supra* note 3, at 844.

32. *See* MILLER, *supra* note 1, at 4; Boyer & Meidinger, *supra* note 3, at 844.

section 304 of the Clean Air Act Amendments of 1970 (CAA).<sup>33</sup> In subsequent environmental legislation, Congress tended to lift the section out of the CAA and include it in new statutes and amendments made to existing laws.<sup>34</sup> In fact, many courts have recognized the similarities between the statutes and have used case law for the CAA as persuasive authority in interpreting the language of the later statutes.<sup>35</sup> For this reason, and because citizen suit enforcement has concentrated on the Clean Water Act (CWA),<sup>36</sup> this Note considers and discusses the citizen suit provisions of the CAA<sup>37</sup> and the CWA.<sup>38</sup>

33. 42 U.S.C. § 7604 (1994).

34. See Blomquist, *supra* note 4, at 339; Snook, *supra* note 4, at 4; see also, e.g., Endangered Species Act of 1973, 16 U.S.C. § 1540(g) (1994) (including a citizen suit provision in the original version of the statute); Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act) § 505, 33 U.S.C. § 1365 (1994) (adding citizen suit provision through amendments to existing statute).

35. See, e.g., Hallstrom v. Tillamook County, 844 F.2d 598, 600 (9th Cir. 1987) (stating that the citizen suit provision language in the various environmental statutes is either the same or similar and courts have interpreted the provisions identically despite slight differences in wording); Friends of the Earth v. Consolidated Rail Corp., 768 F.2d 57, 63 (2d Cir. 1985) (*Conrail*) (finding the Clean Water Act (CWA) citizen suit provision to be a "clear parallel" of section 304 of the CAA and finding that the legislative history is similar in all significant respects) (citing Natural Resources Defense Council v. Train, 510 F.2d 692, 702 (D.C. Cir. 1975)); Student Pub. Interest Research Group v. Fritzsche, Dodge & Olcott, Inc., 579 F. Supp. 1528, 1534 n.8 (D.N.J. 1984) (citing the parallel between the CWA and the CAA citizen suit provisions), *aff'd*, 759 F.2d 1131 (3d Cir. 1985) (*SPIRG*); MILLER, *supra* note 1, at 7 ("The citizen suit sections of the various environmental statutes are virtually identical, being patterned closely after Clean Air Act § 304 . . . . [P]recedent under one statute . . . clearly applies to others.").

36. See MILLER, *supra* note 1, at 11-14.

37. 42 U.S.C. § 7604. The relevant portion of the CAA citizen suit provision provides:

(a) . . .

Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf—

(1) against any person . . . who is alleged to have violated . . . or to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, [or]

(2) against the Administrator where there is alleged a failure . . . to perform any act or duty . . . not discretionary . . . The district courts shall have jurisdiction . . . to enforce such an emission standard or limitation, or such an order, or to order the Administrator . . . and to apply any appropriate civil penalties . . . .

(b) . . .

No action may be commenced—

Generally, when interpreting a statutory provision, the starting point is the language of the statute itself.<sup>39</sup> For this Note, the specific language that will be analyzed is: "No action may be commenced . . . if the [government] has commenced and is diligently prosecuting [an] action in a court."<sup>40</sup> The meaning of the statutory language or, more precisely, an indication of the congressional purpose for including the language, may be obtained by reviewing the provision's legislative history.<sup>41</sup>

(1) under subsection (a)(1) of this section—

(A) prior to 60 days after the plaintiff has given notice of the violation . . . or

(B) if the Administrator or State has commenced and is *diligently prosecuting a civil action in a court* of the United States, or a State to require compliance . . . but in any such action in a court of the United States any person may intervene as a matter of right.

*Id.* § 7604(a)-(b) (emphasis added).

38. 33 U.S.C. § 1365 (1994). In pertinent part, the CWA citizen suit provision states:

(a) . . .

Except as provided in subsection (b) of this section and section 1319(g)(6) . . . any citizen may commence a civil action on his own behalf—

(1) against any person . . . who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure . . . to perform any act or duty . . . which is not discretionary . . . . The district courts shall have jurisdiction . . . to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act . . . and to apply any appropriate civil penalties . . . .

(b) . . .

No action may be commenced—

(1) under subsection (a)(1) of this section—

(A) prior to sixty days after the plaintiff has given notice of the alleged violation . . . or

(B) if the Administrator or State has commenced and is *diligently prosecuting a civil or criminal action in a court* of the United States, or a State to require compliance . . . but in any such action in a court of the United States any citizen may intervene as a matter of right.

*Id.* § 1365(a)-(b) (emphasis added).

39. "It is well settled that 'the starting point for interpreting a statute is the language of the statute itself.'" *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 56 (1987) (quoting *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

40. 33 U.S.C. § 1365(b)(1)(B) (1994); *accord* 42 U.S.C. § 7604(b)(1)(B).

41. *See Garcia v. United States*, 469 U.S. 70, 74-75 (1984) (stating that although



## LEGISLATIVE HISTORY

A cursory review of the legislative history for the citizen suit provision indicates that the suits were viewed as inexpensive alternatives to government enforcement and as a means to encourage agencies to uphold the law.<sup>42</sup> In fact, various courts have found that in enacting the citizen suit provision, "Congress made clear that citizen groups [we]re not to be treated as nuisances or troublemakers but rather as welcomed participants in the vindication of environmental interests."<sup>43</sup> Although a majority of Congress believed citizen suits to be a beneficial advance in enforcement of environmental laws, a close inspection of the legislative record reveals that a minority did not look so kindly upon granting such broad enforcement authority to mere private citizens.<sup>44</sup>

The majority position, aptly titled by one commentator as the Expansionist Approach,<sup>45</sup> viewed citizen suits as an aid to government enforcement. The majority advocated that citizen suits properly act "to both goad the responsible agencies to more vigorous enforcement of the antipollution standards and, if the agencies remained inert, to provide an alternative enforcement mechanism."<sup>46</sup> In addition, the followers of the Expansionist

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"we are satisfied that the statutory language with which we deal has a plain and unambiguous meaning[,] . . . we now turn to the legislative history as an additional tool of analysis"); *Consumer Prod. Safety Comm'n*, 447 U.S. at 108 (stating that statutory language must be regarded as conclusive, "[a]bsent a clearly expressed legislative intention to the contrary"). *But see* *Piper v. Chris-Craft Indus.*, 430 U.S. 1, 26 (1977) (warning that "[r]eliance on legislative history in divining the intent of Congress is . . . a step to be taken cautiously").

42. *See* 116 CONG. REC. 32,903, 32,926-27 (1970) (statement of Sen. Muskie) (stating that citizen suits would provide a valuable source of assistance to overworked agencies); 116 CONG. REC. 32,919 (1970) (statement of Sen. Spong) (describing the intent of the CAA provision as being to "complement and encourage the abatement activities of governmental agencies").

43. *Friends of the Earth v. Carey*, 535 F.2d 165, 172 (2d Cir. 1976), *quoted in* *Friends of the Earth v. Consolidated Rail Corp.*, 768 F.2d 57, 63 (2d Cir. 1985) (*Conrail*); *see also Gwaltney*, 484 U.S. at 60 (stating that Congress envisioned that citizen suits would play a supplementary role in enforcement); *Natural Resources Defense Council, Inc. v. Train*, 510 F.2d 692, 699-700 (D.C. Cir. 1975) (stating that Congress believed citizen suits could be helpful in detecting violations and bringing them to the attention of the proper authorities).

44. *See infra* text accompanying notes 48-51.

45. Snook, *supra* note 4, at 4.

46. *Baughman v. Bradford Coal Co.*, 592 F.2d 215, 218 (3d Cir. 1979); *see* S. REP.

Approach justified citizen suits as providing assistance to over-worked and underresourced agencies.<sup>47</sup>

The minority position, which has been called the Restrictive Approach,<sup>48</sup> viewed citizen suits as infringing upon agency discretion.<sup>49</sup> The advocates of this view thought that insisting on the need for alternative private enforcement denigrated the professionalism of responsible government agencies<sup>50</sup> and the granting of wide enforcement authority would flood the already clogged courts and cause agencies to expend scarce resources on frivolous claims.<sup>51</sup>

These competing views shaped the ultimate citizen suit provision, which, as a compromise, allowed citizen suits but required that specific limitations be satisfied.<sup>52</sup> The diligent prosecution restriction was one of these limitations.<sup>53</sup> The legislative history indicates that the purpose of the diligent prosecution limitation was to ensure that the agency acted in a manner that protected the citizens adequately.<sup>54</sup> As for the exact language of the dili-

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No. 91-1196, at 36-37 (1970); 116 CONG. REC. 33,104 (1970) (statement of Sen. Hart); 116 CONG. REC. 32,902 (1970) (statement of Sen. Muskie); Snook, *supra* note 4, at 4-5.

47. See MILLER, *supra* note 1, at 4-5; Snook, *supra* note 4, at 5; cf. 116 CONG. REC. 32,927 (1970) ("[I]t is too much to presume that, however well staffed or well intentioned the[] enforcement agencies, they will be able to monitor [all] the potential violations . . . under [the] act.") (statement of Sen. Muskie).

48. See Snook, *supra* note 4, at 4.

49. See 116 CONG. REC. 32,925-26 (1970) (statement of Sen. Hruska); MILLER, *supra* note 1, at 5; Snook, *supra* note 4, at 4-5; see also Doris K. Nagel, Comment, *Environmental Law—Citizen Suits and Recovery of Civil Penalties*, 36 KAN. L. REV. 529, 532 (1988) (pointing out that citizen suits were feared in part because of the belief that a lack of a single controlling entity would result in haphazard application of environmental laws).

50. See Snook, *supra* note 4, at 5 (citing Jeffrey G. Miller, *Private Enforcement of Federal Pollution Control Laws, Part II*, 14 *Envtl. L. Rep.* (Envtl. L. Inst.) 10,063, 10,064 n.11 (1984)).

51. See 116 CONG. REC. 32,925-26 (1970) ("The functioning of the department could be interfered with, and its time and resources frittered away by responding to these law suits.") (statement of Sen. Hruska).

52. See MILLER, *supra* note 1, at 5.

53. See *id.* at 4-5. Another major limitation was the notice and delay requirement. See *id.* at 5; see also, e.g., Clean Air Act Amendments of 1970 § 304, 42 U.S.C. § 7604(b) (1994) (requiring citizen suit plaintiffs to give notice 60 days before filing such a suit).

54. See *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987) (citing S. REP. NO. 92-414, 36-39, 64 (1971), reprinted in ENVIRONMENTAL

gent prosecution provision, particularly the terms "in a court" and "diligence," the legislative history is silent.

## JUDICIAL INTERPRETATION AND IMPLEMENTATION

### *Introduction*

Most courts hearing a citizen suit case begin their analyses with the proposition that the purpose of citizen suits is to "supplement, not supplant," government enforcement,<sup>55</sup> a view that the Supreme Court has adopted.<sup>56</sup> In addition, when interpreting the specific language of the diligent prosecution limitation, courts usually ask the same two questions: first, what is an action in a court, and second, what constitutes diligent prosecution?<sup>57</sup> It is in their answers to these questions that judicial opinions diverge greatly.<sup>58</sup>

Despite the seemingly obvious requirement of a court for the "action in a court" question,<sup>59</sup> courts addressing the issue do

POLICY DIVISION OF THE CONGRESSIONAL RESEARCH SERVICE OF THE LIBRARY OF CONGRESS, 2 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 1454-57, 1482 (1973) [hereinafter LEGISLATIVE HISTORY] (stating that citizen suits are proper when the agencies fail to exercise their enforcement responsibility).

The purpose of the other primary limitation, the notice and delay provision, was to provide an agency with the opportunity to consider the alleged problem and decide whether the agency would address the concern by proceeding with its own action. See S. REP. NO. 92-414, at 80 (1971) ("The time between notice and filing of the action should give the administrative enforcement office an opportunity to act on the alleged violation."). Commentators have argued that the delay period is woefully inadequate to allow for the filing of a case by the government. See MILLER, *supra* note 1, at 45-49; Boyer & Meidinger, *supra* note 3, at 898 (arguing that unless the government is on the verge of filing an action when the notice letter arrives, the 60 day delay is not a sufficient time period for the government to win the race to the courthouse).

55. See, e.g., *Atlantic States Legal Found., Inc. v. Eastman Kodak Co.*, 933 F.2d 124, 127 (2d Cir. 1991) (citing *Gwaltney*, 484 U.S. at 59-60); see also Blomquist, *supra* note 4, at 370; Snook, *supra* note 4, at 6.

56. See *Gwaltney*, 484 U.S. at 60.

57. See *Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517, 1524 (9th Cir. 1987); *Student Pub. Interest Research Group v. Fritzsche, Dodge & Olcott, Inc.*, 759 F.2d 1131, 1135 (3d Cir. 1985) (*SPIRG*).

58. See Boyer & Meidinger, *supra* note 3, at 901-05; Snook, *supra* note 4, at 6.

59. The statutes clearly state that the agency or state must be prosecuting an "action in a court" for the action to bar a citizen suit. 33 U.S.C. § 1365(b)(1)(B) (1994) (emphasis added); accord 42 U.S.C. § 7604(b)(1)(B) (1994). But see Clean Water Act

not agree whether a formal judicial proceeding is actually necessary.<sup>60</sup> The two conflicting interpretations that have developed

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§ 309(g), 33 U.S.C. § 1319(g)(6) (1994) (amending the CWA in 1987 with a government prosecution restriction on citizen suits but without the "in a court" language). Congress included section 309(g) of the CWA, which addresses *administrative* penalties, so that *administrative* penalty actions would preempt citizen suits seeking *civil* penalties. See 33 U.S.C. § 1319(g)(6)(A)(i)-(ii), (g)(6)(B); H.R. CONF. REP. NO. 99-1004, at 133 (1986); Frank B. Cross, *Rethinking Environmental Citizen Suits*, 8 TEMP. ENVTL. L. & TECH. J. 55, 62 (1989); Mark S. Fisch, Note, *The Judiciary Begins To Erect Another Dam Against Citizen Suits Under the Clean Water Act*, 22 STETSON L. REV. 209, 214 n.33, 230 (1992). At first blush, section 1319(g)(6) appears to address the topic of this Note (preemption of citizen suits by agency actions); this Note, however, argues that Congress should extend preclusion to *all* types of citizen suits, not just actions for civil penalties.

Although some controversy exists regarding the scope of section 1319, the statutory language, legislative history, and predominant opinion state that, when an alleged violator has paid administrative penalties, section 1319 bars only citizen suits seeking civil penalties, or the civil penalty claims in multiple-claim citizen suits. See 33 U.S.C. § 1319(g)(6)(A)(i)-(ii), (g)(6)(B); H.R. CONF. REP. NO. 99-1004, at 133 (1986) ("No one may bring an action to recover *civil penalties* under . . . [section 1365] for any violation with respect to which the Administrator . . . is diligently prosecuting an *administrative civil penalty action*. [T]his limitation would not apply to . . . an action seeking relief other than civil penalties (e.g., an injunction or declaratory judgement.)" (emphases added); Washington Pub. Interest Research Group v. Pendleton Woolen Mills, 11 F.3d 883, 885-87 (9th Cir. 1993) (holding that a citizen suit seeking declaratory relief, injunctive relief, and civil penalties was not barred by an agency action that was not a penalty action); Coalition for a Liveable W. Side, Inc. v. New York City Dep't of Env'tl Protection, 830 F. Supp. 194, 196 (S.D.N.Y. 1993) (finding that section 1319(g)(6) precluded only citizen suits seeking civil penalties); Arkansas Wildlife Fed'n v. Bakaert Corp., 791 F. Supp. 769, 775 (W.D. Ark. 1992) (holding that prior EPA actions did not bar a citizen suit seeking declaratory judgement, injunctive relief, and civil penalties because the agency actions were for compliance and not for penalties). *But see* Arkansas Wildlife Fed'n v. ICI Americas, Inc., 29 F.3d 376, 383 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1094 (1995) (finding that preclusion of only civil penalty citizen suits would lead to unreasonable results); North & S. Rivers Watershed Ass'n v. Town of Scituate, 949 F.2d 552, 558 (1st Cir. 1991) (finding that it would be "inconceivable" for section 1319 to preclude only citizen suits seeking civil penalties); Fisch, *supra*, at 230-31 (assuming section 1319 extended to section 1365 but disregarding statutory language limiting its preclusion to actions "under this subsection"—section 1319(g)—which applies only to administrative penalty actions).

60. Compare *Baughman v. Bradford Coal Co.*, 592 F.2d 215, 218 (3d Cir. 1979) (holding that administrative agency actions can be equivalent to court actions so long as certain requirements are met), with *Friends of the Earth v. Consolidated Rail Corp.*, 768 F.2d 57, 63 (2d Cir. 1985) (*Conrail*) (holding that the statutory language unambiguously requires a formal court proceeding), and *Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517, 1525 (9th Cir. 1987) (holding that a formal court proceeding is required).

among courts analyzing the issue are the Plain Language Approach and the *Baughman* Approach. Courts following the Plain Language Approach find that the language unambiguously requires a formal court proceeding to preclude a citizen suit,<sup>61</sup> whereas courts adhering to the *Baughman* Approach read the statute as allowing administrative actions to be the equivalent of court actions.<sup>62</sup>

The diligence question is more important than the "in a court" question. Regardless of the approach taken for the "in a court" issue, to preclude a citizen suit the government must have undertaken the action in a diligent fashion.<sup>63</sup> What actually constitutes diligence, however, is an unsettled issue in the courts.<sup>64</sup> Nevertheless, when forced to confront the issue, courts generally determine diligence on a fact-specific basis after reviewing the totality of the circumstances, particularly the total effort and results of the agency action.<sup>65</sup>

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61. See *infra* notes 66-84 and accompanying text.

62. See *infra* notes 87-129 and accompanying text.

63. See, e.g., *Friends of the Earth v. Consolidated Rail Corp.*, 768 F.2d 57, 63 (2d Cir. 1985) (*Conrail*) (stating that in accordance with the plain language of the statute, a citizen is precluded only if the agency or state is *diligently* prosecuting an action in a court; the court, however, did not reach the diligence question because it held the action was not in a court); *Gardeski v. Colonial Sand & Stone Co.*, 501 F. Supp. 1159, 1166 (S.D.N.Y. 1980) (following the *Baughman* Approach, the court found that the agency actions "failed to meet any reasonable test of diligent prosecution"); see also *Snook*, *supra* note 4, at 9 (emphasizing that even the courts most receptive to agency actions precluding citizen suits require a sufficient level of diligence).

64. Reasons typically cited as causing confusion on the issue include the lack of any workable standards, such as statutory requirements on the management of an enforcement case, and uncertainty caused by the general vagueness of the term. See *Boyer & Meidinger*, *supra* note 3, at 850, 899-901 (stating that the lack of statutory standards leaves courts guessing as to whether prosecution of a given case is sufficiently diligent); see also Gail J. Robinson, Note, *Interpreting the Citizen Suit Provision of the Clean Water Act*, 37 CASE W. RES. L. REV. 515, 530-34 (1987) (discussing causes of ineffective agency enforcement).

In addition to coming up in section 1365 cases, the diligence issue arises in CWA section 1319 cases. See 33 U.S.C. § 1319(g)(6)(A)(i)-(ii); see also *supra* note 59 (discussing and describing CWA section 1319 and cases interpreting the section). A review of the case law under section 1319, however, fails to provide guidance on the diligence issue because the opinions rarely address that issue. See cases cited *supra* note 59. The opinions tend to focus instead on the main controversy surrounding section 1319—the scope of preclusion. See cases cited *supra* note 59.

65. "In deciding whether the EPA has satisfied [the diligence] mandate, it is necessary to consider the full context of the agency's actions. An evaluation of 'diligence'

## What Does "In a Court" Mean?

### *The Plain Language Approach*

Some courts find that a Plain Language Approach to interpreting the statutory language disposes of the first question in their analysis of the citizen suit diligent prosecution limitation. In 1985, the Court of Appeals for the Second Circuit decided *Friends of the Earth v. Consolidated Rail Corp. (Conrail)*<sup>66</sup> using such an interpretation.<sup>67</sup> *Conrail* involved a consolidated appeal of two district court CWA citizen suits raising the common question of whether enforcement actions by a state agency precluded the bringing of a related citizen suit.<sup>68</sup> Both of the district courts found that the agency actions in their respective cases were the "functional equivalent" of court actions and, therefore, precluded the citizen suits.<sup>69</sup> Upon review of the district courts' analyses, the Second Circuit concluded that, if it were to have accepted the lower courts' standard, it would have found the agency proceedings were not the functional equivalent of a court action.<sup>70</sup> The court, however, found the functional equivalence test inappropriate and expressly declined to adopt it.<sup>71</sup>

The court reasoned that the diligent prosecution limitation

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measures comprehensively the process and effects of agency prosecution." Student Pub. Interest Research Group v. Fritzsche, Dodge & Olcott, Inc., 579 F. Supp. 1528, 1535 (D.N.J. 1984) (finding that the agency actions did not constitute diligence), *aff'd*, 759 F.2d 1131 (3d Cir. 1985) (*SPiRG*); see Snook, *supra* note 4, at 9; see also Sierra Club v. Simkins Indus., 617 F. Supp. 1120, 1126 (D. Md. 1985) (finding that an action is not of sufficient diligence as to preclude a citizen suit when it may be inadequate to protect the plaintiff fully).

66. 768 F.2d 57 (2d Cir. 1985).

67. See *id.* at 62-63.

68. See *id.* at 58.

69. *Id.* at 61. The functional equivalence test used by the district courts was the two-step *Baughman* Approach that is presented in the following section of this Note. See *infra* text accompanying notes 89-110.

70. See *Conrail*, 768 F.2d at 61-62. The court found that in each case the agency proceeding failed both prongs of the lower courts' tests. See *id.* at 62. The appellate court found that the agencies' enforcement powers were much weaker than those available to the EPA in federal court because the agencies could not enjoin and because it was unclear whether the agencies could assess penalties greater than \$1000 per violation. See *id.* Furthermore, the court found that the agencies' procedures were inadequate because of the lack of a right to intervene. See *id.*

71. See *id.*

language of the CWA “unambiguously and without qualification refer[red] to an ‘action in a court of the United States, or a State.’”<sup>72</sup> Moreover, although the court found that the statutory language analysis alone sufficed to support its holding, the court also analyzed the legislative history of the diligent prosecution limitation and found no indication that Congress intended any meaning other than what was “plainly stated.”<sup>73</sup> As further justification for deciding that agency actions were not meant to preclude citizen suits, the Second Circuit found that Congress had shown its ability to provide for such a reading in other environmental statutes and, if that was what Congress had meant, it would have so stated.<sup>74</sup> The court, therefore, held that citizen suits could be precluded only if an agency had commenced and was diligently prosecuting a formal action in a state or federal court.<sup>75</sup> Because no formal court proceedings had occurred in these CWA cases, the court reversed the lower courts and held that the citizen suits were not barred.<sup>76</sup>

In *Sierra Club v. Chevron U.S.A., Inc.*,<sup>77</sup> the Court of Appeals for the Ninth Circuit similarly adopted the interpretation that formal court proceedings were necessary to preclude a citizen suit.<sup>78</sup> In *Chevron*, the court reviewed a cross-appeal of a decision that an agency enforcement action did not preclude the citizen suit.<sup>79</sup> The court began by quoting the citizen suit statutory

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72. *Id.* (quoting 33 U.S.C. § 1365(b)(1)(B) (1988)).

73. *Id.* at 63.

74. *See id.* The statutes cited by the court indicate that agency actions are to preempt citizen suits in the same manner as CWA section 309, 33 U.S.C. § 1319—by deleting the “in a court” clause from the diligent prosecution restriction. *See supra* note 59. The statutes cited were the Toxic Substances Control Act of 1976 (TSCA), 15 U.S.C. § 2619(b)(1)(B) (1994); the Endangered Species Act of 1973 (ESA), 16 U.S.C. § 1540(g)(2) (1994); the Marine Protection, Research, and Sanctuaries Act of 1972 (MPRSA), 33 U.S.C. § 1415(g)(2) (1994); and the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. § 6972(b)(2) (1994). RCRA is the common name for the 1984 amendments to the Solid Waste Disposal Act, 42 U.S.C. §§ 6901-6992(k) (1994).

75. *See Conrail*, 768 F.2d at 63.

76. *See id.*

77. 834 F.2d 1517 (9th Cir. 1987).

78. *See id.* at 1525.

79. *See id.* Just like the district courts in *Conrail*, the lower court in *Chevron* decided the case under an analysis that considered agency actions to be the equivalent of court proceedings. *See id.*

limitation language and listing the contentions of the parties.<sup>80</sup> The court then reviewed the Second Circuit's *Conrail* decision regarding the "in a court" issue.<sup>81</sup> The court concluded that the Second Circuit's Plain Language Approach led to a proper interpretation of the citizen suit statute and, therefore, barred the citizen suit required formal court proceedings.<sup>82</sup>

To summarize, the Plain Language Approach argues that the language of the statute unambiguously and clearly requires formal action in a court. Furthermore, advocates of the Plain Language Approach claim that even a review of the legislative history reveals that Congress gave no indication whatsoever that the word "court" was to mean anything other than its plain meaning.<sup>83</sup> To extinguish any lingering doubt as to the intent of the statutory provision, the Plain Language Approach also finds that Congress has expressed an ability to provide for administrative preemption in environmental statutes and had Congress wanted such a result here, it clearly would have so indicated.<sup>84</sup> As a practical matter, therefore, the Plain Language Approach formalistically applies the statute to the facts of a case and precludes a citizen suit only when the agency enforces the statute through a formal court proceeding that addresses the same wrongs alleged in the citizen suit and in which private citizens have a right to intervene. The Plain Language Approach, although providing certainty and predictability in its application,

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80. *See id.* at 1524. The Sierra Club contended, inter alia, that administrative action could never equate to action in a court. *See id.* Chevron, however, argued that agency action could be equivalent to court proceedings and, in this case, the agency actions were sufficiently comparable to be considered equivalent. *See id.*

81. *See id.* at 1524-25.

82. *See id.* at 1525. The Ninth Circuit reached its holding primarily because the statute specifically referred to "courts" and made absolutely no reference to any type of administrative proceeding. *See id.* at 1524-25. In addition, the Ninth Circuit stated that Congress had demonstrated an ability to provide for citizen suit preemption in other environmental statutes; the court found that that fact dispelled any lingering ambiguity about the term "courts" as it was used in the statute. *See id.* at 1525; *see also supra* note 74 (listing the other environmental statutes and stating how they indicate preemption).

83. *See supra* note 73 and accompanying text.

84. *See supra* text accompanying note 74. In fact, Congress has specifically amended the CWA so that, under the right circumstances, certain citizen suit claims are preempted by specific administrative actions. *See supra* note 59 (discussing 33 U.S.C. § 1319(g)).



is unaffected by either the equities of particular situations or the potential for creating socially undesirable results.

### *The Baughman Approach*

The antithesis of the plain language approach used in *Conrail*<sup>85</sup> and *Chevron*<sup>86</sup> is the Third Circuit's *Baughman* Approach,<sup>87</sup> which many other courts have expressly or implicitly adopted.<sup>88</sup> The Third Circuit's opinion in *Baughman v. Bradford Coal Co.*<sup>89</sup> was the first to consider whether administrative actions could be the equivalent of court action and thus sufficient to preclude citizen suits.<sup>90</sup> In *Baughman*, the plaintiff brought a citizen suit under the CAA, alleging that the defendant had violated the Pennsylvania Implementation Plan in contravention of the CAA.<sup>91</sup> In response, the defendant claimed that a prior Pennsylvania Department of Environmental Resources (DER) civil penalty action, held before the Pennsylvania Environmental Hearing Board, precluded the plaintiff's suit.<sup>92</sup> The court found that, despite the fact that the word "court" in a statute usually referred only to tribunals of the judiciary and not of the executive, "an administrative board may be a 'court' if its powers and characteristics make such a classification necessary to achieve statutory goals."<sup>93</sup> The Third Circuit reasoned that the preclusion of citizen suits must be viewed in light of the policies discussed in the legislative history for the suits, specifically, that citizen suits were intended both to goad agencies into

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85. *Friends of the Earth v. Consolidated Rail Corp.*, 768 F.2d 57 (2d Cir. 1985) (*Conrail*).

86. *Chevron*, 834 F.2d 1517.

87. *See Baughman v. Bradford Coal Co.*, 592 F.2d 215 (3d Cir. 1979).

88. *See infra* text accompanying notes 96-124.

89. 592 F.2d 215 (3d Cir. 1979).

90. *See id.* at 217; Boyer & Meidinger, *supra* note 3, at 902.

91. *See Baughman*, 592 F.2d at 216.

92. *See id.* at 217. The earlier agency action resulted in a consent order between the defendant and the DER. *See id.* at 217 n.2. The court found that, because the prior agency action alleged the same violations the plaintiffs complained of and requested penalties "sufficient to deter such unlawful conduct in the future," the prior agency action was similar to the citizen suit even though the agency action did not request a direct prohibition of further plan violations. *See id.* at 217.

93. *Id.* (citing *Volkswagen de Puerto Rico, Inc. v. Puerto Rico Labor Relations Bd.*, 454 F.2d 38, 44 (1st Cir. 1972)).

more vigorous enforcement and to provide an alternative enforcement mechanism if the agencies refused to act.<sup>94</sup> Upon review of the facts, the court determined that the state board lacked the powers and characteristics of a court; therefore, the citizen suit was not barred.<sup>95</sup>

The Third Circuit reaffirmed its position in *Student Public Interest Research Group (SPIRG) v. Fritzsche, Dodge & Olcott, Inc.*<sup>96</sup> In *SPIRG*, the court again faced the question of whether agency actions could be the equivalent of formal court proceedings, this time under the CWA.<sup>97</sup> The district court had held that agency actions did not bar the appellee's citizen suit because the actions were not the equivalent of formal court proceedings.<sup>98</sup> Interestingly, the appellee in the case argued that *Baughman* did not control because the citizen suit was brought under the CWA, not the CAA; however, the court found that argument to be meritless.<sup>99</sup> The court reviewed the remaining arguments of the parties<sup>100</sup> and affirmed the lower court hold-

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94. See *id.* at 218; see also S. REP. NO. 91-1196, at 36-37 (1970); 116 CONG. REC. 32,903 (1970) (statement of Senator Muskie). Also cited was legislative history indicating that Congress intended to allow citizen suits "in a manner that would be least likely to clog already burdened federal courts and most likely to trigger governmental action which would alleviate any need for judicial relief." *Baughman*, 592 F.2d at 218 (quoting *City of Highland Park v. Train*, 519 F.2d 681, 690-91 (7th Cir. 1975) and citing 116 CONG. REC. 32,926, 33,104 (1970) (statements of Sen. Muskie and Sen. Hart)).

95. See *Baughman*, 592 F.2d at 218-19. The court reasoned that the board lacked the capacity to accord sufficient relief and that the board procedures were deficient. See *id.* Specifically, the court found that the relief the board could grant was not substantially equivalent to that available to the EPA in federal court because the board lacked the power to enjoin the violation, and the board was empowered only to assess a penalty of \$10,000 plus \$2500 for each day of continued violation, an amount roughly one-tenth the penalty available under the CAA. See *id.* Also, the court found that the procedures followed by the board were deficient because citizen intervention was only available by discretion and not by right. See *id.* at 219.

96. 759 F.2d 1131 (3d Cir. 1985).

97. See *id.* at 1132.

98. See *id.* The district court additionally found that the agency actions were not prosecuted diligently. See *id.*

99. See *id.* at 1136 n.4. Specifically, the court found that in *Baughman* the two provisions had been used interchangeably, that the language of the two provisions was virtually identical, and that no other court distinguished the provisions in the suggested manner. See *id.*

100. See *id.* at 1135.

ing that the agency actions did not preclude appellee's citizen suit.<sup>101</sup> Moreover, in reaching its holding, the court reaffirmed its position that when deciding whether an administrative enforcement action precludes a citizen suit, the *Baughman* Approach was the appropriate test because, if the standards of the analysis are met, the actions effectively serve the purposes behind the citizen suits.<sup>102</sup>

Since the two Third Circuit cases, other courts have expressly adopted the *Baughman* Approach. For example, in *Atlantic States Legal Foundation, Inc. v. Universal Tool & Stamping Co.*,<sup>103</sup> a district court explicitly followed the *Baughman* Approach to decide a defendant's claim that a state agency's earlier administrative action barred the plaintiffs CWA citizen suit.<sup>104</sup> The district court correctly stated that the *Baughman* Approach required that "(1) the state agency have coercive powers to compel compliance with effluent limitations and (2) there be procedural similarities to a suit in federal court with citizens having the right to intervene."<sup>105</sup>

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101. *See id.* at 1139. Although the circuit court concurred with the district court that appellee's citizen suit was not preempted because the agency action was not the equivalent of a court proceeding, it did not agree with the reasoning of the district court fully. *See id.* at 1137-38. The district court had held that the agency action was not that of a court primarily because it provided inadequate procedures concerning citizen involvement. *See id.* at 1137. The circuit court found that procedures alone were not dispositive; they were "just one of several factors." *Id.* Nevertheless, upon review of all the factors, the circuit court did indeed find the procedures inadequate (because they did not afford citizens the right to intervene or the opportunity to participate); however, it also found that the administrative agency lacked the requisite power to accord substantially equivalent relief. *See id.* at 1137-39.

102. *See id.* at 1135-36. The purposes listed included goading agencies to enforce provisions more vigorously and providing alternative enforcement if the agencies did not act. *See id.* at 1136.

103. 735 F. Supp. 1404 (N.D. Ind. 1990).

104. *See id.* at 1413-15. Specifically, the defendant claimed that an Indiana Department of Environmental Management (IDEM) action qualified as a court action and, therefore, the action was being diligently prosecuted. *See id.* at 1413. The plaintiff, on the other hand, claimed that the IDEM action was not the equivalent of court proceedings because the IDEM lacked the power to enforce its civil penalties and cease and desist provisions without bringing an action in a court. *See id.* at 1414.

105. *Id.* The court ultimately found that IDEM had authority to institute a civil penalty suit for up to \$25,000 per day of violation and to request that the violator be enjoined from continuing the violation. *See id.* The court, however, agreed with the plaintiff's argument that the IDEM actions were not the equivalent of court pro-

In *Sierra Club v. Simkins Industries, Inc.*,<sup>106</sup> the Maryland district court expressly adopted the *Baughman* Approach to the citizen suit diligent prosecution issue.<sup>107</sup> In reviewing the parties' arguments,<sup>108</sup> the court cited *Baughman* and acknowledged that in certain circumstances agency actions can be equivalent to a court proceeding.<sup>109</sup> Furthermore, the court found that "in order to be accorded court status, a state agency must possess the full remedial powers inherent to traditional judicial courts."<sup>110</sup>

Other courts, although not expressly adopting the *Baughman* Approach, have acknowledged the virtues of the analysis by employing virtually identical logic to decide very similar issues. For example, the United States Supreme Court, in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*,<sup>111</sup> used analogous reasoning to find that the supplementary role envisioned for citizen suits could be undermined by permitting such suits for wholly past violations.<sup>112</sup> Although the Court's decision did not directly address the "in a court" issue of the diligent prosecution provision, the Court demonstrated that it would be necessary to preclude citizen suits that interfere with agency discretion.<sup>113</sup>

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ceedings because IDEM could only enforce its penalties through a formal court action. *See id.* at 1414-15. Thus, the court held that the citizen suit was not barred because the IDEM proceeding was not the equivalent of an action in a court. *See id.* at 1415.

106. 617 F. Supp. 1120 (D. Md. 1985).

107. *See id.* at 1126.

108. The defendant claimed that a prior administrative proceeding addressed the same concerns alleged in the plaintiff's CWA citizen suit and, therefore, barred the suit. *See id.* at 1125. The plaintiff argued that the citizen suit was not barred because, not only was it filed after the requisite notice and delay period, but the state agency actions were not "tantamount" to diligent prosecution as required under section 1365. *See id.*

109. *See id.* at 1126.

110. *Id.* In the end, the court held that the plaintiff's suit was not barred, reasoning that, although the agency had the power to revoke a permit, impose civil penalties, issue orders requiring corrective action, and execute a consent order, the administrative proceedings were not the equivalent of a court action because the agency could only seek injunctive relief from a court. *See id.*

111. 484 U.S. 49 (1987).

112. *See id.* at 60.

113. *See id.* at 60-61.

Suppose that the Administrator identified a violator of the Act and issued a compliance order . . . . Suppose further that the Administrator agreed not to assess or otherwise seek civil penalties on the condition that the violator take some extreme corrective action . . . that it otherwise would not be obliged to take. If citizens could file suit, . . . then the Administrator's discretion to enforce the Act in the public interest would be curtailed considerably. The same might be said of the discretion of state enforcement authorities.<sup>114</sup>

Like the Third Circuit in *Baughman*, the Court in *Gwaltney* believed that if the characteristics of an agency are such that its own enforcement will achieve statutory goals, then formal judicial proceedings would not be necessary.<sup>115</sup>

Perhaps the most surprising court to use *Baughman*-like logic was the Second Circuit Court of Appeals in *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.*<sup>116</sup> Six years earlier, in *Conrail*,<sup>117</sup> the Second Circuit expressly had refused to adopt the *Baughman* Approach.<sup>118</sup> In fact, the *Conrail* decision was the seminal case of the Plain Language Approach, the converse of the *Baughman* Approach.<sup>119</sup>

Nonetheless, in *Kodak*, the Second Circuit went against its own prior rationale and used *Baughman*-like logic to hold that a citizen suit was not permitted.<sup>120</sup> Although the court ostensibly held that the plaintiff could not use a citizen suit solely to attack the terms of a settlement agreement between the defendant and a state agency,<sup>121</sup> the court's espoused principles and logic also indicated that the court believed that an administrative action, if diligently prosecuted and applicable to the same wrong as a citizen suit, bars the citizen suit.<sup>122</sup> Specifically, the Second

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114. *Id.* at 60-61.

115. *See id.*; *see also supra* notes 94-95 and accompanying text.

116. 933 F.2d 124 (2d Cir. 1991).

117. *Friends of the Earth v. Consolidated Rail Corp.*, 768 F.2d 57 (2d Cir. 1985) (*Conrail*).

118. *See supra* notes 66-76 and accompanying text.

119. *See supra* notes 66-82 and accompanying text.

120. *See Kodak*, 933 F.2d at 125-27.

121. *See id.* at 127.

122. *See id.*

Circuit stated: “[i]f the state enforcement proceeding has caused the violations alleged in the citizen suit to cease without any likelihood of recurrence—has eliminated the basis for the citizen suit—we believe that the citizen action must be dismissed.”<sup>123</sup> The Second Circuit made absolutely no reference to its prior findings that the statutory language “unambiguously and without qualification” required a formal court proceeding to bar a citizen suit, that the legislative history gave no indication that agency actions could ever preempt citizen suits, or that Congress knew how to write a law so as to preclude citizen suits.<sup>124</sup>

In sum, the *Baughman* Approach argues that policy considerations require that in certain circumstances agency actions may be the equivalent of court proceedings, so long as two categories of factors are satisfied.<sup>125</sup> The first factor is whether the agency tribunal has the coercive power to compel compliance, particularly the powers to enjoin and to assess meaningful penalties.<sup>126</sup> The second factor is whether the procedures of the tribunal are comparable to those of a federal court, especially the right to intervene, as opposed to discretionary intervention.<sup>127</sup> The *Baughman* Approach, therefore, at least in theory,<sup>128</sup> al-

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123. *Id.* In accordance with its new-found belief, the Second Circuit remanded the case for a determination of whether the agency proceeding caused the violations to cease with sufficient likelihood of not recurring. *See id.* at 128. After remand, the district court dismissed the case without deciding the issue. *See Atlantic States Legal Found., Inc. v. Eastman Kodak Co.*, 809 F. Supp. 1040 (W.D.N.Y. 1992), *aff'd*, 12 F.3d 353 (2d Cir. 1993).

124. *Friends of the Earth v. Consolidated Rail Corp.*, 768 F.2d 57, 62 (2d Cir. 1985) (*Conrail*); *see supra* notes 72-74 and accompanying text.

125. *See Student Pub. Interest Research Group v. Fritzsche, Dodge & Olcott, Inc.*, 759 F.2d 1131, 1136 (3d Cir. 1985) (*SPIRG*) (“[B]efore an agency proceeding can be characterized as a ‘court’ under the citizen suit provision, a dual inquiry must be made.”).

126. *See id.*

127. *See id.*

128. This assertion is qualified as theoretical because, in practice, courts generally have been unwilling to find that the agency actions were sufficient to preclude citizen suits. *See, e.g., Atlantic States Legal Found., Inc. v. Universal Tool & Stamping Co.*, 735 F. Supp. 1404, 1416 (N.D. Ind. 1990) (holding that a state agency did not diligently prosecute a defendant under the CWA and refusing to bar a citizen suit). *But see Hudson River Sloop Clearwater, Inc. v. Consolidated Rail Corp.*, 591 F. Supp. 345, 351 (N.D.N.Y. 1984) (“[T]his court is unwilling to find [the state agency’s] efforts to [sic] totally unsatisfactory as to be deemed to amount to less than diligent prosecution.”), *rev’d sub nom. Conrail*, 768 F.2d 57.

lows courts to provide justice under the specific facts of a situation by considering the likelihood that the statutory goals of compliance and citizen safety are reached in an efficient and practical manner.<sup>129</sup>

### *What Constitutes Diligence?*

The next question courts ask in citizen suit diligent prosecution cases is whether the actions have been diligently prosecuted. Although the issue has yet to be litigated in a court applying the Plain Language Approach<sup>130</sup> and is rarely addressed in courts following the *Baughman* Approach,<sup>131</sup> the legislative his-

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129. See Snook, *supra* note 4, at 11.

130. Although no one has researched the reason for the lack of case law applying the Plain Language Approach, potential causes include the uncertainty among the courts themselves as to what approach they follow; the rarity of agency enforcement of formal court cases; perceived heightened agency efforts in formal court proceedings so that potential citizen suit plaintiffs are not encouraged to sue; presumptions by potential plaintiffs that, if an agency is prosecuting in a court, then the agency efforts will be found diligent; and actual effectiveness of the agency action in a court such that plaintiffs are not compelled to act. See, e.g., *Conrail*, 768 F.2d at 63 (stating that a citizen suit is precluded by a diligently prosecuted action in a court, but not reaching the diligence question because the court found that the agency action was not in a court).

131. See, e.g., *SPIRG*, 759 F.2d at 1139 (“[T]he EPA’s informal enforcement procedure in the instant case does not otherwise resemble a suit in a federal court . . . .”); *Sierra Club v. SCM Corp.*, 572 F. Supp. 828, 831 n.3. (W.D.N.Y. 1983) (“[The state agency] may thereafter fail the test of diligent prosecution if it fails to adequately monitor or enforce the consent order or if it permits new and independent pollution law violations to occur.”). Diligence is rarely addressed under the *Baughman* Approach because the court’s finding that the agency proceeding was not the equivalent of a court often preempts discussion of the issue. See, e.g., *Baughman v. Bradford Coal Co.*, 592 F.2d 215, 218-19 (3d Cir. 1979) (finding that an agency action was not sufficiently equivalent to a court, and, therefore, not addressing the diligence issue).

Courts, however, occasionally address the issue when interpreting section 1319 of the CWA. See, e.g., *Arkansas Wildlife Fed’n v. ICI Americas, Inc.*, 29 F.3d 376, 380 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1094 (1995) (agreeing with the district court’s finding that the state agency was “diligently prosecuting” its action); *Universal Tool*, 735 F. Supp. at 1416-17 (finding that the agency enforcement was not diligent). In *Universal Tool*, the court found that the agency proceeding was not diligent in light of (1) the agency’s apparent willingness to bend procedures for the defendant, evidenced by the defendant getting a consent decree in a single day when the process usually takes four to six weeks; (2) the defendant’s continued violations after the agency actions; (3) the lenient penalty assessed in the agency proceedings, only \$10,000 total for hundreds of violations which were each punishable by a fine of

tory indicates that diligence, measured as adequacy, was the main thrust of the diligent prosecution limitation on citizen suits.<sup>132</sup> Courts often complain that there is a lack of guidance as to the meaning of the term,<sup>133</sup> but when forced to address the question, courts typically state that they make the determination by considering the full context of the agency's actions and the protection that the actions afford the citizens.<sup>134</sup>

For example, in *Student Public Interest Research Group (SPIRG) v. Fritzsche, Dodge & Olcott, Inc.*,<sup>135</sup> the New Jersey district court stated that "[a]n evaluation of 'diligence' measures comprehensively the process and effects of agency prosecution."<sup>136</sup> In the case, the court held that the agency actions had not been diligent because the actions did not ensure the level of citizen protection required by the CWA.<sup>137</sup> The Northern Dis-

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\$25,000; and (4) the defendant's acknowledgement that the citizen suit, and not the agency action, moved the defendant to comply with its permit. *See id.* at 1416-17. 132.

It should be emphasized that if the agency had not initiated abatement proceedings following notice or if 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.

S. REP. NO. 91-1196, at 37 (1970) (emphases added).

133. *See, e.g.*, Gardeski v. Colonial Sand & Stone Co., 501 F. Supp. 1159, 1164 (S.D.N.Y. 1980) ("No judicial guidance exists as to what constitutes diligent prosecution.").

134. *See id.* ("Any such determination must rest at least in part . . . on the agency's enforcement record."); *Student Pub. Interest Research Group v. Fritzsche, Dodge & Olcott, Inc.*, 579 F. Supp. 1528, 1535 (D.N.J. 1984) ("[W]e must consider the citizen's complaint of lack of diligence 'against the background of the agency action.'") (citations omitted), *aff'd*, 759 F.2d 1131 (3d Cir. 1985) (*SPIRG*); *see also* Sierra Club v. Simkins Indus., Inc., 617 F. Supp. 1120, 1126 (D. Md. 1985) (stating that the actions "may be inadequate to fully protect the plaintiff herein and therefore would not be so diligent as to preempt the citizen suit").

135. 579 F. Supp. 1528.

136. *Id.* at 1535.

137. *See id.* at 1537. The agency action failed to give the protection of the statute because the Schedule of Compliance into which the agency entered with the defendant was impermissibly extended beyond the date set in the statute. *See id.* at 1536-37. Interestingly, the court found unpersuasive another of plaintiffs' arguments that the agency action could not be diligent because the agency seriously acted only after the citizen suit was filed. *See id.* at 1536. The court said that such a result



trict of New York, in *Hudson River Sloop Clearwater, Inc. v. Consolidated Rail Corp.*,<sup>138</sup> interpreted diligence similarly, i.e., based on citizen protection, and found that the agency actions were diligent.<sup>139</sup> Although implementing an uncommon understanding of the word diligence, these holdings show that diligence under the CWA includes an element of citizen protection and the adequacy of the action in meeting that goal.

In *Gardeski v. Colonial Sand & Stone Co.*,<sup>140</sup> a district court used a more everyday interpretation of diligence, stating that a determination of diligence must rest at least in part on the enforcement record.<sup>141</sup> The court then reviewed at length the agency's enforcement efforts.<sup>142</sup> The court concluded that the initial agency efforts would have qualified as diligent had the defendant complied with them, but after the initial efforts the agency actions failed to satisfy any reasonable test of diligence.<sup>143</sup>

Diligence, it is safe to say, is not a concrete standard for

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was exactly what Congress intended when it included the notice and delay limitation on citizen suits. *See id.*

138. 591 F. Supp. 345 (N.D.N.Y. 1984), *rev'd on other grounds sub nom. Friends of the Earth v. Consolidated Rail Corp.*, 768 F.2d 57 (2d Cir. 1985) (*Conrail*).

139. *See id.* at 351. Because the court in *Clearwater* found that the Consent Order entered into between the defendant and the agency was likely to achieve compliance with the CWA, the court held that the agency's actions were diligent. *See id.* The court conceded that the enforcement might not have imposed the "Draconian measures" the plaintiff preferred, but the court was unwilling to find the actions so "totally unsatisfactory" as to be less than diligent prosecution. *See id.* Moreover, the court found the plaintiff's focus on the penal elements was misplaced because permit compliance was the goal and the agency action made such a result just as likely as plaintiff's preferred penalties. *See id.*

140. 501 F. Supp. 1159 (S.D.N.Y. 1980).

141. *See id.* at 1164.

142. *See id.* at 1164-66. In reviewing the total enforcement record, the court found in sequential order that the agency's decision to use administrative procedures was proper; the defendant and agency entered into a Consent Order and Schedule of Compliance; the defendant failed to comply; the agency made no formal demand for compliance; the agency did not initiate enforcement proceedings at that time; after more than four months, the agency demanded compliance; defendant's violations continued; the agency fined the defendant \$50,000 and again demanded compliance; the defendant never paid the fine; the agency finally planned an administrative hearing, but no hearing was ever held; another Consent Order was entered; and the violations continued. *See id.*

143. *See id.* at 1166; *see also* discussion *supra* note 142.

courts to apply. The legislative history for the diligent prosecution limitation and these cases, however, provide criteria for a court to consider when determining whether the actions in a specific situation constitute diligence. To be diligent, actions must sufficiently ensure that the public is safe from the violations that the applicable statute seeks to stop; that is, the court honestly should believe that the actions will bring the violator into compliance. In addition, a common understanding of the word diligence necessitates that when, under the facts of the situation, a violator and/or agency acts unreasonably (a concept not at all foreign to courts), the actions cannot be found to be diligent.

### *Discussion*

Admittedly, the practical difference between the Plain Language Approach and the *Baughman* Approach is not overwhelmingly significant because most courts find the agency actions insufficient to preclude citizen suits and both approaches therefore result in the preclusion of few citizen suits.<sup>144</sup> As described below, however, permitting agency actions to preclude citizen suits avoids negative policy effects and furthers beneficial ones. In the following section, this Note proposes a statutory amendment that directs courts to permit diligent prosecution of agency actions to preempt citizen suits. In addition, in lieu of a statutory amendment, this Note proposes a judicial standard for interpreting the current statutory language that equitably balances the beneficial policy concerns of preemption by agency actions and the competing approaches to statutory language.

### *Proposal*

This Note proposes deletion of the "in a court" clause from the

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144. See, e.g., *Atlantic States Legal Found., Inc. v. Universal Tool & Stamping Co.*, 735 F. Supp. 1404 (N.D. Ind. 1990) (finding agency proceeding not sufficient to satisfy diligent prosecution requirement so as to preclude citizen suit). *But see Hudson River Sloop Clearwater, Inc. v. Consolidated Rail Corp.*, 591 F. Supp. 345 (N.D.N.Y. 1984) (finding that the diligent prosecution requirement was satisfied because defendant was in compliance with consent order), *rev'd sub nom. Friends of the Earth v. Consolidated Rail Corp.*, 768 F.2d 57 (2d Cir. 1985) (*Conrail*).

provision. This slight alteration of the statutory language, which has been implemented in various environmental statutes, directs courts to hold that diligently prosecuted agency actions preempt citizen suits.<sup>145</sup> Furthermore, as addressed below, such a change does not compromise the ultimate goal of environmental legislation—citizen safety—and, in fact, it controls suspect policy concerns while furthering useful ones.

For various reasons, however, an amendment of the current statutory language may not be forthcoming.<sup>146</sup> Under the current statutory language, a court addressing a preemption case likely will find that a citizen suit is not precluded, either based on the Plain Language Approach's statutory construction argument or based on the *Baughman* Approach plus a finding that the agency actions were not "substantially equivalent" to court actions. One of the reasons that courts using the *Baughman* Approach are not likely to find agency actions "substantially equivalent" is the lack of guidance as to when agency actions meet this criterion.<sup>147</sup>

To promote the beneficial policy results of agency actions preempting citizen suits, this Note proposes an analysis that provides more guidance than does the *Baughman* Approach's substantial equivalence test. Although the proposed analysis follows the *Baughman* Approach substantially, it also evokes the strong statutory construction argument that favors the Plain Language Approach. The analysis is: permit diligently prosecuted agency actions to bar citizen suits, but only when the agency proceeding is "convincingly court-like." Criteria for determining "convincingly court-like" are, at a minimum, that the agency have authority to enjoin the violator as well as power to grant relief equal to or greater than that available in a court,<sup>148</sup> and that citizens have

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145. See discussion *supra* notes 59, 74.

146. For example, the conservative nature of the current Congress indicates that Congress may not be receptive to statutory amendments, particularly ones that lead to greater agency action and potential interference with business. See Cindy Skrzycki, *Slowing the Flow of Federal Rules: New Conservative Climate Chills Agencies' Activism*, WASH. POST, Feb. 18, 1996, at A1.

147. See Robinson, *supra* note 64, at 530-34.

148. If the ultimate administrative penalty incurred were less than that required in a formal court proceeding, it would not preclude a finding that the proceeding is convincingly court-like because "[i]t would be unreasonable and inappropriate to find

a right and an opportunity to intervene in the agency proceeding.<sup>149</sup> The contemplated benefit of this more concrete standard is that it will remove a court's reluctance to preempt citizen suits based on a lack of guidance. These proposed analyses equitably balance the rights and interests of the citizen-plaintiff and the alleged violator-defendant. First, the citizens' right to public safety is promoted because, even if the "in a court" language were removed, a requirement that the actions be diligently prosecuted, i.e., reasonably likely to compel compliance, ensures safety.<sup>150</sup> In addition, the analyses further the alleged violator's interests by allowing agency actions to solve the problem, thus encouraging a quick and efficient resolution.

### *Policy Considerations*

Implementing the proposed analyses to allow preemption of citizen suits by agency actions also advances some important policy goals. The policy considerations examined include possible interference with agency discretion, frivolous and harassing citizen suits, duplicate enforcement, and risk of inconsistent enforcement.

### *Interference with Agency Discretion*

Because administrative agencies have expertise in highly technical areas and because Congress writes statutes giving an agency primary enforcement authority, agencies should have discretion to implement the strategies that they believe best effectuate statutory goals.<sup>151</sup> Requiring a formal court proceed-

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failure to diligently prosecute simply because [the defendant] prevailed in some fashion or because a compromise was reached." *Arkansas Wildlife Fed. v. ICI Americas, Inc.*, 29 F.3d 376, 380 (8th Cir. 1994) (citing *Connecticut Fund for the Env't v. Contract Plating Co.*, 631 F. Supp. 1291, 1294 (D. Conn. 1986)).

149. The main difference between the *Baughman* Approach's "substantially equivalent" test and the proposed "convincingly court-like" standard is that the proposed test provides more concrete requirements. The proposed standard requires the agency's remedial powers to be equal to or greater than those of a court, as opposed to the less definite equivalence standard. Moreover, the proposed analysis unambiguously requires both the chance and the right to intervene, again in contrast to merely requiring the procedures to be equivalent.

150. Assuming, of course, that compliance with the standards is safe.

151. See *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985) ("The agency is far better

ing, the most harsh enforcement method, as opposed to possibly less stringent but more efficient administrative proceedings, interferes with an agency's or state's discretion.<sup>152</sup> Cited rationales for why an agency or state might implement enforcement means that are less restrictive than a formal court proceeding include: (1) the realization that a particular standard was overly strict because it was based on broad congressionally-set technology-based standards of performance;<sup>153</sup> (2) a record of steady and impressive progress with due consideration given to other discretionary factors;<sup>154</sup> (3) countervailing state considerations of gaining industry trust and support to meet other state-initiated environmental goals;<sup>155</sup> (4) considerations of interstate cooperation to meet regional goals;<sup>156</sup> and (5) the fact that agency agreements generally offer a satisfactory solution to the underlying environmental concern that protects the public at a small fraction of the costs of litigation.<sup>157</sup>

In addition to obstructing discretion as to the type of enforcement to implement, citizen suits can interfere with state or agency discretion as to what sites to address.<sup>158</sup> Once a citizen suit is initiated, an agency can choose to initiate its own action, intervene in the citizen suit action, or take no action at all.<sup>159</sup> The practical effect of this choice is that the agency must address the concern raised in the citizen suit or lose that opportunity forever.

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equipped than the courts to deal with the many variables involved in the proper ordering of its priorities."); Blomquist, *supra* note 4, at 410 (stating that agencies or states use professionals with specialized understanding of unique socioeconomic and geophysical considerations); Snook, *supra* note 4, at 11-12.

152. See Blomquist, *supra* note 4, at 409-10. Requiring a court proceeding for enforcement, instead of seeking to resolve the disputes by informal negotiation, mediation, or less restrictive agency compliance orders, causes agency and state goals of reasonable enforcement to yield to the pressure of pursuing the harshest enforcement methods available. See *id.*; Snook, *supra* note 4, at 11-12.

153. See Blomquist, *supra* note 4, at 410.

154. See *id.* Discretionary factors cited include financial resources of the discharger and the seriousness of the violations. See *id.*

155. See *id.*

156. See *id.*

157. See Snook, *supra* note 4, at 7, 11-12.

158. See *id.* at 3.

159. See MILLER, *supra* note 1, at 45-49; Boyer & Meidinger, *supra* note 3, at 897; Snook, *supra* note 4, at 3. The opportunity for the agency to choose a course of action is the purpose of the notice and delay limitation provision. See *supra* note 54.

Also, exercising its intervention right precludes an enforcing agency from using administrative responses, thereby forcing the agency to allocate substantial amounts of scarce resources to join in an often-times long and complex court battle.<sup>160</sup> Moreover, the agency may have already considered the environmental concern of the citizen suit but decided it was a low priority, better addressed by an administrative enforcement method that consumes fewer agency resources than a formal court action.<sup>161</sup> In practice, various courts have noted these policy concerns when choosing to implement the *Baughman* Approach.<sup>162</sup>

The primary argument in favor of limiting agency discretion is the belief that agencies do not always enforce the statute as strictly as Congress intended.<sup>163</sup> In fact, as stated above, one of the foundations and original purposes of citizen suits was to goad agencies into acting when they otherwise were not.<sup>164</sup> The argument against exclusive agency enforcement includes the following rationales: delay in agency actions; lobbying pressures from violators; and agency willingness to allow deviations.<sup>165</sup> These reasons, albeit not an inclusive list, have counter-arguments, however, that either refute or severely weaken the asserted dangers.

First, although the tendency of agencies toward delay and inaction may be well known<sup>166</sup> and one of the purposes of citizen suits was "to stir slumbering agencies and to circumvent bureaucratic inaction,"<sup>167</sup> the risk of possible delays in agency actions is no worse than judicial system inefficiencies and the concomitant delays in enforcement incurred while waiting for court

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160. See Snook, *supra* note 4, at 3.

161. See *id.*

162. See, e.g., *North & S. Rivers Watershed Ass'n v. Town of Scituate*, 755 F. Supp. 484, 487 (D. Mass. 1991) (stating that the court was unwilling to "circumscribe the administrator's discretion to implement a plan that, in his expert judgment, adequately address[ed] a violation") (citing *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987)).

163. See Robinson, *supra* note 64, at 531-32.

164. See S. REP. NO. 91-1196, at 36-37 (1970).

165. See Robinson, *supra* note 64, at 532.

166. See *id.* (citing Henry J. Friendly, *A Look at the Federal Administrative Agencies*, 60 COLUM. L. REV. 429, 432 (1960)).

167. *Friends of the Earth v. Carey*, 535 F.2d 165, 173 (2d Cir. 1976).

action.<sup>168</sup> At best, such a situation presents a Hobson's choice of either administrative delays or judicial delays.

Second, Congress predicted the danger of passive agency enforcement caused by political pressure from certain interest groups<sup>169</sup> and addressed it with the citizen suit mechanism itself and its statutory procedural safeguards.<sup>170</sup> As a logical outgrowth of the fear that agencies would be unduly sympathetic to the regulated industries because of an imbalance of interests represented in agency decision making, citizen suits give the public the right to be heard in enforcement decisions and provide for expense reimbursement.<sup>171</sup>

Lastly, the argument concerning agency willingness to allow deviations in enforcement loses considerable force when it is remembered that Congress in the past has thought it prudent to give discretionary deviation options to agencies.<sup>172</sup> In fact, the Supreme Court has held that an agency could grant a variance properly, even when statutory requirements may not be met.<sup>173</sup>

Therefore, because the dangers of more deferential review are not completely justified, permitting at least some agency discretion to choose what enforcement actions to take and where to

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168. See Snook, *supra* note 4, at 7. While a court action is ongoing, a temporary injunction may or may not issue to stop any current violations until formal court proceedings can be instituted. These actions delay implementation of any enforcement or compliance plan, possibly allowing future polluting activities and, at worst, if the polluter prevails in court, ensure that no enforcement activities are ever implemented.

169. See Robinson, *supra* note 64, at 533 (stating that "[a]gencies under pressure from violators tend to delay enforcement proceedings or to overlook certain violations").

170. See Boyer & Meidinger, *supra* note 3, at 843-44.

171. See *id.* at 844; see also 33 U.S.C. § 1365(b)(1)(B), (d) (1994) (giving citizens the right to intervene and authorizing the payment of litigation costs to substantially prevailing parties).

172. See, e.g., 42 U.S.C. § 7521(b)(3) (1994) (providing for certain waivers that may be granted by the agency with respect to emissions standards).

173. See *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60 (1975), cited in Robinson, *supra* note 64, at 533-34; see also James N. Cohan, Comment, *Enforcement of the Clean Air Amendments of 1970*, 10 URB. L. ANN. 297, 308-11 (1975) (criticizing the Supreme Court's *Train* opinion for ignoring the principle of nondegradation by approving a dispersion enhancement strategy, which the author believed would actually increase pollution). Concededly though, exercise of discretion that patently exceeds statutory mandates is not permitted. See *Student Pub. Interest Research Group, Inc. v. Fritzsche, Dodge & Olcott, Inc.*, 579 F. Supp. 1528, 1536-37 (D.N.J. 1984), *aff'd*, 759 F.2d 1131 (3d Cir. 1985) (*SPIRG*).

take them is a preferable policy. The preclusion of citizen suits when an agency or state actively pursues enforcement either by formal court or administrative actions addresses this policy concern. In addition, the requirement of diligent prosecution alleviates the possible danger that the agency actions may not adequately protect the public. In sum, permitting diligently prosecuted administrative actions to preclude citizen suits minimizes interference with agency discretion.

### *Frivolous and Harassing Citizen Suits*

Another policy concern is that citizen-plaintiffs will bring a multitude of frivolous and harassing suits that will clog the already overburdened courts.<sup>174</sup> Although Congress made clear that it wanted to encourage citizen suits when justified, it also clearly expressed its belief that meritless citizen suits should not be brought.<sup>175</sup> The statutory mechanisms typically cited as protecting against frivolous suits are twofold: one statutory provision awards litigation costs to the prevailing party,<sup>176</sup> and another precludes civil penalty awards from going to the citizens.<sup>177</sup> These mechanisms are flawed, however, because they do not adequately address the danger and because they implicate other critical policy concerns.

As Congress has pointed out and others have noted, the danger of possibly having to pay the defendant's litigation costs is likely to discourage frivolous and harassing suits.<sup>178</sup> The same

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174. See MILLER, *supra* note 1, at 5.

175. See *supra* notes 42-54 and accompanying text; see also *Friends of the Earth v. Consolidated Rail Corp.*, 768 F.2d 57, 63 (2d Cir. 1985) (*Conrail*) (stating that citizen suits "are not to be treated as nuisances . . . but rather as welcomed participants" in the enforcement of environmental laws); Boyer & Meidinger, *supra* note 3, at 839, 846 (stating that courts need to control inventive litigants' attempts to use citizen suits for purposes not intended by Congress, yet still keep citizen suits fairly easy to bring and to prove; also noting both that the inclusion of citizen suit provisions reflects skepticism over the prospect of government enforcement, and that the citizen suit provisions indicate some congressional caution about giving private parties the power to enforce regulatory statutes).

176. See 33 U.S.C. § 1365(d) (1994).

177. See *id.* § 1365(a); Robinson, *supra* note 64, at 527-28.

178. See Robinson, *supra* note 64, at 528 ("Congress acknowledged that frivolous and harassing citizen suits could be deterred by awarding litigation costs to defendants in such cases.") (citing S. REP. NO. 92-414, at 81 (1971), *reprinted in* LEGISLA-



provision, however, may award litigation costs to the plaintiff.<sup>179</sup> Theoretically then, plaintiffs might be encouraged, or at least not discouraged as much, to bring a questionable citizen suit. Commentators have argued, however, that because citizens must bear the initial expense themselves, the provision would not encourage them to bring suits that they otherwise would not bring.<sup>180</sup> This initial expense argument implicates another policy concern that, when combined with the above-described interference with agency discretion concern, is critically important.

The implication is that only citizens with the means to retain counsel and absorb the initial costs of litigation will be able to bring citizen suits.<sup>181</sup> In addition, once an agency commences a citizen suit, its resources must become focused on the concern of the citizen suit, regardless of the agency's opinion on the significance of the environmental danger presented. This is so because the agency is forced either to intervene or to lose any voice in the enforcement action.<sup>182</sup> This can result in the unwelcome situation where a minor problem in an affluent community absorbs significant agency resources, while a more critical environmental concern in a less wealthy neighborhood remains unaddressed because the citizens lack political clout and cannot absorb the initial costs of litigation.<sup>183</sup> Thus, not only are agency

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TIVE HISTORY, *supra* note 54, at 1415, 1499 ("[C]ourts may award costs of litigation . . . whenever the court determines that such action is in the public interest. The court could thus award costs of litigation to defendants where the litigation was obviously frivolous or harassing. This should have the effect of discouraging abuse of the provision.").

179. See 33 U.S.C. § 1365(d) ("[C]ourt[s] . . . may award costs of litigation . . . to any prevailing or substantially prevailing party.") (emphasis added); Richard E. Schwartz & David P. Hackett, *Citizen Suits Against Private Industry Under the Clean Water Act*, 17 NAT. RESOURCES LAW. 327, 367 (1984) ("Congress sought to provide for attorneys' fees in two circumstances: (1) to a plaintiff who performs 'a public service' in litigation brought under an environmental statute, and (2) to a defendant subjected to 'frivolous or harassing' litigation.").

180. See David Allan Feller, *Private Enforcement of Federal Anti-Pollution Laws Through Citizen Suits: A Model*, 60 DENV. L.J. 553, 564 (1983) (stating that economic disincentives may chill a prospective plaintiff's initiative and "[t]he expectation that plaintiffs may be reimbursed by the court through an award of fees does not remove the immediate burden of such expenses").

181. See Feller, *supra* note 180, at 564; Robinson, *supra* note 64, at 528.

182. See *supra* notes 159-62 and accompanying text.

183. See Snook, *supra* note 4, at 3.

resources diverted from dangerous environmental concerns to less serious ones (as determined by the expert agency), but the mechanism for determining who receives the benefit of the scarce agency resources is citizen wealth, a "traditionally disfavored" classification.<sup>184</sup>

The other statutory mechanism used to protect against frivolous suits is the requirement that citizen suit civil penalties go into the Treasury and not directly to the citizen plaintiffs.<sup>185</sup> This mechanism is weak for a variety of reasons. First, very few environmental statutes authorize citizen plaintiffs to seek civil penalties—only the CWA and the Resource Conservation and Recovery Act (RCRA).<sup>186</sup> Second, Congress has amended the CWA and the RCRA so that diligently prosecuted administrative actions now clearly preempt civil penalty citizen suits.<sup>187</sup> Third, the provision is easily circumvented by negotiated settlements, in which penalties under federal claims are traded for damages in pendent state claims.<sup>188</sup> Lastly and most fundamentally, the power to award civil penalties in actions brought by private parties has been challenged as undermining important values of the

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184. *Lubin v. Panish*, 415 U.S. 709, 719 (1974) (Douglas, J., concurring) (quoting *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 668 (1966)); see also *Edwards v. California*, 314 U.S. 160, 184 (1941) (Jackson, J., concurring) ("[A] man's mere property status, without more, cannot be used by a state to test, qualify, or limit his rights as a citizen of the United States.").

185. See *Robinson*, *supra* note 64, at 528.

186. See 33 U.S.C. § 1365(a) (1994); 42 U.S.C. § 6972(a) (1994). Although the majority of citizen suits are brought under the CWA, 10 of the 12 federal environmental statutes authorizing citizen suits do not have such a limitation. See *MILLER*, *supra* note 1, at 83; *Blomquist*, *supra* note 4, at 339 n.3.

187. See 33 U.S.C. § 1319(g)(6)(A)-(B); *Cross*, *supra* note 59, at 62. In section 1319(g), Congress dropped the "in a court" language to indicate that administrative penalty actions preempt civil penalty citizen suits. See *supra* note 59. Section 1319, however, applies only to penalty actions; the argument in this Note is that Congress should extend the preclusion to all types of citizen suits as long as the agency action is reasonably likely to ensure that compliance is diligent.

188. See *MILLER*, *supra* note 1, at 83. The practice of negotiating payments to plaintiffs, however, has been limited by 33 U.S.C. § 1365(c)(3), which allows the government to object to proposed settlements to ensure that appropriate penalties have been paid. See 33 U.S.C. § 1365(c)(3); see also Michael P. Stevens, *Limits on Supplemental Environmental Projects in Consent Agreements To Settle Clean Water Act Citizen Suits*, 10 GA. ST. U. L. REV. 757, 764 (1994) (explaining that the 45-day notice requirement before the entry of a consent decree would permit the EPA to object to any proposed consent decree involving a private plaintiff).

American legal system.<sup>189</sup> Requiring that civil penalties in citizen suits be paid to the Treasury, therefore, is not a particularly effective protection against frivolous citizen suits.

As shown above, the award of litigation costs and the preclusion of civil penalties awards to citizens theoretically protect against frivolous and harassing citizen suits. In reality, however, the protection is minimal and the mechanisms tend to implicate unattractive and unacceptable policy concerns. Combining these policy concerns with the real danger of frivolous and harassing suits indicates that restricting citizen suits is desirable when an agency action sufficiently addresses the concern. Furthermore, requiring that the actions be diligent, that is, reasonably certain to ensure statutory compliance, promotes the ultimate goal of citizen safety.

### *Duplicate Enforcement*

A further rationale for precluding citizen suits when an agency action sufficiently addresses the citizen's concern is the need to avoid multiple enforcement actions against an alleged violator.<sup>190</sup> As the Southern District of New York stated, "[t]o require an agency to commence any form of proceeding would be senseless where the agency has already succeeded in obtaining the respondent's agreement to comply with the law in some enforceable form."<sup>191</sup> Furthermore, when the agency action meets the diligence hurdle, it is the functional and practical equivalent of a citizen suit, and as such, a citizen suit would result in duplicate litigation against the alleged violator for the same factual concerns.<sup>192</sup> Not only does this raise fairness and collateral es-

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189. See Blomquist, *supra* note 4, at 340 (arguing that the vast powers given by Congress to private individuals to pursue civil penalties under the CWA are so far-reaching and uncircumscribed as to undermine some important outcome-independent values of the American legal system: process, rule of law, and division of legal labor); see also Boyer & Meidinger, *supra* note 3, at 935-57 (discussing and criticizing the legitimacy of private enforcement).

190. See Boyer & Meidinger, *supra* note 3, at 895-922 (analyzing the problem of coordination between private and public enforcement); Snook, *supra* note 4, at 9-10; Robinson, *supra* note 64, at 529.

191. *Gardeski v. Colonial Sand & Stone Co.*, 501 F. Supp. 1159, 1166 (S.D.N.Y. 1980).

192. See Snook, *supra* note 4, at 11-12.

toppel issues, but judicial efficiency is also significantly impaired. An advocate of the Plain Language Approach has posited that this concern is alleviated by the doctrine of virtual representation, which bars a prospective plaintiff from suing if another party having the same interests has already sued the defendant.<sup>193</sup> Permitting preemption by diligent administrative enforcement, however, addresses the danger of multiple litigation without resort to the equitable doctrine of virtual representation.

### *Risk of Inconsistent Enforcement*

Related to the danger of multiple litigation is the risk that alleged violators will be subject to inconsistent enforcement efforts.<sup>194</sup> Requiring a formal court proceeding to preclude a citizen suit would result in inconsistent enforcement by "[B]alkanizing" the enforcement.<sup>195</sup> That is, multiple litigation would create three separate enforcement entities—federal, state, and private—for each environmental issue.<sup>196</sup> Although it is true that Congress attempted to mitigate these concerns by expressly providing for agency intervention in citizen suits and by requiring that citizen suits seek to enforce only the Environmental Protection Agency (EPA) standards,<sup>197</sup> these provisions have offered inadequate protection.<sup>198</sup>

First, although citizen suits must seek to enforce only the EPA standards, the focus and concerns of the party seeking enforce-

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193. See Robinson, *supra* note 64, at 529 (citing *Environmental Defense Fund v. Alexander*, 501 F. Supp. 742 (N.D. Miss. 1980), *modified on other grounds sub nom. Environmental Defense Fund v. Marsh*, 651 F.2d 983 (5th Cir. 1981)).

194. See Boyer & Meidinger, *supra* note 3, at 895-97; Snook, *supra* note 4, at 10; Robinson, *supra* note 64, at 529.

195. Snook, *supra* note 4, at 10 (citing *Sierra Club v. Colorado Ref. Co.*, 852 F. Supp. 1476 (D. Colo. 1994)).

196. See *id.*

197. See Robinson, *supra* note 64, at 529-30. Congress made such an enforcement requirement in the hope of ensuring uniform application of environmental laws. "The standards for which enforcement would be sought either under administrative enforcement or through citizen enforcement procedures are the same. Therefore the participation of citizens in the courts seeking enforcement of water pollution control requirements should not result in inconsistent policy." S. REP. NO. 92-414, at 80 (1971), *reprinted in* LEGISLATIVE HISTORY, *supra* note 54, at 1498 (1973).

198. See MILLER, *supra* note 1, at 45-49 (discussing the effectiveness of the notice-and-delay provision); Boyer & Meidinger, *supra* note 3, at 897-907.

ment can differ radically.<sup>199</sup> State and federal agencies may have the same general goals, but they also may differ on how to implement them and how to handle certain individual environmental matters.<sup>200</sup> In addition, citizen groups can have entirely different foci, ranging from completely localized concerns to broad policy issues.<sup>201</sup> Also, as indicated in the discussion of interference with agency discretion,<sup>202</sup> conflicting motives can force an agency to allocate resources to an environmental concern that the agency considered but deemed to be of low priority. Most significantly, however, the notice and delay provision, which Congress included to allow the EPA an opportunity to intervene, has not provided enough time for the EPA to analyze the situation adequately and decide whether to intervene.<sup>203</sup>

Primarily for the final reason, the existing statutory provisions do not ensure uniform enforcement. Precluding citizen suits by diligently prosecuted agency actions, on the other hand, does ensure uniform enforcement by guaranteeing that the entity with the greatest expertise, the agency, has control over the enforcement when the agency deems it necessary.

### *Resolving Judicial Confusion*

For the policy reasons described above, allowing diligently prosecuted agency actions to preempt citizen suits is the preferred approach. Furthermore, as described in this Note's proposal,<sup>204</sup> the desired means of implementing the approach is by amending the statutory language. Such an amendment would resolve any judicial confusion on the issue. To reiterate, the pri-

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199. See Snook, *supra* note 4, at 10.

200. See *id.*

201. Cf. *id.* (addressing the contrasting goals of citizen groups and governmental enforcement agencies).

202. See *supra* notes 159-62 and accompanying text.

203. See MILLER, *supra* note 1, at 45-49 (stating that the time necessary for EPA to prepare a referral and for Department of Justice to file "almost always will take much longer than 60 days"); Boyer & Meidinger, *supra* note 3, at 897-907 ("The principal reason why the notice-and-preclusion system has not functioned as originally intended is that sixty days is not sufficient time in most cases to process a referral package [between the EPA and the Department of Justice] who actually files the case."); *supra* note 54.

204. See *supra* notes 145-50 and accompanying text.

mary proposal is to amend the statutory language of the citizen suit diligent prosecution limitation to omit the "in a court" phrase, thereby directing courts to permit diligently prosecuted agency actions to preempt citizen suits. In lieu of a statutory amendment, however, the proposed convincingly court-like standard offers a means of providing courts with more guidance, perhaps leading courts to find preclusion in more cases.<sup>205</sup>

### *Conclusion*

This Note's proposal offers greater benefits and fewer dangers than the current judicial interpretations of the citizen suit diligent prosecution limitation. Whereas the strict Plain Language Approach has appealing clarity and simplicity in its implementation, the approach also poses very unappealing dangers, such as possible frivolous and harassing citizen suits clogging courts, multiple and possibly conflicting enforcement efforts, and potential interference with agency discretion. On the other hand, the *Baughman* Approach, although lacking some clarity, sufficiently addresses the dangers of the Plain Language Approach, and equitably balances the rights and interests of the parties involved. Under the current statutory language, however, the *Baughman* Approach has its own problems, in particular the strength of the

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205. In fact, adoption of this analysis or a similar one by the Supreme Court is not wholly unlikely. The Court has stated in dicta that preemption of a citizen suit would be proper if the suit interfered with agency discretion. See *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60-61 (1987). Despite the Court's dicta, however, indications from the current Court's view of statutory interpretation suggests that the Court would be unwilling to accept such a reading of the current statutory language. For example, in deciding to use a Plain Language approach in 1985, the Second Circuit used as support the Supreme Court's statements that "[i]t is a 'familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.'" *Friends of the Earth v. Consolidated Rail Corp.*, 768 F.2d 57, 62 (2d Cir. 1985) (*Conrail*) (quoting *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980), and citing *United States v. Turkette*, 452 U.S. 576, 580 (1981)). The Second Circuit further relied on a Supreme Court statement that if a court interprets statutory language as unambiguous, "judicial inquiry is complete except in 'rare and exceptional circumstances.'" *Conrail*, 768 F.2d at 62-63 (quoting *Garcia v. United States*, 469 U.S. 70, 75 (1984) (citation omitted)). Such strong language indicates that the Court would be reluctant to permit even a logical extension of the statute beyond the plain meaning of the language included by Congress.

statutory construction argument against it, and the lack of standards for determining when agency actions are equivalent to court proceedings. The proposed statutory amendment, which unambiguously directs that citizen suits may be barred by agency proceedings, effectuates the goals of the statutes, avoids damaging consequences while furthering beneficial policy considerations, and protects the rights and interests of all the parties involved. In the absence of a statutory amendment, a convincingly court-like analysis, which requires that the agency proceeding, at a minimum, have the authority to accord relief equal to or greater than that available to the EPA in a federal court and have procedures equal to those available in a federal court, addresses the problems of the current approaches and attempts to implement the beneficial policies that preempting citizen suits by diligently prosecuted agency actions offers.

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