COMMENTS

Precluding Preclusion: A Proposal for a New Way of Addressing Citizen Suit Overfiling

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I. INTRODUCTION

For most of its history, the United States has tried to deal with water pollution in some fashion.[1] Prior to the 1970s, those attempts proved to be rather ineffective. Take for example the infamous Cuyahoga River in Ohio, which caught fire over a dozen times.[2] In 1972, the United States Congress passed what would become known as the Clean Water Act (CWA), a comprehensive framework to stem the tide of pollution and clean up the nation's waterways.[3] To help ensure the CWA's strict compliance requirements were met, Congress created a provision for so-called "citizen suits" to allow everyday citizens acting as "private attorneys general" to bring enforcement actions against polluters and stubborn government officials.[4] Citizen suits were designed, however, to play a supplementary role to the government's primary enforcement authority.[5]

Under this enforcement framework, citizen-plaintiffs can jump through every procedural hoop and bring a timely action only to have the rug pulled out from under them by a later-filed government consent decree. This agency "overfiling" all but assures citizen suits are dismissed.[6] While not entirely consistent in their approaches, most of the United States Courts of Appeals that have addressed the question agree citizen suits under the CWA or Clean Air Act (CAA)[7] are precluded

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1. *See* William L. Andreen, *The Evolution of Water Pollution Control in the United States—State, Local, and Federal Efforts, 1789-1972* (pts. 1 & 2), 22 STAN. ENVTL. L.J. 145, 215 (2003).

2. *See* Jonathan H. Adler, *Fables of the Cuyahoga: Reconstructing a History of Environmental Protection*, 14 FORDHAM ENVTL. L. REV. 89, 90-105 (2002); *see also America's Sewage System and the Price of Optimism*, TIME (Aug. 1, 1969), *available at* http://www.time.com/time/magazine/article/0,9171,901182,00.html (quipping that the river "oozes rather than flows" and that one "does not drown" but rather "decays").

3. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251-1387 (2006)).

4. *See* 33 U.S.C. § 1365.

5. *See* Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 60 (1987) ("[T]he citizen suit is meant to supplement rather than to supplant governmental action."). While the CWA vests primary enforcement powers in both the federal and state governments, the terms "government" and "agency" as used in this Comment refer to the federal government and the Environmental Protection Agency (EPA).

6. The term "overfiling" describes a situation in which the government brings a subsequent enforcement action after a citizen suit commences and a final judgment is entered in the government action. The term typically describes a situation in which the EPA files an enforcement action after a state has already prosecuted the same violation. *See* Jerry Organ, *Environmental Federalism Part I: The History of Overfiling Under RCRA, the CWA, and the CAA Prior to* Harmon, Smithfield, *and* CLEAN, 30 Envtl. L. Rep. (Envtl. Law Inst.) 10,615, 10,116 n.11 (2000); William Daniel Benton, *Application of Res Judicata and Collateral Estoppel to EPA Overfiling*, 16 B.C. ENVTL. AFF. L. REV. 199, 201 (1988).

7. 42 U.S.C. §§ 7401-7671q (2006).

when subsequent government action results in a final order first, warranting their dismissal.[8]

The purpose of this Comment is not to definitively answer the question of whether or not preclusion should apply to overfiled citizen suits—it assumes without taking sides that preclusion does indeed apply. Rather, the purpose is to highlight that the application of preclusion is not without its problems. Aside from the obvious issue of whether or not citizens are entitled to litigation costs, several other less obvious problems arise. This Comment begins with an overview of the creation and intent behind the CWA and its citizen suit provision.[9] With that context in mind, an examination of how courts currently handle overfiling of citizen suits follows.[10] Next, a description of the negative consequences of overfiling is given,[11] followed by an exploration of possible solutions.[12] The Comment concludes with the proposition that many of the problems created by overfiling can be favorably remedied without infringing on the government's enforcement discretion.[13]

II. CITIZEN SUITS UNDER THE CLEAN WATER ACT

A. The Clean Water Act

By the late 1960s, Congress and the nation began to appreciate the strain unbridled postwar expansion was putting on the natural environment. The ubiquity of industrial pollution in the nation's waterways led one scholar to lament, "Pollution invades our waters in such a noxious variety of forms as to nearly defy description."[14] In 1972, Congress amended what eventually became the Clean Water Act[15] to

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8. *See* Justin Vickers, *Res Judicata Claim Preclusion of Properly Filed Citizen Suits*, 104 NW. U. L. REV. 1623, 1635-45 (2010); St. Bernard Citizens for Envtl. Quality, Inc. v. Chalmette Ref., L.L.C., 500 F. Supp. 2d 592, 602-03 (E.D. La. 2007). One circuit stands alone, however, refusing to dismiss first-filed citizen suits. *See* Chesapeake Bay Found. v. Am. Recovery Co., 769 F.2d 207, 208-09 (4th Cir. 1985). Even circuits that have applied preclusion have suggested preclusion may not always apply. *See* EPA v. City of Green Forest, 921 F.2d 1394, 1404 (8th Cir. 1990) ("[T]here may be some cases in which it would be appropriate to let a citizens' action go forward in the wake of a subsequently-filed government enforcement action.").

9. *See infra* Part II.

10. *See infra* Part III.

11. *See infra* Part IV.

12. *See infra* Part V.

13. *See infra* Part VI.

14. N. William Hines, *Nor Any Drop To Drink: Public Regulation of Water Quality, Part I: State Pollution Control Programs*, 52 IOWA L. REV. 186, 186 (1966).

15. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251-1387 (2006)). The Clean Water Act (CWA) was a watershed achievement in protecting the nation's waterways, but "[u]nlike Athena [it] did not spring full grown from the brow of Zeus." N. WILLIAM HINES, UNIV. OF IOWA COLL. OF LAW,

"restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[16] Two of the primary goals of the CWA were to make all navigable waters safe enough for swimming and fishing by 1983 and to eliminate the discharge of pollutants into navigable waters by 1985.[17] Those goals, however, remain elusive.[18]

To fulfill its mission, the CWA mandates that, with a few exceptions, "the discharge of any pollutant by any person shall be unlawful."[19] The National Pollutant Discharge Elimination System (NPDES) provides one of two notable exceptions,[20] allowing limited discharge of certain effluents under special permits.[21] Permit holders are held strictly liable: "[I]f the discharge violates the explicit terms of the permit, the discharger has violated the CWA, even if there is *no scientifically identifiable adverse impact* on the receiving water."[22] While Congress recognized the primacy of individual states' self-determination in the effort "to prevent, reduce, and eliminate pollution," it nevertheless

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HISTORY OF THE 1972 CLEAN WATER ACT (2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2045069. Eight decades "of gradually intensifying federal involvement" led to the CWA. *Id.* at 2.

16. 33 U.S.C. § 1251(a).

17. *Id.* § 1251(a)(1)-(2).

18. While great progress has been made, according to EPA estimates, "about half of our rivers and streams, one-third of lakes and ponds, and two-thirds of bays and estuaries are 'impaired waters,' in many cases not clean enough for fishing and swimming." James Salzman, *Why Rivers No Longer Burn*, SLATE (Dec. 10, 2012), http://www.slate.com/articles/health_and_science/science/2012/12/clean_water_act_40th_anniversary_the_greatest_success_in_environmental_law.html; *see also* Richard Mertens, *Clean Water Act at 40: Is It Failing To Meet New Pollution Challenges?*, CHRISTIAN SCI. MONITOR (Oct. 18, 2012), http://www.csmonitor.com/Environment/2012/1018/Clean-Water-Act-at-40-Is-it-failing-to-meet-new-pollution-challenges (summarizing current issues the CWA faces).

19. 33 U.S.C. § 1311(a).

20. *See also* Clean Water Act § 404, 33 U.S.C. § 1344 (second notable exception allowing "discharge of dredged or fill material"). The NPDES exception may yet consume the rule—there are currently almost one million permittees. E-mail from Jacqueline Clark, Assoc. Reg'l Counsel, U.S. Envtl. Prot. Agency, to author (Feb. 13, 2013, 06:50 CST) (on file with author).

21. 33 U.S.C. § 1342(a)(1). In addition to limitations on effluent limitations, the NPDES requires most permittees file "Discharge Monitoring Reports" (DMRs). *Id.* § 1318(a); *see* E. ROBERTS & J. DOBBINS, ENVTL. L. INST., THE ROLE OF THE CITIZEN IN ENVIRONMENTAL ENFORCEMENT § 4.2.3 (1992), *available at* http://www.inece.org/2ndvol1/roberts.htm. Except for trade secrets, all information contained in DMRs becomes a matter of public record. 33 U.S.C. § 1318(b). DMR data is critically important to citizen involvement in enforcement of the CWA. ROBERTS & DOBBINS, *supra*, § 4.2.3 ("It is difficult to overstate the importance of such reports in not only initiating suits, but also giving citizens the capability to win them."); Adeeb Fadil, *Citizen Suits Against Polluters: Picking Up the Pace*, 9 HARV. ENVTL. L. REV. 23, 66 (1985) ("The ease of developing cases from public records has facilitated the mass citizen enforcement of NPDES . . . permits under the Clean Water Act.").

22. David R. Hodas, *Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority Is Shared by the United States, the States, and Their Citizens?*, 54 MD. L. REV. 1552, 1565 (1995) (emphasis added).

vested initial control over the NPDES largely in the Environmental Protection Agency (EPA).[23] Not only may the EPA issue NPDES permits, but it also determines whether the states may issue and enforce permits for discharges into their own navigable waters through their permitting programs.[24] Where the EPA approves a state's permit program, the state assumes primary responsibility for enforcing the CWA, but the EPA maintains concurrent jurisdiction.[25] Working together, the EPA and state agencies form the primary means by which the CWA is implemented and enforced.

B. Section 505: Legislative History and Purpose

Section 505 of the CWA traces its lineage to two historical antecedents: *qui tam* actions and the development of precursor citizen suit statutes. Originating in medieval English common law, *qui tam* actions allow private individuals to bring civil actions on their own behalf and on behalf of the government so that they may share in any potential award or penalty.[26] As far back as 1388, an English water pollution law allowed dual enforcement by public officials and aggrieved individuals.[27] *Qui tam* actions eventually fell out of favor in English law, but in the United States they continued to linger—albeit relatively unnoticed—into the modern era.[28] With growing concern over the nation's waterways, environmentalists in the early 1970s tried to bring a number of *qui tam* actions under the archaic Rivers and Harbors Act of 1899.[29] Perhaps due to an unfamiliarity with such causes of action, the courts were unconvinced the Act provided for such suits, and all of the cases were

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23. 33 U.S.C §§ 1251(b), 1342(a); *see id.* § 1251(d) (explaining that "Administrator" refers to the Administrator of the EPA).

24. *Id.* § 1342(a)-(b). As of 2003, forty-six states had approved state NPDES permit programs. *State Program Status*, U.S. ENVTL. PROT. AGENCY, http://cfpub.epa.gov/npdes/statestats.cfm (last updated Apr. 14, 2003).

25. 33 U.S.C. § 1342(i). EPA's authority over state permitting programs has led one commenter to quip, "The state under the [CWA] serves merely as an administrative arm of the EPA." Randall S. Schipper, Note, *Administrative Preclusion of Environmental Citizen Suits*, 1987 U. ILL. L. REV. 163, 167 (1987).

26. *See* Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 774-77 (2000) (explaining development of *qui tam* actions in English and American legal traditions).

27. *See* Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 BUFF. L. REV. 833, 946-49 (1985) (citing 12 Rich. 2, c. 13 (1388)).

28. *See* Note, *The History and Development of Qui Tam*, 1972 WASH. U. L.Q. 81, 101-15 (1972); Allan W. May, Note, *Qui Tam Actions and the Rivers and Harbors Act*, 23 CASE W. RES. L. REV. 173, 182-84 (1971).

29. May, *supra* note 28, at 215-19. The impetus for these attempts came from a House Committee of Government Operations report suggesting such suits were available under a portion of the Rivers and Harbors Act. *See* Note, *supra* note 28, at 81.

dismissed on procedural grounds.[30] While initially a major setback, the momentum behind citizen enforcement no doubt spilled over into the halls of Congress, where the CWA and its citizen suit provision were just beginning to take shape.

The second important development leading up to the CWA citizen suit provision was the passage of the CAA in 1970.[31] Based on experience with private enforcement provisions in other federal laws[32] and the timely advent of the first environmental citizen suit provision in Michigan,[33] Congress included a citizen suit provision in the CAA.[34] The discussions and debates surrounding the CAA citizen suit set the stage for passage of the similar CWA citizen suit provision two years later.

The legislative history behind the CAA citizen suit provision reveals a stark ideological divide between those for and against citizen enforcement. In an era where "disenchantment with the effectiveness of government agencies"[35] was at its peak, proponents saw citizen suits as a counterweight to perceived "agency capture," whereby agencies became beholden to the demands of the regulated.[36] For their part, opponents warned that the potentially unlimited resources of citizens would burden beleaguered agencies and overworked courts and prevent agencies from carrying out their duties.[37] Addressing these concerns, advocates played off the idea of overtaxed agencies, shifting their emphasis away from mistrust of agencies toward the notion that citizen suits would actually *help* agencies by picking up the enforcement slack.[38]

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30. *See* Note, *supra* note 28, at 82.

31. Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended at 42 U.S.C. §§ 7401-7671 (2006)).

32. *See* Jeffrey G. Miller, Private Enforcement of Federal Pollution Control Laws Part I, 13 Envtl. L. Rep. (Envtl. Law Inst.) 10,309, 10,309 (1983).

33. *See* Joseph L. Sax & Roger L. Conner, *Michigan's Environmental Protection Act of 1970: A Progress Report*, 70 MICH. L. REV. 1003 (1972) (analyzing the new statute); Joseph L. Sax & Joseph F. DiMento, *Environmental Citizen Suits: Three Years' Experience Under the Michigan Environmental Protection Act*, 4 ECOLOGY L.Q. 1, 2-6 (1974) (assessing the effectiveness of the statute's citizen suit provision).

34. 42 U.S.C. § 7604.

35. Boyer & Meidinger, *supra* note 27, at 837 ("The conventional wisdom casts doubt on both the quantity and quality of regulatory action.").

36. *See id.* at 843-44 ("The modern citizen suit provisions were first enacted at a time when 'capture' theories dominated scholarly and popular thought about regulation.").

37. *See* Miller, *supra* note 32, at 10,311 (citing 116 CONG. REC. 32934 (1970) (statement of Sen. Roman Hruska)); 116 CONG. REC. 32925-26 (1970) (statement of Sen. Roman Hruska), *reprinted in* Natural Res. Def. Council v. Train, 510 F.2d 692, 726-27 (D.C. Cir. 1975).

38. *See* Miller, *supra* note 32, at 10,311 & n.11; 116 CONG. REC. 32,927, 33,104 (1970) (statement of Sen. Edmund Muskie and Sen. Philip Hart), *reprinted in Natural Res. Def. Council*, 510 F.2d at 727-30.

The citizen suit provision that resulted from these contrasting viewpoints was ultimately one of great compromise. To protect agency discretion, the "diligent prosecution" bar was added, allowing citizen suits only where government enforcement was not already underway.[39] In addition, a lengthy notice period was added to allow an agency to act first, and in order to discourage frivolous suits, power was given to judges to award litigation costs to defendants.[40] Considering these modest limitations, advocates got most of what they wanted, and citizens emerged with an unprecedented and powerful tool.[41]

Most subsequent federal environmental citizen suit provisions stem from the historic CAA provision.[42] As one scholar put it, "There has been a tendency to literally 'lift' [the citizen suit provision] from the Clean Air Act and transpose it with only the most cursory conforming changes into other environmental statutes."[43] This is certainly true with the CWA; the statutes and congressional reports for the CAA and CWA are nearly identical.[44]

And so, with these two antecedents—*qui tam* actions that created public demand for participation in regulating water pollution and a statutory framework supplied by the CAA—Congress incorporated a citizen suit provision in the CWA.[45] The citizen suit provision strikes a balance between citizen empowerment and agency supremacy in an effort to combat the nonenforcement that plagued earlier pollution-control laws.[46] The legislative history reveals that Congress intended

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39. *See* Derek Dickinson, Note, *Is "Diligent Prosecution of an Action in a Court" Required To Preempt Citizen Suits Under the Major Federal Environmental Statutes?*, 38 WM. & MARY L. REV. 1545, 1553 (1997). Unfortunately, in both the legislative history and resulting statute, Congress gave very little instruction about how courts should determine whether agencies were engaged in sufficiently "diligent prosecution" to bar citizen suits. *See id.* at 1553-54; Heather L. Maples, Note, *Reforming Judicial Interpretation of the Diligent Prosecution Bar: Ensuring an Effective Citizen Role in Achieving the Goals of the Clean Water Act*, 16 VA. ENVTL. L.J. 195 (1996) (proposing judicial framework for evaluating diligent prosecution).

40. *See* Dickinson, *supra* note 39, at 1553 n.53, 1575-76; 33 U.S.C. § 1365(b), (d).

41. *See* S. REP. NO. 99-50, at 28 (1985), *reprinted in* 2 S. COMM. ON ENV'T & PUB. WORKS, 100TH CONG., A LEGISLATIVE HISTORY OF THE WATER QUALITY ACT OF 1987 (PUBLIC LAW 100-4) INCLUDING PUBLIC LAW 97-440; PUBLIC LAW 97-117; PUBLIC LAW 96-483; AND PUBLIC LAW 96-148, at 1420-1545 (Comm. Print 1988) (noting that citizen suits "are a proven enforcement tool" that "have deterred violators and achieved significant compliance gains").

42. Miller, *supra* note 32, at 10311.

43. *Id.*

44. *Compare* 33 U.S.C. § 1365 (CWA citizen suit), *and* S. REP. NO. 92-414 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3744-3747 (Senate report on CWA), *with* 42 U.S.C. § 7604 (2006) (CAA citizen suit), *and* S. REP. NO. 91-1196, at 36-39 (1970) (Senate report on CAA).

45. Dickinson, *supra* note 39, at 1549-50.

46. *See* S. REP. NO. 92-414, at 5, *reprinted in* 1972 U.S.C.C.A.N. 3668, 3672 ("[O]nly one case [brought by the government against a polluter] . . . reached the courts in more than two decades [under preceding water pollution laws]").

CWA citizen suits to serve two purposes: to first prompt agencies into action and then, if need be, to counter any subsequent agency inaction.[47] These purposes serve the same end, maximum enforcement of the CWA.

The dual purposes also reflect the enforcement hierarchy envisioned by Congress. The legislative histories of both the CAA and CWA highlight the tension that overlapping enforcement mechanisms create. The report by the Senate Committee on Public Works made clear that Congress "intend[ed] the great volume of enforcement actions be brought by the State[s]," while "the authority of the Federal Government should be used judiciously . . . in those cases deserv[ing] Federal action because of their national character, scope, or seriousness."[48] The report further instructs, "[I]f the Federal, State, and local agencies fail to exercise their enforcement responsibility, the public is provided the right to seek vigorous enforcement action under the citizen suit provisions of [the CWA]."[49] Under this framework, EPA and equivalent state agencies enjoy primary enforcement status, with citizen suits picking up any slack, either through notification or subsequent enforcement.

The United States Supreme Court in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, [50] confirmed this two-tier understanding of the enforcement system.[51] The Court believed citizen suits were "meant to supplement rather than to supplant governmental action."[52] In holding section 505 did not authorize citizen suits for wholly past and complete violations, the Court was adamant that the statute and its legislative history do not allow citizen-plaintiffs to interfere with agency enforcement discretion.[53] Justice Marshall, author of the opinion, offered this hypothetical to illustrate the danger that past-violation citizen suits pose to agency discretion:

> Suppose that the [EPA] 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, such as to install particularly effective but expensive machinery, that it otherwise would not be obliged to take. If citizens could file suit, months or years later, in order to seek the civil penalties that the Administrator chose to forgo, then the

47. *See* Dickinson, *supra* note 39, at 1552.
48. S. REP. NO. 92-414, at 64, *reprinted in* 1972 U.S.C.C.A.N. 3668, 3730.
49. *Id.*
50. 484 U.S. 49 (1987).
51. *See id.* at 60.
52. *Id.*
53. *See id.* at 60-61.

> Administrator's discretion to enforce the Act in the public interest would be curtailed considerably.[54]

Allowing such an action to be filed by citizens would "change the nature of the citizens' role from interstitial to potentially intrusive," the Court warned.[55]

While somewhat beyond the scope of this Comment, it is important at least to note the highly selective nature of the Court's analysis.[56] Looking at what Congress intended by enacting section 505, the Court overstated the importance of agency discretion. The legislative history is clear, Congress did not intend for the EPA or state agencies to be beyond reproach:

> It should be emphasized that . . . if the citizen believed efforts initiated by the agency to be inadequate, the citizen might choose to file [a citizen suit]. 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

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54. *Id.* This hypothetical fact pattern bears a striking resemblance to what eventually happened in *Friends of Milwaukee's Rivers v. Milwaukee Metropolitan Sewerage District*, 382 F.3d 743 (7th Cir. 2004). *See infra* Part III.B. It is also interesting to note that Justice Marshall did not seem to believe preclusion would otherwise bar the citizen suit.

55. *Gwaltney*, 484 U.S. at 61.

56. For example, the Court rejected the argument that the "to be in violation" phrase in section 505 was a "debatable lapse of syntactical precision" by citing *subsequent* legislation to prove "Congress has demonstrated . . . that it knows how to avoid this prospective implication by using language that explicitly targets wholly past violations." *Id.* at 57. Likewise, the Court points to the use of present-tense language in section 505 as evidence that it does not reach past violations. *Id.* at 59. What the Court subsequently discusses, however, is either not completely accurate or has no bearing on what sort of violations citizens may enforce. The Court first states, "A citizen suit may be brought *only* for violation of a permit limitation 'which is in effect' under the [CWA]." *Id.* (emphasis added) (quoting 33 U.S.C. § 1365(f) (2006)). Permits, however, are only one of *seven* "effluent standard[s] or limitation[s]" that a citizen suit may enforce (none of which use the present tense). *See* 33 U.S.C. § 1365(f)(1)-(7). The Court also points out that governors, who are not subject to any notice requirements, may seek *injunctive* relief *against the EPA* for a violation that "is occurring" in another state. *Gwaltney*, 484 U.S. at 59 (quoting 33 U.S.C. § 1365(h)). Injunctive relief obviously cannot remedy wholly complete past violations, nor does that subsection allow *civil penalties against the violator*, which could. Finally, the Court points to the definition of "citizen" as "a person . . . having an interest which is or may be adversely affected" to prove section 505 is only prospective. *Id.* (quoting 33 U.S.C. § 1365(g)). This, however, conflates a citizen's constitutionally required present standing with the temporally unrelated statutory violation. A citizen may obviously be adversely affected by a wholly past violation: a one-time discharge of highly radioactive waste into a river may cause a citizen to cease recreating in the river for many years (if not permanently) after the violation. Such an injury was caused by the past violation and could be redressable through an enforcement action to penalize the violator and force adequate cleanup. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). These two examples of the Court's misguided analysis of the statute and its legislative history are not the only oversights, but any more lengthy analysis would be an unwarranted digression.

> the agency action as inadequate, it would have jurisdiction to consider the citizen action notwithstanding any pending agency action.[57]

The "diligent prosecution" bar in section 505 respects agency discretion but provides a place for citizens and the judiciary to ensure adequate compliance with the CWA. Section 505 also allows for intervention as of right in an existing government enforcement action, which further undercuts the Court's belief that agency discretion is paramount. Moreover, Congress indicated it was not convinced agencies necessarily needed to employ that much discretion in prosecuting CWA violations, advising that "[e]nforcement of violations of requirements under this Act should be based on relatively narrow fact situations requiring a minimum of discretionary decision making or delay."[58] *Gwaltney*, therefore, should not be overread to suggest the purpose and legislative history of CWA citizen suits make citizen suits completely subservient to inadequate or unreasonably delayed enforcement.

The final bit of history worth mentioning regarding how citizen suits fit into the broader CWA framework is the 1987 amendments to the Act. Amongst other things, the amendments granted the EPA authority to impose administrative penalties in addition to civil penalties.[59] When the EPA, or a state agency acting pursuant to comparable state law, decides to impose administrative penalties on its own in lieu of civil penalties through a court action, that administrative action precludes citizens from bringing subsequent action seeking civil penalties for the same violation.[60] (Whether citizens may maintain a suit for injunctive relief remains an open question.)[61] There are two exceptions, however, that allow citizen suits for civil penalties despite an agency action for administrative penalties. A citizen suit filed *before* an administrative action will not be precluded, nor will a suit be precluded where notice was given by a citizen-plaintiff before the administrative action commenced and the citizen suit was filed within 120 days of the notice.[62] Given the potential for enforcement overlap between citizens and

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57. S. REP. NO. 92-414, at 80 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3746.

58. *Id.* at 64, *reprinted in* 1972 U.S.C.C.A.N. 3668, 3730.

59. Water Quality Act of 1987, § 314, Pub. L. No. 100-4, § 314, 101 Stat. 7, 46 (1987) (codified as amended at 33 U.S.C. § 1319(g) (2006)).

60. 33 U.S.C. § 1319(g)(6)(A)(iii).

61. *See generally* Lisa Donovan, Note, *Power to the People: The Tenth Circuit and the Right of Citizens To Sue for Equitable Relief Under Section 309(G)(6)(A) of the Clean Water Act*, 34 B.C. ENVTL. AFF. L. REV. 143 (2007). For its part, the legislative history of the administrative penalty section clearly states that injunctive relief remains a viable request. *See* H.R. REP. NO. 99-1004, at 133 (1986) (Conf. Rep.) ("[T]his limitation would not apply to . . . an action seeking relief other than civil penalties (e.g., an injunction or declaratory judgment) . . . .").

62. 33 U.S.C. § 1319(g)(6)(B)(i)-(ii).

agencies, the Conference Report for the 1987 amendments suggested the onus was on agencies seeking administrative penalties to "prevent duplicate proceedings by [either] intervening in the ongoing citizen enforcement suit or by bringing [his or her] own judical [sic] action before a citizen suit is filed."[63] Interestingly, although not adopted by the Conference Committee and thus not enacted, the House amendment to the Senate bill provided that no judgment in a citizen suit in which the United States was not a party could be subsequently binding on the government.[64] Presumably, the forty-five-day period for judgment review of any unilateral citizen suit settlement[65] adequately protects the interests of the federal government in cases where it chooses not to intervene directly.

C. Section 505: The Citizen Suit Provision

The CWA citizen suit provision, section 505, generally allows "any citizen [to] commence a civil action on his [or her] own behalf . . . against any person . . . alleged to be in violation of [the Act]."[66] A "citizen" is anyone adversely affected by the pollution, including associations or organizations whose memberships are affected.[67] Citizen suits are not allowed, however, when the EPA or state "has commenced and is diligently prosecuting a civil . . . action in a court . . . to require compliance with the standard, limitation, or order."[68] This "diligent

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63. H.R. REP. NO. 99-1004, at 133.

64. *Id.* at 163.

65. 33 U.S.C. § 1365(c)(3).

66. *Id.* § 1365(a)(1). The citizen suit provision also allows citizens to bring an action against the Administrator of the EPA to force him or her to perform a nondiscretionary action or duty. *Id.* § 1365(a)(2). Buried deep down at the end of the statute is also a subsection allowing the governor of a state to file suit against the EPA Administrator for failure to enforce effluent standards in another state that adversely effects the governor's state. *Id.* § 1365(h).

67. *Id.* § 1365(g); *see* Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977). A citizen plaintiff must also have standing to bring suit. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 180-88 (2000) (establishing the current standing doctrine); *see also* Jonathan H. Adler, *Stand or Deliver: Citizen Suits, Standing, and Environmental Protection*, 12 DUKE ENVTL. L. & POL'Y F. 39, 51-57 (2001) (providing an overview of citizen suit standing). Associational standing allows an organization to bring suit on behalf of its members when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt*, 432 U.S. at 343; *see also* Robert B. June, *The Structure of Standing Requirements for Citizen Suits and the Scope of Congressional Power*, 24 ENVTL. L. 761, 787-93 (1994) (providing an overview of representational (associational) standing in citizen suits).

68. 33 U.S.C. § 1365(b)(1)(B). Not surprisingly, the exact meaning of "commenced" and "in a court" are not exactly straightforward. *See* La. Envtl. Action Network v. Sun Drilling Prods. Corp., 716 F. Supp. 2d 476, 479-81 (E.D. La. 2010) (examining the circuit split over when an

prosecution" bar, as it is known, has been the undoing of many citizen suits and the subject of much litigation.[69] All is not lost, however, for would-be citizen-plaintiffs—if the government is diligently prosecuting a claim,[70] section 505 allows citizens to intervene as of right in the action.[71]

Where neither the EPA nor a state has commenced an enforcement action, citizen-plaintiffs are free to bring their own, subject to certain procedural requirements. A citizen-plaintiff must give sixty-days' notice to the EPA, the relevant state enforcement agency, and the alleged violator before filing suit.[72] The sixty-day notice period serves to prompt enforcement agencies to bring their own enforcement actions once they have been made aware of the alleged violation, reflecting a policy preference in favor of government enforcement over citizen enforcement.[73] Notice is ostensibly also intended to give violators time to bring themselves into compliance.[74] If authorities bring an enforcement action within the sixty-day period, the "diligent prosecution" bar comes into play, precluding a citizen-plaintiff from subsequently filing suit at the end of the sixty days.[75] As noted above, a citizen may intervene in the government action.

If no government action commences within the sixty-day period, citizen-plaintiffs are permitted to bring enforcement actions on their own behalf. Section 505 allows both injunctive relief and applicable civil penalties, which are payable to the United States Department of the Treasury.[76] Upon filing the action, citizen-plaintiffs must serve copies of the complaint to the United States Attorney General and the EPA.[77]

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action "commences"); Dickinson, *supra* note 39, at 1554-66 (analyzing interpretations of "in a court").

69. *See* Dickinson, *supra* note 39, at 1546-47; Maples, *supra* note 39, at 196.

70. Diligent prosecution is presumed. *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 890 F. Supp. 470, 486-87 (D.S.C. 1995) (citation omitted) (noting that the presumption "burden is a heavy one" to overcome). While there is no clear test for determining when a plaintiff has overcome this burden, at least one commentator has attempted to provide courts with a cohesive framework. *See* Maples, *supra* note 39, at 218-24.

71. 33 U.S.C. § 1365(b)(1)(B); *see also* FED. R. CIV. P. 24(a)(1).

72. 33 U.S.C. § 1365(b)(1)(A). *But see id.* § 1365(b) (allowing immediate action after notice given for certain violations).

73. *See* discussion *infra* note 75.

74. Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 60 (1987).

75. While the Senate Report on the Clean Water Act asserted that "[t]he time between notice and filing of the action should give the administrative enforcement office an opportunity to act on the alleged violation," S. REP. NO. 92-414, at 80 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3745, some scholars believe such actions actually take much longer than sixty days to work their way through the internal bureaucracy of the EPA. *See* Boyer & Meidinger, *supra* note 27, at 898.

76. 33 U.S.C. § 1365(a); *Gwaltney*, 484 U.S. at 53.

77. 33 U.S.C. § 1365(c)(3).

While the EPA remains free to bring its own subsequent enforcement action, it may also intervene as of right in a citizen suit under section 505.[78] The EPA, however, has "generally not taken a very active part in private enforcement litigation, and the courts usually have not compelled [it] to do so."[79]

If the EPA does not intervene, citizen-plaintiffs may, generally, litigate their enforcement action as they see fit. Most parties eventually reach a settlement, although some citizen suits do go to trial.[80] If the parties and the judge agree to a consent decree, the Attorney General and the EPA must be given forty-five days to review it before the judgment may be entered.[81] Barring any objections from the federal government within the forty-five-day window, the citizen-plaintiff and violator-defendant may reach whatever arrangement they choose, as long as the judge approves.[82] To deter frivolous suits and reward good-faith citizen enforcement, section 505 allows the court, in its discretion, to award litigation costs "to any prevailing or substantially prevailing party."[83]

Given that the EPA and states enjoy primary enforcement authority under the CWA, there is no similar statutory bar preventing government actions after timely filed citizen suits have commenced. As mentioned, section 505 does permit the EPA to intervene in a citizen suit, but it rarely chooses to do so.[84] In fact, the statute is otherwise completely silent on the issue of subsequent government action. This silence can lead to the situation where a citizen-plaintiff has given proper notice to all involved parties, waited the minimum sixty days, and sometime thereafter commenced an enforcement action, only to have the case be dismissed when subsequent government action results in a consent decree. In the absence of statutory guidance, courts have been left to their own devices to determine what effect subsequent government enforcement should have on first-filed citizen suits. As the next Part will

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78. *Id.* § 1365(c)(2).

79. *See* Boyer & Meidinger, *supra* note 27, at 906-07.

80. *See, e.g.*, EPA v. City of Green Forest, 921 F.2d 1394 (8th Cir. 1990).

81. 33 U.S.C. § 1365(c)(3).

82. While section 505 only allows courts to impose injunctive relief and civil penalties, "[t]he provisions of the [CWA] provide no limitation on the type of payments to which parties to citizens' suits can agree in a settlement." Sierra Club, Inc. v. Elec. Controls Design, Inc., 909 F.2d 1350, 1356 (9th Cir. 1990). Violators may agree, for example, to make charitable donations to nature conservancy or reclamation projects.

83. 33 U.S.C. § 1365(d). Although this provision does not distinguish between plaintiffs and defendants, many courts, if not most, have traditionally awarded costs to defendants only upon finding that the suit was frivolous or harassing. Kelly Davis, *Levying Attorney Fees Against Citizen Groups: Towards the Ends of Justice?*, 39 TEX. ENVTL. L.J. 39, 42-45 (2008).

84. *See supra* note 79 and accompanying text.

discuss, this has led to a mishmash of opinions from the United States Courts of Appeals.

III. CITIZEN SUIT PRECLUSION

In some form or another, most of the circuits that have considered the issue of later-begun agency action utilize claim preclusion to dismiss overfiled citizen suits.[85] The weight of circuit authority indicates that only a contrary ruling from the Supreme Court would change things. Considering that the citizen suit provision does not expressly override common law preclusion, and given the Court's interpretation of the CWA's legislative history and its reluctance toward implied repeal,[86] a contrary ruling against the circuits seems very unlikely.[87] Moreover, what little scholarly critique exists arguing that courts have misapplied preclusion to overfiled citizen suits also seems unlikely to yield any paradigm shift.[88] It can therefore be assumed for purposes of this Comment that preclusion applies. Discussed below is a brief look at two leading methods courts have used to determine whether citizen suits are precluded.

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85. *See* St. Bernard Citizens for Envtl. Quality, Inc. v. Chalmette Ref., L.L.C., 500 F. Supp. 2d 592, 603-06 (E.D. La. 2007). *But see* Chesapeake Bay Found. v. Am. Recovery Co., 769 F.2d 207, 208-09 (4th Cir. 1985) (refusing to apply preclusion).

86. Implied repeal is a judicial doctrine under which a court determines that the repeal of a previous law is necessarily implied by a subsequent act of the legislature. 1A NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 23.9 (7th ed. 2012).

87. *See Gwaltney*, 484 U.S. at 60 (citizen suits are secondary to government enforcement); Benton, *supra* note 6, at 210 (noting the potential argument that section 311(b)(6)(E)'s prohibition against the double assessment of civil penalties under sections 311 and 309 "impliedly repeals other applications of res judicata and collateral estoppel by omission"); Karen Petroski, Comment, *Retheorizing the Presumption Against Implied Repeals*, 93 CALIF. L. REV. 487, 489-90 (2004) (asserting that the Supreme Court has transformed the traditional presumption against implied repeals into a rigid rule forbidding use of the doctrine). This issue of whether later-begun agency action precludes a citizen suit, however, is relatively unexplored in the literature; a colorable argument may yet exist that it does not. That successive enforcement actions by a citizen and an agency are allowed under 33 U.S.C. § 1319(g)(6)(B) indicates at least some congressional intent to override common law preclusion to some degree, and the diligent-prosecution bar theoretically allows revisiting of an inadequate final government action, perhaps indicating further implied intent. Moreover, in certain limited circumstances where strong public policy warrants, preclusion may not apply to government consent decrees in general. *See* Alexandra Leake, *Res Judicata Effect of Consent Judgments in Patent Litigation*, 18 B.C. INDUS. & COM. L. REV. 66, 95-97 (1976).

88. *See* Alexis E. Applegate, Comment, *Common Law Preclusion and Environmental Citizen Suits: Are Citizen Groups Losing Their Standing?*, 39 B.C. ENVTL. AFF. L. REV. ELECTRONIC SUPPLEMENT 1, 9-14 (2012), http://lawdigitalcommons.bc.edu/ealr/vol39/iss3/1/; Vickers, *supra* note 8, at 1645-51.

A. Eighth Circuit: Traditional Claim Preclusion Doctrine

The claim preclusion doctrine is often applied to citizen suits facing final action in a subsequent government action (typically a consent decree). The general requirements for claim preclusion are "(1) an identity of claims in the two actions; (2) a final judgment on the merits in the first action; and (3) identity or privity between the parties in the two actions."[89] In the context of EPA or state overfiling of citizen suits, the first two prongs are easily met. There is identity of claims because both enforcement actions arise from the same cause of action, i.e., a violation of a particular portion of the CWA.[90] Further, the second prong is also met in situations where a consent decree is entered in the subsequent government action, which constitutes a final judgment on the merits. It is the third prong, however, that is problematic.[91]

As citizen-plaintiffs are not typically parties to subsequent concurrent government enforcement, to satisfy the third prong of the claim preclusion test, courts must find citizens to be in privity with the government agencies.[92] Nonparties to the original action are in privity with the parties if they have "succeeded to [a] party's interest in property, . . . if [they] controlled the prior litigation, [or] if the [original] part[ies] adequately represented [their] interests in the prior proceeding."[93] With overfiling of citizen suits, the "adequately represented" test is most applicable. Quite often, the doctrine of *parens patriae* is used to satisfy courts (and violators) that government agencies adequately represented citizen-plaintiffs' interests.[94] Broadly, *parens patriae* allows "states to bring actions on behalf of their citizens in law or

89. Frank v. United Airlines, 216 F.3d 845, 850 (9th Cir. 2000).

90. *But see* Vickers, *supra* note 8, at 1649-50 ("Courts have thus far not taken seriously the possibility that the claims made by a citizen suit might be different from those made by an agency seeking enforcement.").

91. *See id.* at 1624 ("'Privity' is a somewhat ambiguous term that is at the heart of the difficulty the courts have in applying res judicata in the context of properly filed citizen suits."). Criticism centers around whether the government truly represents the interests of the public and whether those are the same as the agencies' interests. *See* Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486 (2012); Applegate, *supra* note 88; Vickers, *supra* note 8, at 1646-49.

92. Citizen-plaintiffs can be parties to the subsequent government action if they choose to, because section 505 allows intervention as of right in the government's enforcement action. 33 U.S.C. § 1365(b)(1)(B) (2006). Likewise, the consent decree process allows for public comment outside of the judicial proceedings. *Id.* § 1319(g)(4)(A).

93. Latham v. Wells Fargo Bank, N.A., 896 F.2d 979, 983 (5th Cir. 1990) (citing Benson & Ford, Inc. v. Wanda Petroleum, 833 F.2d 1172 (5th Cir. 1987)).

94. *See* Applegate, *supra* note 88, at 7-9; Vickers, *supra* note 8, at 1626.

equity for damages not suffered by any one citizen."[95] Because citizen suits only allow for remediation of CWA violations and consent decrees require a judicial determination that they are in the public interest, it is not difficult for courts to find that the government adequately represented citizen-plaintiffs' interests in its enforcement action.[96]

In *EPA v. City of Green Forest*, the United States Court of Appeals for the Eighth Circuit upheld the lower court's dismissal of a citizen suit after a subsequent government action resulted in a consent decree.[97] With the consent decree already entered and the citizen-plaintiff conceding the issue of identity of the claims, the court was tasked only with determining privity, although the word "privity" never appears in the court's opinion.[98] The court did not engage in much analysis, however, instead relying largely on a district court opinion that analyzed whether *parens patriae* served to preclude its particular (and factually distinct) case.[99]

Indeed, the Eighth Circuit never said one way or another whether the case was truly a *parens patriae* situation or whether it was under that theory that the citizen suit was precluded. Rather, the court placed great emphasis on the supplementary role of citizen enforcement to justify preclusion.[100] It also made a fleeting reference to mootness while still in

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95. Vickers, *supra* note 8, at 1626 n.12. The contours and development of the *parens patriae* doctrine are well beyond this Comment's scope. Applicability of this doctrine, however, remains a critical component of whether citizen suits may be precluded by subsequent government action. *See* sources cited *supra* notes 90-91 (questioning the applicability of the doctrine to citizen suit preclusion). *See generally* Allan Kanner, *The Public Trust Doctrine,* Parens Patriae*, and the Attorney General as the Guardian of the State's Natural Resources*, 16 DUKE ENVTL. L. & POL'Y F. 57 (2005) (discussing a state's ability to protect its natural resources by using the *parens patriae* doctrine).

96. For a look at the role judges play in environmental consent decrees, see Patricia M. Wald, *Negotiation of Environmental Disputes: A New Role for the Courts?*, 10 COLUM. J. ENVTL. L. 1 (1985).

97. 921 F.2d 1394, 1397, 1403-05 (8th Cir. 1990). The citizen-plaintiffs were wrongfully denied intervention in the government action by the district court, which also refused to consolidate the two enforcement actions. *Id.* at 1397.

98. *Id.* at 1403. Likewise, although "privies" appears once in the court's quotation of the claim preclusion doctrine, the court never directly explained that its discussion of *parens patriae* was meant to establish privity between the citizen-plaintiff and government. *Id.*

99. *Id.* at 1403-04 (citing United States v. Olin Corp., 606 F. Supp. 1301 (N.D. Ala. 1985)).

100. *See id.* at 1403 ("Recognizing the preeminent role that government actions must play in the CWA enforcement scheme, we hold that [the citizen suit is precluded]."); *id.* at 1404 ("In view of the preeminent role that must be afforded the EPA in enforcing CWA violations . . . we hold that it was proper for the district court to dismiss [the citizen suit].").

the guise of discussing claim preclusion.[101] However convoluted the opinion may have been, preclusion seems to be what the court intended. While the court recognized "that there may be some cases in which it would be appropriate to let a citizens' action go forward in the wake of a subsequently-filed government enforcement action," the entry of the consent decree meant this case was not one of them.[102]

B. Seventh Circuit: Added Diligent Prosecution Test

The United States Court of Appeals for the Seventh Circuit also believes overfiled citizen suits are subject to claim preclusion, but in *Friends of Milwaukee's Rivers v. Milwaukee Metropolitan Sewerage District*, the court added a slight twist to the analysis.[103] The facts of the case have been described as "an environmentalist's worst nightmare," involving "huge environmental violations exacerbated by a complete lack of regulation, resulting in over thirty years of damage."[104] In 1977, the Milwaukee Metropolitan Sewerage District (MMSD) entered into a stipulation with the State of Wisconsin regarding more than sixty violations of its discharge permits.[105] The stipulation imposed no fines, but required $2 billion in improvements to MMSD's facilities over the next two decades.[106] Not surprisingly, violations continued, and in 2001, the Friends of Milwaukee's Rivers (FMR) sent notice to the EPA, the State of Wisconsin, and MMSD of its intent to bring a citizen suit enforcement action.[107]

One day before the sixty-day notice period expired, the State and MMSD unsuccessfully tried to enter a new stipulation in their original case.[108] When subsequent negotiations between the three parties broke down, and FMR commenced its citizen suit in 2002.[109] The same day FMR filed its suit, the State filed its own enforcement action that quickly resulted in a stipulation similar to the one previously denied during the

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101. *See id.* at 1404 ("Since citizens suing under the CWA are cast in the role of private attorneys general, as a practical matter there was little left to be done after the EPA stepped in and negotiated a consent decree.").

102. *Id.*

103. 382 F.3d 743, 757-65 (7th Cir. 2004).

104. Vickers, *supra* note 8, at 1635 (citing *Friends of Milwaukee's Rivers*, 382 F.3d at 748-51). Sadly, the fact pattern is hardly unique. *See, e.g.*, La. Envtl. Action Network (LEAN) v. City of Baton Rouge, 677 F.3d 737, 740-42 (5th Cir. 2012) (per curiam) (long-standing pollution by a municipality that was largely ignored by regulators).

105. *Friends of Milwaukee's Rivers*, 382 F.3d at 749.

106. *Id.*

107. *Id.* at 749-50.

108. *Id.* at 750.

109. *Id.*

notice period.[110] Soon thereafter, MMSD sought dismissal of the citizen suit on grounds of claim preclusion.[111]

The Seventh Circuit first noted the citizen suit statute provided no bar to the citizen suit because it was filed before the government action.[112] The court next considered whether claim preclusion warranted dismissal.[113] Moving through the elements, the court found FMR's claims were the same as those in the state's settled action under Wisconsin's "transactional" approach to identity of claims.[114] Looking then to whether FMR was in privity with the state, the court was unwilling to presume the state was acting in its *parens patriae* role.[115] Rather, the court looked to section 42 of the Restatement (Second) of Judgments, which instructs:

> A person is not bound by a judgment for or against a party who purports to represent him if . . . [t]he representative failed to prosecute or defend the action with due diligence and reasonable prudence, and the opposing party was on notice of facts making that failure apparent.[116]

With that in mind, the Seventh Circuit laid out its test for whether citizens are precluded by subsequent government action: "[I]n order for the state agency to be in privity with the public's interests, the state's subsequently-filed government action must be a diligent prosecution."[117]

To appraise the diligence of the government's prosecution, the court turned to the citizen suit provision for guidance.[118] Looking at the diligent-prosecution bar, the court focused on the fact that for a government action to be sufficient to bar a citizen suit, it must "require

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110. *Id.* at 750-51.

111. *Id.* at 751.

112. *Id.* at 752-57. The court was unconvinced the original denied stipulation in 2001 constituted a diligent prosecution. *Id.* at 753-54.

113. *Id.* at 757.

114. *Id.* 757-58. The "transaction" approach for claim identity looks at "whether the facts are related in time, space, origin, or motivation, [and] whether they form a convenient trial unit." *Id.* at 757 (alteration in original) (quoting N. States Power Co. v. Bugher, 525 N.W.2d 723, 729 (Wis. 1995) (internal quotation marks omitted)).

115. *Id.* at 759.

116. RESTATEMENT (SECOND) OF JUDGMENTS § 42(1)(e) (1982).

117. *Friends of Milwaukee's Rivers*, 382 F.3d at 759. It would seem as though the "diligent prosecution" language in the court's test is perhaps a reference to the citizen suit provision rather than the language used in the Restatement, because the court's test makes no mention of the "reasonable prudence" portion of the Restatement test. *Cf.* Vickers, *supra* note 8, at 1637. If that is the case, the court's "diligent prosecution" would not require a showing of both elements of the Restatement test. It may rather be simply that the court saw "reasonable prudence" as somehow superfluous or otherwise present if diligent prosecution exists. It is likewise unclear what is to be made of the "opposing party . . . notice" portions in the Restatement.

118. *Friends of Milwaukee's Rivers*, 382 F.3d at 759.

compliance" with the CWA.[119] Therefore, the Seventh Circuit held, "[I]f the judicial action is 'capable of requiring compliance' with the Act and is 'calculated to do so,' the citizens' suit will be barred."[120]

Applying its new test to the case, the court engaged in a lengthy review of the new stipulation between the State of Wisconsin and MMSD.[121] The court concluded that it could not determine from the evidence available to it whether the stipulation was calculated to require compliance.[122] As such, it reversed the district court's application of claim preclusion and remanded the case for further determination.[123] The court instructed that the district court would be warranted in reapplying claim preclusion if reviewing a more complete record revealed the stipulation was calculated to require compliance.[124] In that event, the Seventh Circuit added, the district court would have to weigh whether or not to apply the fairness exception to claim preclusion available under state law.[125]

IV. IDENTIFYING THE PROBLEMS OF CITIZEN SUIT PRECLUSION

Preclusion of citizen suits may not seem to present many problems. Indeed, it is in theory beneficial because preclusion prevents repetitive or unnecessary litigation. At the end of the day, violators are punished either way, and their violations, abated. And the enforcing agency will presumably impose remedial measures strict enough to force compliance, though maybe not as strict as citizen-plaintiffs would have preferred.[126] In these regards, the public is, for the most part, no worse off because of preclusion. There are, however, a small number of problems that emerge. While not earth-shattering, these problems exist nonetheless and violate the spirit of the CWA. What follows is a look at four problems that arise when citizen suits are precluded.

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119. *Id.* (quoting 33 U.S.C. § 1365(b)(1)(B) (2000)).

120. *Id.* (quoting Jeffrey G. Miller, *Overlooked Issues in the "Diligent Prosecution" Citizen Suit Preclusion*, 10 WIDENER L. SYMP. J. 63, 84, 85 (2003)); *see also id.* ("[T]he statute does not require that the [State] succeed; it requires only that the [State] try, diligently." (quoting Supporters to Oppose Pollution v. Heritage Group, 973 F.2d 1320, 1324 (7th Cir. 1992) (internal quotation marks omitted))); *id.* at 763 ("The concern with diligent enforcement is *whether* violations are prosecuted, not *how* they are prosecuted.").

121. *Id.* at 759-65.

122. *Id.* at 765.

123. *Id.*

124. *Id.*

125. *Id.*

126. *But see, e.g.*, La. Envtl. Action Network (LEAN) v. City of Baton Rouge, 677 F.3d 737, 741-44 (5th Cir. 2012) (per curiam); *Friends of Milwaukee's Rivers*, 382 F.3d at 749-51.

A. Problem 1: Missed Opportunities

There are two salient aspects of citizen suits that are lost when they become precluded. First, citizen suits serve an important and intended purpose of providing oversight of the government's diligence in enforcing the CWA.[127] Under traditional claim preclusion, however, once the government and violator reach an agreement, the consent decree is all but off-limits to citizen enforcement.[128] Second, citizen suits serve a vital function that few agency enforcements provide—public exposure.[129] Public adjudication serves an underappreciated yet vital role that adds value well beyond that of a consent decree alone.[130] When first-filed citizen suits are precluded by subsequent government action, they cannot contribute to the broader public record.[131] Because the rationale for precluding citizen suits is often that they provide nothing more than the government already achieved, these points are particularly important in assessing the relative value of what is lost by not maintaining those suits.

B. Problem 2: Least-Cost Incentive

The value of citizen suits aside, the most glaring problem is the perverse incentive citizen suit overfiling creates for violators. It is no small secret violators often prefer dealing with government agencies rather than citizen-plaintiffs.[132] In *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, a case that reached the Supreme Court, the defendant purposely sought government enforcement within the sixty-day notice period to preclude the citizen suit.[133] The defendant went so far as to draft the state's complaint and pay its filing fee in court.[134] On the last day of the notice period, the parties entered a consent decree that

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127. *See supra* note 57 and accompanying text.

128. The public may comment on consent decrees, and courts may reopen consent decrees in certain circumstances, but the former significantly diminishes the role of citizen enforcement, and the latter is an uphill battle.

129. Public awareness is a large component of citizen suits under the Emergency Planning and Community Right-To-Know Act of 1986. *See* Robert W. Shavelson, *EPCRA, Citizen Suits and the Sixth Circuit's Assault on the Public's Right-To-Know*, 2 ALB. L. ENVTL. OUTLOOK 29, 37 (1995) ("Since its enactment in 1986, EPCRA arguably has done more than any other federal statute to raise corporate, government and citizen conscienceness [sic] about toxic pollution.")

130. *See* Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255, 1273-74 (2005) ("The trial is a site of 'deep accountability' where facts are exposed and responsibility assessed . . . .").

131. While administrative proceedings do create a public record, they rarely garner the attention and coverage a court case can.

132. *See* Vickers, *supra* note 8, at 1627, 1641.

133. 528 U.S. 167, 176 (2000).

134. *Id.* at 176-77.

required a $100,000 civil penalty and "every effort" by the defendant to comply with its permit.[135] By comparison, the district court in the citizen suit found the defendant gained over $1,000,000 in benefits by violating its permits.[136] The court imposed over $400,000 in fines, an amount it determined under the CWA guidelines and in light of the "significant amount of legal fees" the citizen-plaintiff was entitled to receive.[137]

While certainly an extreme case, *Laidlaw* nevertheless hints at the malincentive overfiling creates. With the specter of preclusive agency action looming over timely filed citizen suits, defendants may bide their time in the hopes of a better settlement offer from the government. Once a second offer arises, the rational defendant will pick whichever is cheaper.[138] The additional remediation or penalties the defendant elects to forgo by choosing the weaker offer, however slight they may be, represent a loss to society. Allowing this lesser-cost election belies the strict compliance the CWA demands and undermines the public interest in maximum enforcement.[139]

C. Problem 3: Loser's Penalty

Perhaps fittingly in some way, the application of preclusion poses at least one disadvantage to defendants who must defend multiple actions. When courts dismiss citizen suits because of government action but still award citizen-plaintiffs litigation costs, defendants get stuck with the bill for their own litigation costs in two actions *and* the plaintiff's costs. This amounts to what could be called a "loser's penalty," measured either as the entire cost of the now unnecessary citizen suit or as the cost of defending the subsequent government action in addition to a citizen suit.[140] In either case, the defendant incurs extra expense because the citizen suit has no bearing on when the government decides to bring suit.

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135. *Id.* at 177.

136. *Id.* at 178.

137. *Id.*

138. To be sure, this holds true as long as the citizen-plaintiff is unwilling to negotiate below the government's offer. If the offers are at all similar, however, it begs the question why the agency would file a subsequent action in the first place, rather than intervene or stand down.

139. *See supra* notes 22, 58 and accompanying text. That there are *three* enforcers demonstrates Congress's desire for maximum enforcement.

140. Assuming the marginal increased cost to defendant of government intervention in citizen suit is less than maintaining separate government and citizen actions (and possible appeals).

D. Problem 4: Wasting Judicial Resources

In the end, it is really the courts that are most put-upon by the preclusion of citizen suits. Defendants who settle in subsequent government actions obviously preferred that option relative to the citizen suit. Prevailing citizen-plaintiffs get a violation enforced and may receive attorney's fees to boot. Courts, on the other hand, get stuck with two cases instead of one, and when citizen suits are precluded, they must expend resources to dispose of the unnecessary case. It is certainly ironic that Congress was concerned that *citizens* would burden the courts, yet ultimately *agencies* impose a burden when they do not bring a timely enforcement action, choose not to intervene in a citizen suit, and then bring their own subsequent action.[141]

V. ADDRESSING THE PROBLEMS OF CITIZEN SUIT PRECLUSION

Having identified a number of problems that result from precluding citizen suits, the question becomes, What should be done about them, if they are worth dealing with at all? If preclusion is applicable, there is little reason not to apply it. Preclusionary doctrines sit at the very core of what we think constitutes justice and fairness. The value of preventing unnecessary or redundant litigation most often outweighs that of allowing parties to relitigate claims or maintain claims that are moot.[142] Indeed, that is why many circuit courts have employed these doctrines—albeit in a less-than-uniform manner—to preclude citizen suits following subsequent government action. To do otherwise, and allow citizen suits to continue, would be unfair to violators and a tremendous waste of judicial resources. Whatever weight the problems identified above may carry, they do not seem to outweigh the compelling interests in favor of preclusion.

The real solution to these problems then would not seem to be barring preclusion, but avoiding it altogether. While many have examined the reasons why preclusion should or should not apply, there has been little or no discussion about heading off preclusion as a possible alternative.[143] When addressing the problems caused by citizen suit preclusion in situations where citizens and the government are forced to work together, it becomes clear that it is at least worth considering

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141. *See supra* note 37 and accompanying text.

142. Ignoring, for a moment, the constitutional implications of mootness on standing.

143. *See, e.g.*, St. Bernard Citizens for Envtl. Quality, Inc. v. Chalmette Ref., L.L.C., 500 F. Supp. 2d 592, 604-06 (E.D. La. 2007); Applegate, *supra* note 88, at 9-14; Vickers, *supra* note 8, at 1645-52; Donovan, *supra* note 61, at 166-177.

whether such a change is warranted. Not only do the disadvantages of preclusion go away, but the resulting framework provides several benefits to boot.

The proposed model would avoid preclusion and mootness by limiting the number of enforcement actions to one. For any one violation, the government may either choose to bring an enforcement action before or within the sixty-day notice period or let the statutory preclusion clock run. After sixty days, either the government or citizen-plaintiff may file an action. Once one party commences an action, however, the other party *must* intervene and join the action if it wishes to play a role in the enforcement; the other party cannot bring its own subsequent action.

As radical as the model may sound, it is not all that different than the section 505 framework as it currently stands. Citizens may intervene in a government enforcement action already commenced, as may the government in a first-filed citizen-plaintiff action. The only difference here is that the government is prevented from bringing a collateral action after a citizen suit is filed. Agency discretion is completely unaffected. The government still has discretion to unilaterally bring an action within the sixty-day period. And the government still faces the possibility of a citizen-intervener joining its action within that period. With this model in mind, consider how it might apply to the four problems above.

A. Problem 1: Missed Opportunities

The proposed model ensures citizens always have access to the court and a stake in the enforcement of the CWA. Without the possibility of preclusion, citizens may actively monitor and help guide government enforcement as parties to the litigation. They may likewise be able to shine light on violations and inadequate enforcements. Very important, as well, is the fact that citizen-plaintiffs are much more likely to receive litigation costs because they will always be a prevailing party if there is only ever one enforcement action.[144]

B. Problem 2: Least-Cost Incentive

The proposed model would end defendants' practice of shopping for the best deal in concurrent actions. If maximum enforcement is not in the public interest due to policy considerations or other circumstances, citizens intent on maximum enforcement will not be able to threaten the

144. Under the current framework, citizen-plaintiffs may not always be regarded as a prevailing party in their suit when a defendant-violator seeks to have the citizen suit dismissed following resolution in a subsequently filed government action.

public interest if timely government action or intervention is taken. In this way, agency discretion is not infringed, while defendants will, hopefully, no longer be able to game the system.

C. Problem 3: Loser's Penalty

In this situation, the proposed model would enhance citizen suits' ability to do what they were intended to do: force the government to take action.[145] If agencies and defendants know they are locked into a citizen suit once filed, both parties will have strong incentives to settle within the sixty-day notice period. Defendants can thus avoid paying citizen-plaintiffs' litigation costs. And even if the government does not bring suit in that period, defendants are at least not subjected to the penalty of having to defend two actions if the government cannot bring its own action after the citizen suit is filed.

D. Problem 4: Wasting Judicial Resources

Currently, citizen suits subject to preclusion waste valuable judicial resources when the government subsequently files its own enforcement action in duplicative litigation. Further judicial resources must be spent disposing of a precluded citizen suit and litigating any appeals. Under the proposed model, the maximum caseload for courts relating to any certain violation is always one. The government will bring an initial action within sixty days of a citizen's notice, or either party may bring one after that point. Congress sought to conserve judicial resources by placing limits on citizen suits. This one-action rule furthers that goal and economizes it.

VI. PROPOSING SOLUTIONS TO THE PROBLEM OF PRECLUDED CITIZEN SUITS

The most challenging feature of the proposed model is actually making it work. There are several ways it could take shape. What follows are two ways current stakeholders can exercise their power to achieve all, or at least some, of the model's aspirations.

A. Congressional Legislation

The most obvious way to avoid preclusion would be for Congress to amend the CWA. The amendment would provide that in the event of a timely filed citizen suit before which neither the EPA nor the state

145. *See supra* notes 47-49 and accompanying text.

agency commence a diligent prosecution within the sixty-day notice period, the EPA would be barred from independent subsequent action. Its recourse would instead be intervention in the citizen suit. The logical place for such an amendment would be in section 505, the citizen suit statute, in the form of a new subsection "i" entitled "Effect of action." The new subsection might read:

> Action taken by a citizen under subsection (a)(1) shall not affect or limit the Administrator's or Secretary's authority to enforce any provision of this chapter, or that of a State under a State law comparable to this subsection; except that any violation with respect to which the citizen has commenced an action under subsection (a)(1) shall not be the subject of a civil action under section 1319(b) or 1319(d) of this title.

Such an amendment would leave in place the ability of the EPA to bring its own action for criminal and administrative penalties at any time, as well as the authority of the states under comparable laws. Once a citizen suit commences, however, the EPA would be forced to intervene. Of course, prior to commencement of the citizen suit, the EPA is free to bring whatever action it chooses to bring.

Alternatively, a less substantial amendment could make courts more active participants in shaping enforcement actions. The subsection granting district courts jurisdiction over citizen suits could be amended to require consolidation of concurrent enforcement actions by the EPA and citizens. Such an amendment would be consistent with the original congressional intent regarding how courts and agencies might deal with multiple enforcement actions.[146] It would likewise reflect the attitude of the United States Court of Appeals for the Fourth Circuit, which, relying on the legislative history, suggested that consolidation, not preclusion, is the proper course of action.[147]

As part of either amendment, the sixty-day notice period could also be extended. If the brevity of the current notice window is a significant factor in agency overfiling of citizen suits, the period should be lengthened to ninety days. If neither of the proposed amendments is made, this change would at least make it less likely citizen suits are precluded, while still allowing speedy resolution of violations. Extending the notice period any further would be warranted only by a strong showing from the EPA that it is physically impossible to initiate an enforcement action within ninety days.

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146. *See supra* notes 57, 63 and accompanying text.

147. *See* Chesapeake Bay Found. v. Am. Recovery Co., 769 F.2d 207, 208-09 (4th Cir. 1985).

None of the amendments offered above, nor others in the same vein, would infringe on EPA discretion any more than citizen suits already do. As noted, the EPA has complete discretion during the notice period, however long it is, to bring its own enforcement action. With citizen intervention already available in actions commenced within the notice period, the decision to bring an enforcement action is really the only completely discretionary action the EPA can take. Therefore, under the proposed amendments, the EPA loses no discretion once an action is commenced; it enjoys as much freedom as it does under the current statute in that it may be forced to share an enforcement action with a citizen through intervention.

B. Judicial Management

As touched upon above, courts can also play a role in avoiding preclusion of citizen suits. The advantage of this solution is that courts already have everything they need to make it happen. Under the Federal Rules of Civil Procedure, courts are in an excellent position to guide and shape enforcement actions so far as duplicative actions are concerned. Rule 42 allows courts to "(1) join for hearing or trial any or all matters at issue in the actions; (2) consolidate the actions; or (3) issue any other orders to avoid unnecessary cost or delay" when "actions before the court involve a common question of law or fact."[148] Given that venue, cause of action, operative facts, and defendant are all the same, and that intervention is available in either enforcement action to either plaintiff,[149] successive enforcement actions seem like perfect candidates for consolidation. Congress said as much when adopting the citizen suit provision.[150]

VII. CONCLUSION

Citizen suits under the CWA have long served a vital role in prompting and achieving compliance with the Act. Congress intended citizens to be active participants in the enforcement process but to have a secondary role. Unfortunately, this second-class status can work against citizen suits when primary enforcement agencies overfile and reach a judgment first. Not only does this practice undermine the intent behind

148. FED. R. CIV. P. 42.

149. While not granted intervention as of right like citizens and the EPA under the CWA, states could presumably attempt to intervene under other provisions. *See* FED. R. CIV. P. 24.

150. *See supra* note 57 and accompanying text.

citizen suits, but it also creates real consequences when it precludes citizen suits.

This Comment hopes to contribute in a small part to the discussion surrounding what can be done regarding citizen suit preclusion. While many jurists and scholars have already tackled the issues from traditional angles, there is something to be said for thinking outside the preclusion box. By enacting modest changes to the citizen suit framework, preclusion can become a nonissue while we also economize judicial resources, save defendants money, increase compliance, and perhaps most importantly, keep citizens in the fight.

The chances of this model being adopted, even the currently available judicial management aspect of it, are slim. The main goal of this Comment, however, is to raise awareness and spark a conversation about whether it is time to update a statute written over forty years ago. Congress was inspired in 1972 to tackle big problems with the help of individual citizens. Hopefully it can find that magic again.