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ROBERT D. SNOOK*

INTRODUCTION

For over twenty years, the environmental citizen suit has had the potential to be, and has occasionally functioned as, an important tool that empowers individual citizens to protect their local environment and assist in directing environmental policy through private enforcement actions. Unfortunately, in certain circumstances, the effectiveness of the citizen suit as a tool has been limited by a battery of procedural barriers raised by polluters and others. Some of these barriers are found in the text of statutes and others derive from federal common law.1 The defendants raising these barriers include the usual list of suspects, such as industrial manufacturers and real estate developers, but also include local governments.2 It is self-evident that industry defendants oppose citizen suits as a cost matter. However, it is interesting that government regulators sometimes side with defendants in citizen suit

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2. See Hallstrom, 831 F.2d at 890 (county government); Orange Environment, 923 F. Supp. at 530 (county government); Davies, 43 ERC at 1225 (private company).
cases. This may stem from a belief that "citizen activism in environmental . . . enforcement . . . can lead to tension between the government and the governed. The government may fear that citizen involvement in environmental enforcement will disrupt its own enforcement efforts and reduce its flexibility to tailor enforcement decisions to particular circumstances" as well as consume scarce public funds on issues that may be of secondary importance. The irony of the situation becomes apparent when one realizes that even as government regulators side with defendants against private citizens, government officials lavish praise on the citizen suit process generally. All the while, Congress, unwilling to correct certain obvious inadequacies in the statutory sections, continues to copy these sections verbatim from one environmental statute into another, thereby preserving the textual flaws and ambiguities.

What was Congress's intent in providing essentially the same citizen suit provision in all modern environmental laws? Have they fulfilled that purpose, and, if not, what barriers have prevented this? Finally, what needs to be changed, either judicially or legislatively, to reinvigorate the citizen suit process?

It is the thesis of this Article that citizen suits, as they are currently drafted and interpreted, fail to fulfill their true potential. The defects in the text of various citizen suit provisions, and the inconsistent interpretation given them by the courts, prevent private parties adversely affected by pollution from acting effectively in the absence of government enforcement. Simultaneously, citizen suits, as they are currently employed, discourage the business community from cooperating with government agencies in correcting known environmental problems. Finally, citizen suits, as currently used by various private groups, seriously interfere with effective government regulatory action because the initiation of a citizen suit removes the threat of an enforcement action, which is the principal

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4. As one Senate report stated, "citizen suits are a proven enforcement tool. They operate as Congress intended—to both spur and supplement . . . government enforcement actions. They have deterred violators and achieved significant compliance gains." This same report added: "In the past two years, the number of citizen suits to enforce NPDES permits has surged so that such suits now constitute a substantial portion of all enforcement . . . under this Act." S. REP. No. 99-50, at 28 (1985); see also Jeffrey G. Miller, Private Enforcement of Federal Pollution Control Laws Part II, 14 ENVTL. L. REP. 10063, 10063 (1984) [hereinafter Miller, Part II]; Doris K. Nagel, Comment, Environmental Law—Citizen Suits and Recovery of Civil Penalties, 36 U. KAN. L. REV. 529, 532 (1988).
coercive mechanism available to regulators. These suits can force a government agency to expend a significant part of its diminishing public resources to address matters that may be of significance to a few well-financed individuals and organizations, but may ultimately prove to be of limited importance to protecting the environment.

This Article concludes that these deficiencies may be resolved if the courts, or preferably Congress, permit the development of a unified theory that identifies when an administrative enforcement action will be deemed sufficient to bar initiation of an independent citizen suit. Specifically, it is advanced that a private citizen should be prohibited from bringing suit against an alleged polluter if an appropriate federal or state administrative agency has (i) brought suit in federal or state court with respect to the specific acts in question, (ii) entered into an administrative consent order with the violator, or, in very limited circumstances, (iii) entered into a formal memorandum of understanding with the violator. Development of such a theory will inevitably place effective veto power over environmental enforcement in the hands of government regulators, but will preserve the rights of citizen plaintiffs to act when the government cannot or will not do so.

Part I of this Article generally examines the text and legislative history of the citizen suit provisions. Part II discusses the case law relevant to an interpretation of these provisions. Part III advances a modest proposal for the revision of these statutes.

I. Statutory Language and Legislative History

A. Statutory Language of Citizen Suit Provisions

All major environmental laws, specifically the Clean Air Act,\(^5\) the Federal Water Pollution Control Act, commonly known as the Clean Water Act,\(^6\) the Resource Conservation and Recovery Act ("RCRA"),\(^7\) and the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"),\(^8\) as well as a host of less well known environmental laws, such as the Toxic Substances Control Act,\(^9\) and the Surface Mining Control and Reclamation Act,\(^10\) contain essentially the same citizen suit provisions.\(^11\) They

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all trace their origin to section 304 of the Clean Air Act. In the beginning, Congress exhibited a “tendency to literally ‘lift’” section 304 of the Clean Air Act and “include[ ] [it] in all new federal environmental statutes or major statutory amendments.” Subsequently, several courts used the case law between statutes interchangeably.

The text of the citizen suit provisions is deceptively simple. For example, the Clean Water Act states the following:

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 (i) to the Administrator, (ii) to the State
   in which the alleged violation occurs, and (iii) to any alleged
   violator of the standard, limitation, or order, or
   (B) if the Administrator or State has commenced and is dili­
   gently prosecuting a civil or criminal action in a court of the
   United States, or a State to require compliance with the stan­
   dard, limitation, or order, but in any such action in a court of
   the United States any citizen may intervene as a matter of
   right.

Consequently, there are but two conditions which must be met in order to file a citizen suit. First, the citizen plaintiff must give notice to the violator, the United States Environmental Protection Agency (“EPA”), and any relevant state agency before acting. Second, the suit may be commenced only if the appropriate government agency is not already “diligently prosecuting” its own action.

13. See Hallstrom, 844 F.2d at 600 (“At least eight environmental statutes contain identical or similar provisions. Courts have construed these provisions identically de­spite slight differences in wording.” (citations omitted)); Roe v. Wert, 706 F. Supp. 788, 792 (W.D. Okla. 1989) (“No circuit has addressed the sixty (60) days notice provision of section 9659. However, it is informative that some circuits have addressed the notice requirements of various other environmental statutes.”).
15. See Proffitt v. Rohm & Haas, 850 F.2d 1007, 1011 (3d Cir. 1988) (“There are
As discussed below, these two elements, the notice requirement and the diligent prosecution requirement, as well as a number of common law and prudential doctrines, have formed the crux of efforts by opponents to block or delay citizen suits. Poor drafting and worse interpretation of these two statutory elements has led to the successful prevention of citizen suits. The vague drafting and inconsistent interpretation, however, have not occurred in a vacuum. Conversely, they are the inevitable result of a “tension” inherent in Congress’s attitude towards citizen participation in the enforcement process, specifically, the tension between Congress’s intent to encourage citizen participation in environmental enforcement and Congress’s simultaneous desire to prevent citizen interference with government enforcement. This tension is most clearly revealed in the legislative history behind the citizen suit provisions.

The legislative history of the citizen suit provisions itself has an interesting history of interpretation. Specifically, this author has previously argued that the pertinent legislative history complicates, rather than clarifies, the understanding of this statute because it presents two different and inherently contradictory positions taken by Congress with respect to citizen suits: (i) citizen suits are to be encouraged in order to aid government enforcement efforts; and (ii) citizen suits should be curtailed in order to avoid infringing on the discretion of administrative agencies. Another commentator has expressed it differently, suggesting that the citizen suit provisions unequivocally express Congress’s desire to secure citizen participation in environmental enforcement, but that there was a subsequent struggle to direct the nature of such participation. Specifically, “[t]here is a difference . . . between encouraging citizens to strike out on their own and encouraging them to inspire the agency who is supposed to do the job.”

only two limitations on the right of the citizen to bring suit. First, the citizen must give sixty days’ notice . . . . Second, a citizen may not bring his or her own action if the ‘Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States . . .’”); see also Miller, Part II, supra note 4, at 10063-64.

16. See infra Part II.
18. 2 WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW 64 (1986).
20. RODGERS, supra note 18, at 63.
Whether characterized as a struggle about citizen participation or the form of that participation, the legislative history contains helpful references for those opposed to citizen suits. It is these references that several courts have used to defeat citizen initiatives, and it is therefore helpful to examine the legislative record.

B. Legislative History of the Citizen Suit Provisions

Some of the comments by legislators involved in passage of the various citizen suit provisions suggest that Congress viewed citizen suits as an inexpensive alternative to government enforcement, and that the provisions were therefore included in an effort to encourage the EPA, or relevant state agencies, to act when appropriate.21 From these comments, it appears clear that Congress, at least in part, believed that the provisions would allow citizens to act as private attorneys general and enforce the laws directly.22 Implicit in this approach was the view that individual citizens, because they would be directly affected by the pollution, would be especially motivated, and thus uniquely effective, advocates. Furthermore, it was assumed that the EPA was understaffed and its resources inadequate.23

Alternatively, there were some who viewed citizen suits with suspicion, fearing that the citizen suit provisions would cause a flood of litigation, thereby blocking the courts and hindering the government’s own regulatory actions.24 In addition, some authorities were concerned that citizen suits, because they are not controlled by a single national agency, would result in haphazard application of environmental laws.25

As a consequence, it is possible to conclude that “[c]itizen initiatives to enforce the . . . pollution laws [were] encouraged in various ways, notably by allowing recovery of the costs of litigation, including attorney’s and expert witness fees, and extending intervention as of right in related cases.”26 “This explicit prodding of citizen action [was] blurred somewhat by the legislative insistence,

21. See infra notes 26-30 and accompanying text.
24. See infra notes 34-40 and accompanying text.
26. Rodgers, supra note 18, at 63.
equally vehement, that the citizen suit section is constructed in a way "to encourage and provide for agency enforcement" by virtue of the notice and diligent prosecution requirements.27 Interestingly, the dichotomy of opinion referred to above can be found in the legislative history of each of the environmental laws beginning with the Clean Air Act and running through the reauthorization debates for CERCLA.

For example, with respect to the first view, some in Congress said during the legislative debates surrounding passage of the Clean Air Act that the suits were permitted in order "to both goad the responsible agencies to more vigorous enforcement of anti-pollution standards and, if the agencies remained inert, to provide an alternative enforcement mechanism."28 Senator Muskie stated that "[s]tate and local governments have not responded adequately [to the need for enforcement]. It is clear that enforcement must be toughened [sic]. . . . More tools are needed, and the Federal presence and backup authority must be increased."29 Indeed, it was believed that "[g]overnment initiative in seeking enforcement under the Clean Air Act has been restrained. Authorizing citizens to bring suits for violations . . . should motivate governmental . . . enforcement and abatement proceedings."30

Opponents of the provisions claimed that insisting on the need for alternative private enforcement in effect denigrated the professionalism of the responsible government agencies.31 Therefore, as a second justification for introducing citizen suits, Senator Muskie argued that citizen suits provided a valuable source of assistance to the overworked agencies: "I think it is too much to presume that, however well staffed or well intentioned these enforcement agencies, they will be able to monitor the potential violations."32

Thus, in regard to citizen suit provisions generally, the legislative history of the Clean Air Act supports the view that Congress's intent was to push government regulators to greater enforcement action and to supplement their thinly stretched resources. As one article noted, citizen suits were designed to "expand the scope of

27. Id.
30. S. Rep. No. 91-1196, at 36-37; see also Miller, Part II, supra note 4, at 10064.
31. See Miller, Part II, supra note 4, at 10064.
enforcement without burdening public funds and encourage public authorities to enforce environmental laws.”\(^{33}\)

An entirely different view of the role of private parties is seen, however, with regard to the inclusion of the notice and diligent prosecution provisions. The very existence of these sections implies that Congress was hesitant to allow unfettered citizen access to the courts.\(^{34}\) For example, Senator Hruska remarked, “[t]he functioning of the department could be interfered with, and its time and resources frittered away by responding to these suits.”\(^{35}\) Consequently, the two previously mentioned restrictions were placed on citizen suits to assure that they would complement, and not interfere with, federal regulatory and enforcement programs. “This is confirmed by . . . the precluding of [citizen] suits if a compliance action is being ‘diligently’ prosecuted.”\(^{36}\) As one court noted, these two sections combined suggest that “Congress intended to provide for citizens’ 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.”\(^{37}\)

As noted above, the citizen suit provisions first described in the Clean Air Act were copied, essentially verbatim, in each of the succeeding environmental laws passed over the following two decades. In most cases there was little discussion of the need for citizen suits or how to provide for such suits. To the extent there was any discussion of the issue, it tended to simply echo the arguments heard during passage of the Clean Air Act.

For example, during passage of the Clean Water Act, what little is found in the legislative history with respect to citizen suits reiterates the point 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” a citizen suit.\(^{38}\) The record continues, pointing out that the courts would then examine the agency’s actions to determine if they were adequate and would then permit, consolidate, or dismiss the

\(^{33}\) Wagstaff, supra note 25, at 894.

\(^{34}\) See Walls v. Waste Resource Corp., 761 F.2d 311, 317 (6th Cir. 1985).


\(^{36}\) Rodgers, supra note 18, at 63.

\(^{37}\) Baughman v. Bradford Coal Co., 592 F.2d 215, 218 (3d Cir. 1979) (quoting City of Highland Park v. Train, 519 F.2d 681, 690-91 (7th Cir. 1975)) (citing 116 Cong. Rec. 32,926 and 33,102 (remarks of Senator Muskie); 116 Cong. Rec. 33,183 (remarks of Senator Hart)).

citizen action as required.\footnote{39} It is clear that citizen actions were deemed supplementary to agency proceedings, and further, that the courts were to act as arbiters of whether such private efforts could continue in the face of some form of government enforcement.\footnote{40} This is not to say that citizen participation was to be discouraged. "The [EPA] and the State should actively seek, encourage and assist the involvement and participation of the public in . . . enforcement."\footnote{41} However, note that in two adjacent paragraphs, the legislative history refers on the one hand to its "[c]oncern" about "frivolous and harassing [citizen] actions," and on the other hand, to "legitimate [citizen] actions" as "a public service."\footnote{42} Thus, even in the brief references to citizen suits in the Clean Water Act, there is evidence that Congress viewed such actions as both a valuable public service and as a potential threat to environmental enforcement at the same time.

Similarly, during the CERCLA reauthorization debates, several representatives commented on the absence of a provision allowing citizens to sue in cases of imminent endangerment (as is permitted by RCRA) and complained that "[t]he argument that citizens' suits would interfere with an energetic and well organized cleanup program simply is not supported by the facts."\footnote{43} In fact, the House Report expressly stated that the notice and diligent prosecution requirements would prevent such private enforcement actions from impeding government efforts.\footnote{44} For reasons that will be of interest later, it should be noted that the Report added that diligent prosecution might include either the actual filing of a lawsuit by the EPA or some other "aggressive" enforcement action, such as an administrative order.\footnote{45} Any such activity could constitute a sufficient bar to ensure that such enforcement actions will not be deterred by the diversion of resources that such suits might otherwise engender. The bars are also necessary to avoid the confusion or termination of settlement negotiations because EPA, a State, or potentially responsible parties face citizen suit litigation relative

\begin{footnotes}
\footnote{39}{See id., reprinted in 1972 U.S.C.C.A.N. at 3746.}
\footnote{40}{See id., reprinted in 1972 U.S.C.C.A.N. at 3746.}
\footnote{41}{Id. at 12, reprinted in 1972 U.S.C.C.A.N. at 3679.}
\footnote{42}{Id. at 81, reprinted in 1972 U.S.C.C.A.N. at 3747.}
\footnote{45}{Id., reprinted in 1986 U.S.C.C.A.N. at 3058-59.}
\end{footnotes}
to matters under negotiation. The basic concept is that the purpose of citizens suits is to augment, not duplicate, government enforcement efforts. Consequently, instances where EPA or a State are involved in good faith negotiations will be protected from the drain and disruption that might otherwise be created by citizen suits.\[46\]

It is thus clear that, as late as the 1986 reauthorization debates for CERCLA, Congress continued to be of two minds with respect to citizen suits: first, that citizens should be granted wide latitude to protect themselves, and simultaneously, that citizen suits pose a threat to government enforcement that should be restricted to limited circumstances.

The "inherent tension between citizen as independent agent and as conscience of the public authorities is reflected in both the statute and the case law."\[47\] For example, the Second Circuit has stated that "citizen suits . . . reflect[ ] a deliberate choice by Congress to widen citizen access to the courts, as a supplemental and effective assurance that the Act would be implemented and enforced."\[48\] Other courts have examined the same legislative history and found that the limitations on citizen suits were the result of Congress's "inten[t] to give the EPA an opportunity to resolve issues regarding the interpretation of complex environmental standards by negotiation, unhindered by the threat of an impending lawsuit,"\[49\] and "thereby reduce the volume of costly private environmental litigation."\[50\]

Congress's efforts to hammer out a compromise to allow citizens to sue, yet preserve the overall authority of government regulators, has resulted in a badly fractured legislative history that provides judges abundant opportunity to justify expanding or restricting the citizen suit provisions as they see fit. Consequently, there is not a consistent and logical interpretation of when a given government enforcement effort will be deemed to be adequate, and therefore, when a citizen suit will be prohibited.

47. RODGERS, supra note 18, at 64.
49. Walls v. Waste Resource Corp., 761 F.2d 311, 317 (6th Cir. 1985); see also Hallstrom v. Tillamook County, 844 F.2d 598 (9th Cir. 1987), aff'd, 493 U.S. 20 (1989) ("[L]egislative history reflect[s] Congress's belief that . . . citizen enforcement through the courts should be secondary to administrative enforcement by the EPA.").
50. Walls, 761 F.2d at 317.
II. Case Law

The starting point for judicial interpretation of citizen suits is the United States Supreme Court's ruling in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*[^51] In *Gwaltney*, the Court stated that the purpose of citizen suits is to supplement, not supplant, government enforcement.[^52] Interestingly, the *Gwaltney* Court concluded that it is necessary to free enforcement agencies from citizen suits that might impede their freedom of action in order to avoid unnecessarily limiting the discretion of government authorities.[^53] The Court at one point noted the following:

> Permitting citizen suits for wholly past violations of the Act could undermine the supplementary role envisioned for the citizen suit. This danger is best illustrated by an example. 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, 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 Administrator's discretion to enforce the Act in the public interest would be curtailed considerably.[^54]

The complexity of the issues involved necessitates dividing the decisional law subsequent to *Gwaltney* into two sections: one for notice and one for diligent prosecution.

A. Notice

Following *Gwaltney*, the primary case of interest with respect to the notice requirement is *Hallstrom v. Tillamook County,*[^55] which concluded, consistent with the Supreme Court's generally strict view of citizen suits, that notice is a mandatory jurisdictional prerequisite, the absence of which unequivocally bars a suit.[^56] In *Hallstrom*, the Court came down firmly on the side of those who would restrict the rights of citizens to bring private enforcement actions, concluding that the language of RCRA is mandatory and re-

[^52]: See id. at 60.
[^53]: See id. at 61.
[^54]: Id. at 60-61.
[^56]: See id. at 33.
quires notice before suit may be filed. The Court buttressed its holding by stating that the legislative history indicated that Congress was concerned with avoiding burdening the judicial system with a flood of litigation if citizen suits were permitted too generously. The Supreme Court, however, did not define what constitutes notice. The Court’s silence on this point left open the slim possibility that citizen plaintiffs could escape a motion to dismiss if they had provided the defendant polluter with some form of written communication at least intimating a meaningful possibility of a lawsuit.

Several post-*Hallstrom* courts have found ways to avoid a literal interpretation of the Supreme Court’s holding. For example, in *Friends of the Earth, Inc. v. Chevron Chemical Co.*, a district court judge held that

> a strict application of the notice requirement can be procedurally unwieldy for litigants and courts. For instance, a strict application of the notice requirement would require a plaintiff to send an additional notice to the EPA, state administrator and permittee for every subsequent permit violation occurring after the suit was filed.

The court went even further and relaxed the element of the notice requirement that mandates listing the character of the violation, thus informing plaintiffs that they need only “illuminate the parameters that have been exceeded.”

Other courts have similarly found ways to blunt the effect of *Hallstrom*. For example, in *City of New York v. Anglebrook Ltd. Partnership* and in *Public Interest Research Group, Inc. v. Hercules, Inc.*, courts discovered sufficient flexibility in the statutory text, and the *Hallstrom* decision, to hold less formal notice to defendants and the EPA to be sufficient. In effect, these courts were willing to stretch the definition of what constitutes notice to include

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57. See id.
58. See id. at 28-29. It should be noted that the Court cited the legislative history of the Clean Air Act, because that Act’s legislative history is evidently the most extensive.
61. Id. at 77.
62. Id.
64. 50 F.3d 1239 (3d Cir. 1995).
65. See id. at 1248; *Anglebrook*, 891 F. Supp. at 905.
informal letters and other communications in an effort to avoid dism issing a citizen suit.

Under no circumstances, however, should citizen plaintiffs believe that they can count on generous treatment for technical notice deficiencies. The Supreme Court’s holding in *Hallstrom* is clear: notice is a jurisdictional prerequisite to suit and not a procedural nicety.66 As a practical matter, there is little room for argument regarding the Supreme Court’s holding. Although some courts have been willing to stretch matters somewhat, others have been happy to bar citizen suits for failings of the notice requirement that appear minor indeed. For example, in *National Environmental Foundation v. ABC Rail Corp.*,67 the court applied the notice requirement rigorously and added, in an interesting aside, “that another purpose behind the notice requirement of Section 1365 is to effectuate Congress’s preference that the Act be enforced by governmental prosecution.”68 The court thus articulated a view of citizen suits that appears to have been held by many in Congress during the debates (specifically those who repeatedly expressed their fears that citizen suits would interfere with government initiatives) and by many in the judiciary (such as the Supreme Court), but was rarely expressed so succinctly.

Ultimately, the best advice that can be given to citizen plaintiffs with regard to the notice requirement is to abide by the terms of the statute precisely and to provide the EPA and the putative defendant with timely notice of the fact that a suit is contemplated, who the defendants are, the violations complained of, and the statutes under which suit will be brought. Even if a court might be willing to overlook deficiencies in notice, it may be a waste of resources fighting the issue, and the *Hallstrom* decision gives defendants a powerful weapon to delay or derail citizen suits at their onset.

B. Diligent Prosecution


Like the notice provision, “little or no judicial guidance exists

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67. 926 F.2d 1096 (11th Cir. 1991).
68. *Id.* It should be noted that the court provided no justification for its conclusion that Congress would prefer governmental enforcement.
as to what constitutes diligent prosecution.”69 Unlike the notice element, the diligent prosecution requirement has not benefitted from efforts at clarification by the Supreme Court. As discussed below, the lack of statutory definition and the hazy legislative history have engendered contradictory opinions. This has served to confuse practitioners and offer judges with any set of predilections an array of precedent to support any conclusion they so choose.

An early example of a discussion centering on the diligent prosecution requirement can be found in Baughman v. Bradford Coal Co.,70 in which the Pennsylvania Department of Environmental Resources began an administrative action against Bradford Coal Company for civil penalties related to certain violations of the Clean Air Act.71 Subsequently, a group of private citizens seeking similar penalties initiated an action in federal district court with respect to the same violations.72 The United States Court of Appeals for the Third Circuit stated that “[g]enerally, the word ‘court’ in a statute is held to refer only to the tribunals of the judiciary and not to those of an executive agency with quasi-judicial powers.”73 The court added that “[n]evertheless, an administrative board may be a ‘court’ if its powers and characteristics make such a classification necessary to achieve statutory goals.”74 Interestingly, the court found that the administrative agency in question (the Pennsylvania DEP) did not have the authority to provide relief that is “the substantial equivalent to that available to the EPA in federal courts,” and also found that it did not afford citizen involvement as a matter of right.75 The court therefore held that the administrative action under review was substantively different from a judicial proceeding and that the agency was therefore not a “court” for purposes of the Clean Air Act.76

The Baughman decision is important for several reasons. It was the first decision to hold that administrative proceedings could be the equivalent of judicial actions and, therefore, that such proceedings could bar a simultaneous citizen suit.77 Furthermore, the

70. 592 F.2d 215 (3d Cir. 1979).
71. See id. at 217.
72. See id.
73. Id.
74. Id.
75. Id. at 219.
76. See id.
77. See id. at 217.
significance of the *Baughman* court’s reasoning can be recognized by evaluating citizen suits in the context of regulatory actions. Specifically, regulatory agencies are not always eager to take a violator to court because any court action is an expensive gamble, especially if the perceived violations are considered relatively minor. In such cases, government agencies may instead choose to enter into an administrative consent agreement.

The form and content of such consent agreements vary from state to state. As a general rule, these agreements, which are ultimately ratified by a court, are made between the agency and the offending party. The offending party agrees to perform certain actions, such as cleaning a site, stopping certain emissions, or paying a fine, and, in return, the agency refrains from filing suit.78 Often, such agreements include a stipulation that noncompliance with the consent agreement will automatically result in penalties and/or an injunction.79

Such agreements are, of course, favored by regulators, because they generally offer a practical solution to the environmental concern and accomplish the goal of protecting the public at a small fraction of the cost of litigation. As one court noted, "[b]ypassing the time and expense required by litigation is an obvious plus."80 Furthermore, such agreements often achieve more for the protection of the environment than a conventional lawsuit, because a greater portion of the settlement amount is likely to be used for clean-up as opposed to attorneys’ fees.

Finally, consent agreements are generally quick and efficient mechanisms for resolving an issue. "The courts have long recognized that public policy favors settlements as a cost-efficient means of resolving disputes and conserving judicial resources."81 This is especially true in environmental actions, because consent agreements "relieve the government of considerable burdens on its limited resources."82 Even if successful, a lawsuit takes years, particularly if appeals are involved. Consent agreements can be finalized in a few months and allow the remediation to start before the contamination spreads further. Time, therefore, is a critical factor in remediation efforts.

79. See id. § XXI.
81. Id. (citing Kiefer Oil & Gas Co. v. McDougal, 229 F. 933 (8th Cir. 1915)).
82. Id.
2. Alternatives to *Baughman*

It must, however, be remembered that other courts have not been willing to extend the language of the citizen suit provisions. In fact, two circuits have expressly rejected *Baughman.*

Specifically, in *Friends of the Earth v. Consolidated Rail Corp.*, the United States Court of Appeals for the Second Circuit noted that the language of the citizen suit provision in the Clean Water Act expressly limits citizen suits if an action is proceeding "in a court of the United States, or a State." The court continued, stating that the inclusion of the citizen suit provisions reflects a desire on the part of Congress to encourage citizen participation in enforcing environmental laws. The court concluded that "[t]o interpret [the section] to include administrative as well as judicial proceedings is in our view contrary to both the plain language of the statute and congressional intent."

Similarly, in *Sierra Club v. Chevron U.S.A., Inc.*, the Court of Appeals for the Ninth Circuit stated that "[w]e prefer the Second Circuit's reading of section 1365 over the Third Circuit's reading. Section 1365 does refer specifically to 'courts,' and it makes no direct or veiled reference to any type of administrative proceeding." Noting that other statutes specifically state that a citizen suit is prohibited if either a judicial or administrative action is pending, the Ninth Circuit concluded that "[t]his contrast dispels any lingering ambiguity."

3. Developments Since *Baughman*

While it is true that *Baughman* has been rejected in the Second and Ninth Circuits, it has been followed elsewhere. For example, in *Hudson River Sloop Clearwater, Inc. v. Consolidated Rail Corp.*, the court adopted the reasoning of the *Baughman* decision and added that "[t]here is no question, and the parties do not disa-

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83. *See* *Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517, 1525 (9th Cir. 1987); *Friends of the Earth v. Consolidated Rail Corp.*, 768 F.2d 57, 62 (2d Cir. 1985).

84. *Friends of the Earth v. Consolidated Rail Corp.*, 768 F.2d at 62.

85. *See* *id.* at 63.

86. *Id.*


88. *Id.*


gree, that . . . administrative proceedings may, as a general proposition, be deemed the equivalent of state court action under [the citizen suit provisions].”91 The court then turned to an examination of the nature of the administrative procedure in question and concluded that “[b]ecause [the state agency] is empowered to impose civil penalties on violators in amounts up to $10,000.00 a day, to seek criminal penalties, and to require the Attorney General to seek injunctive relief, its actions have generally been found to represent the statutory equivalent of court action.”92 The court concluded that the administrative action was sufficient evidence that the enforcement agency was diligently prosecuting an action against the polluter though no lawsuit was ever filed.93

Other courts have also followed Baughman. In North and South Rivers Watershed Ass’n, Inc. v. Town of Scituate,94 the Massachusetts Department of Environmental Protection entered into a consent decree in 1987 with the Town of Scituate with respect to violations of the Massachusetts Clean Water Act, a statute which the judge declared to be comparable to the Federal Water Pollution Control Act (“FWPCA”).95 Two years later, a citizens group brought an action in federal court under the federal law for the same violations.96

The district court dismissed the case, finding that the consent order “represent[ed] a substantial, considered and on-going response to the violation,” and therefore constituted “diligent enforcement.”97 In response to the plaintiffs’ argument that the consent order was not evidence of the required diligence, the district court stated the following:

Congress’s express intent “to recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution,” . . . cautions against so confining an interpretation. Indeed, the statute calls for a more deferential approach that does not circumscribe the administrator’s discretion to implement a plan that, in his expert judgment, adequately addresses a violation.98

91. Id. at 348.
92. Id. at 348-49 (citations omitted).
93. See id. at 350-53.
95. See id. at 486.
96. See id. at 484.
97. Id. at 487.
98. Id.
Interestingly, in reviewing the decision of the district court, the First Circuit made the following statement:

The focus of the statutory bar to citizen's suits is not on state statutory construction, but on whether corrective action already taken and diligently pursued by the government seeks to remedy the same violations as duplicative civilian action. . . . Duplicative enforcement actions add little or nothing to compliance actions already underway, but do divert State resources away from remedi­
ying violations in order to focus on the duplicative effort.99

4. Specific Issues in Determining Diligent Prosecution

It is clear, therefore, that some courts view the citizen suit pro­visions as expressing a preference for government regulatory action, and these courts will look hard for reasons to block citizen suits that are perceived as infringing on government prerogatives or wasting government assets.100 On the other hand, as discussed below, citizen plaintiffs have had numerous successes after Baughman in demonstrating that government administrative actions are not sufficiently diligent to forestall private actions. Typically, citizen plaintiffs prevail when there has been (i) a history of noncompli­ance,101 (ii) the imposition of trivial penalties,102 and (iii) no citizen participation.103

For example, in New York Coastal Fishermen's Ass'n v. New York City Department of Sanitation,104 the defendant Department of Sanitation made the tactical mistake of claiming that the Depart­ment of Natural Resources had been diligent in its oversight of the defendant's Pelham Bay Landfill.105 The court, in between refer­ences to the “sordid details of this bureaucratic and political nightmare,”106 responded that such a claim “cannot be taken seri­

100. See North & S. Rivers Watershed Ass'n, Inc., 755 F. Supp. at 487 (concluding that the agency's actions were “substantial, considered and ongoing,” because they included a fixed timetable and expressly left open the possibility of future civil and criminal actions against the polluters).
105. See id. at 164.
106. Id. at 163.
ously in light of the fact that relief is not in sight [for at least four more years].” The court went on to note that the state had been involved since 1983, and, based on the state’s own timetables for correcting the problems, “at least twelve years will run before the problem is rectified. This is not diligent prosecution.” The court then directed attention to the 1985 Order as “a perfect example of the state’s lack of diligence,” and held up to scorn the state’s efforts in the 1985 Order to set up a temporary remediation plan (which took three years) while seeking compliance with the 1985 Order.

After reviewing the defendant’s responses to the 1985 Order, the court concluded that “[t]he state was acting as a pen pal, not a prosecutor.” Turning then to the 1990 Order, the court noted that it permitted the defendants to pollute for five more years while failing to develop a permanent plan as required by the 1985 Order. “It is simply incomprehensible that the discharge of leachate . . . which was to be a temporary measure adopted to remedy the problem, should continue for seven years. . . . This is precisely such an instance when the government has not been fulfilling its duties.”

If nothing else, this case shows the folly of using the diligent prosecution defense in cases where there is a long history of official de facto recognition of noncompliance, complete with toothless consent orders and general incompetence. Particularly damning in this regard are situations in which government efforts proceed over many years without demonstrable effect and smack of over-cozy relationships with polluters.

Another factor of importance in determining if regulators have indeed been diligent is the amount of fines imposed in relation to total potential fines recoverable under the relevant statutes. For example, in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, Laidlaw faced fines potentially totaling up to $2.27 million and negotiated an actual fine of only a modest $100,000. Interestingly, the court specifically noted that, contrary to the policy of using fines and penalties to remove any economic

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107. *Id.* at 170.
108. *Id.* at 168.
109. *Id.*
110. *Id.*
111. *See id.* at 169.
112. *Id.*
114. *See id.* at 491.
incentive for polluting, this reduced fine included no amount reflecting the economic advantage enjoyed by the company for failing to abide.115

Another factor influencing the court to rule in favor of the citizen plaintiffs was the fact that the defendant was permitted by the regulatory agency to draft and file the complaint against itself; this included the defendant paying the required filing fee.116 In addition, it appeared that the consent order was completed in unusual haste, such haste in fact that the private plaintiffs were effectively denied an opportunity to participate.117

The absence of an opportunity for true citizen intervention was again found to be a reason to hold that there was no “diligent prosecution” in Frilling v. Village of Anna.118 In Frilling, the court declined to find that a state’s actions were diligent primarily because, while the state had invoked an administrative proceeding, there had been no formal adversary process, hearing, or witnesses, and the citizens were never permitted to intervene or even comment on the enforcement action.119

While the above cases clearly show that attempts to sanitize past violations by pressing compliant regulators into ludicrously convenient consent orders will often backfire, the citizen plaintiff should not believe that reduced penalties or good agency-industry relationships will automatically prevent a violator from barring a citizen suit. For example, in Connecticut Fund for the Environment v. Contract Plating Co.,120 the state settled with a violator for a mere $3,500.121 The citizen plaintiffs argued that their action covered issues not found in the consent order. The court, however, ruled that “[t]he mere fact that the settlement [was less comprehensive] than the remedy sought in the instant action [was] not sufficient in itself to overcome the presumption that the state action was diligently prosecuted.”122 The court’s conclusion highlighted an important principle; specifically, that the context in which most chal-

115. See id. at 491-92.
116. See id. at 479.
117. See id.
119. See Frilling, 924 F. Supp. at 841.
120. 631 F. Supp. 1291 (D. Conn. 1986).
121. See id. at 1294.
122. Id. (emphasis added).
Challenges to citizen suits arise will create a basic presumption in favor of the state by placing the burden of proving a lack of diligent prosecution upon the citizens. This is true because citizens are required to serve notice upon the violator and the Administrator in advance of suit. 123 This, of course, gives the defendants sixty or ninety days to prepare a defense, including a motion to dismiss arguing that the citizen action is precluded under the statute because the state or federal government is already diligently prosecuting an action.

Even though it is the defendant's motion to dismiss, the burden of proof with respect to the issue of diligent prosecution will effectively remain with the citizen plaintiffs because it is a necessary element of the statute itself to be affirmatively proven by the plaintiff. 124 Furthermore, there is a common law presumption of government regularity that reinforces the conclusion that a citizen plaintiff had better be prepared to prove that the state is not diligently enforcing its environmental laws and not expect that the state will have to affirmatively demonstrate the effectiveness of its efforts. 125

In this regard, note the ruling in Orange Environment, Inc. v. County of Orange. 126 In this case, the court acknowledged that the state's initial efforts to require compliance were stymied "by the recalcitrant and cavalier attitude adopted by the [defendant and] that the [defendant] consistently failed to comply with the terms of the Consent Orders." 127 However, the court found that the state's enforcement efforts ultimately barred a citizen suit, primarily because "the standard for evaluating the diligence of the state in enforcing its action is a low one which requires due deference to the state's plan of attack . . . ." 128 The court cited no support for this statement.

It should be noted that a citizens group should not expect an enthusiastic judicial reception to an attempt to litigate an issue with a defendant with whom the regulatory agency has already entered into a settlement agreement. For example, in Arkansas Wildlife Federation v. ICI Americas, Inc., 129 the state agency issued an order

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123. See 33 U.S.C. § 1365(b)(1)(B) (1994); see also sources cited supra note 11.
125. See, e.g., Leib v. Board of Exam'rs for Nursing, 411 A.2d 42, 46 (Conn. 1979).
127. Id. at 1017.
128. Id.
129. 29 F.3d 376 (8th Cir. 1994).
which the polluter agreed to follow.130 The agency did allow third party involvement and subjected the violator to various penalties.131

The citizens group, however, argued that only insignificant penalties had been extended and that compliance had been delayed repeatedly.132 The court concluded that citizens suits are intended to play an "'interstitial,' rather than 'potentially intrusive' role, [and] that such suits are proper only when the federal, state, or local agencies fail to exercise their enforcement responsibility and that such suits should not considerably curtail the governing agency's discretion to act in the public interest."133 With respect to the allegations that the polluter was being treated too leniently, the judge added that "[i]t would be unreasonable and inappropriate to find failure to diligently prosecute simply because ICI prevailed in some fashion or because a compromise was reached."134 The court concluded that the order acted as a bar to citizen enforcement.135

Particularly interesting was the court's unwillingness to curtail the administrator's discretion to implement a plan. Implicit in this policy is the court's reliance on two principles. The first is that citizen suits are designed to assist government enforcement, not obstruct it. The second is that it makes poor public policy to squander limited judicial resources in re-litigating environmental matters that have already been addressed. As one court described it in *Gardeski v. Colonial Sand & Stone Co.*,136 "[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."137

Some federal courts have allowed citizen suits to proceed, even when state or federal agencies were in the process of actually litigating suits against polluters. For instance, suits were allowed under the following circumstances: (i) when the enforcement agency's suit did not address the same factual matters as the private suits;138 (ii) when the public had no right to intervene in the

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130. See id. at 378.
131. See id. at 380.
132. See id.
133. Id.
134. Id.
135. See id. at 382.
137. Id. at 1166.
138. See Hudson River Fishermen's Ass'n v. County of Westchester, 686 F. Supp. 1044, 1052-53 (S.D.N.Y. 1988) (providing that if government is actively pursuing an
agency’s action; and (iii) when the relief sought by the citizen plaintiffs could not be afforded by the agency’s actions.

5. Review of the Decisional Law

Even a brief review of the decisional law demonstrates that it is unlikely that a regulatory agency will be found to be diligently prosecuting an enforcement action if the following criteria are met: (i) there is a past history of noncompliance with consent orders and/or agency indifference generally; (ii) actual financial penalties are a tiny fraction of potential penalties; (iii) private parties are functionally precluded from commenting or intervening; (iv) the consent agreements contain generous deadlines for compliance; and (v) the relationship between regulator and regulated appears to be overly familiar, especially if the polluter is given carte blanche to draft consent documents.

Citizen plaintiffs can, however, expect an uphill battle. Some courts have concluded, based upon existing precedent and legislative history, that there is a preference in the environmental laws in favor of government enforcement. This may be in order to foster national uniformity of environmental action, or possibly because of a belief, founded in New Deal logic of the 1930’s, that administrative agencies are the institutions with the necessary technical competence to address complex and difficult issues. Whatever the theoretical basis, the result is that private parties may confront an ideological predilection on the part of the judiciary in favor of gov-


144. See New York Coastal Fishermen’s Ass’n, 772 F. Supp. at 169.


146. See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc. 484 U.S. 49, 59-60 (1989).
ernment, as opposed to private, enforcement action. This, combined with an often cool reception to private endeavors on the part of the regulators themselves, and a sincerely held belief by some in government that industry is being crippled by complex and confusing environmental regulations, means that the citizen plaintiff attempting to halt violations of state or federal law is best advised to put on a credible case, very early in the litigation process, to convince a judge that the regulators have conspicuously failed to fulfill their duties and need to be given a strong nudge.

Finally, it should be noted that permitting private enforcement actions to continue in the face of ongoing state or federal initiatives could arguably contravene a key element of national environmental policy. Specifically, federal environmental laws are designed to provide a single, uniform national environmental standard. If individual citizen actions at cross-purposes to government initiatives are allowed to continue, this will result inevitably in the creation of three separate and conflicting enforcement authorities (state, federal, and private) for each environmental issue. One court has even spoken of the threat of “balkanizing” enforcement authority in these circumstances and another has warned that citizen suits allow private parties to “commandeer the federal enforcement machinery” for their own private purposes.

C. Non-Statutory Challenges

In a small number of cases, defendants have raised, in addition to the statutory challenges of notice and diligent prosecution, several related common law doctrines, such as exhaustion of administrative remedies, primary jurisdiction, mootness, absten-

150. See Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor, 619 F.2d 231, 244 (3d Cir. 1980) (providing that sixty day notice requirement is a statutory time limit and thus doctrine of exhaustion of administrative remedies cannot be used to require more than sixty day period); United States v. Ketchikan Pulp Co., 74 F.R.D. 104, 107 (D. Alaska 1977).
151. See Davies v. National Coop. Refinery Ass'n, 43 ERC 1224, 1229 (D. Kan. 1996). In Davies, the court denied a motion to dismiss on abstention and primary jurisdiction grounds, but added the following: “It would . . . make little practical sense. If the court takes jurisdiction of a matter in midstream of the administrative process, there is a good chance the result will either be a needless duplication of the agency’s efforts or conflicting orders as to how to go about remediating the situation.” Id.; see also Avoyelles Sportsmen’s League, Inc. v. Marsh, 715 F.2d 897, 920 (5th Cir. 1983) (providing
tion,\textsuperscript{153} intervention,\textsuperscript{154} and, if the defendant is a government agency, sovereign immunity.\textsuperscript{155} Most of these doctrines are, in a sense, relatives of the diligent prosecution requirement.

Specifically, exhaustion of administrative remedies and the doctrine of primary jurisdiction are mirror images of each other. The exhaustion requirement is involved if an administrative action is pending on a matter over which the agency has authority.\textsuperscript{156} In such cases a court is often deemed to be without jurisdiction to hear the matter until the agency has finished its review.\textsuperscript{157}

Abstention is a similar doctrine that arises when a plaintiff brings an action in federal court, but the state has a pending administrative action.\textsuperscript{158} Primary jurisdiction is involved if an action is not pending before an administrative agency but it appears to the court that the matter is within the special expertise of the agency.

that the doctrine of primary jurisdiction is not applicable if raised first on appeal and there is no evidence that agency intends to act); Legal Envtl. Assistance Found., Inc. v. Hodel, 586 F. Supp. 1163, 1169 (E.D. Tenn. 1984) (holding that the doctrine of primary jurisdiction is not applicable to questions within the competency of the court); Student Pub. Interest Research Group, Inc. v. Fritzche, Dodge & Olcott, Inc., 579 F. Supp. 1528, 1537 (D.N.J. 1984) (providing that the doctrine of primary jurisdiction is not applicable to questions within the competency of the court).

152. \textit{See Atlantic States Legal Found., Inc. v. Eastman Kodak Co., 933 F.2d 124, 128 (2d Cir. 1991) (dismissing citizen suit as moot where state action addressed same violations); Sierra Club v. Train, 557 F.2d 485, 488 (5th Cir. 1977) (holding that the ultimate filing of a suit by the EPA does not moot issue of whether EPA administrator should have sued company); Orange Env't, Inc. v. County of Orange, 923 F. Supp. 529, 538 (S.D.N.Y. 1996) (providing that the doctrine of primary jurisdiction is not applicable to questions within the competency of the court).}

153. \textit{See Coalition for Health Concern v. LWD, Inc., 60 F.3d 1188, 1193 (6th Cir. 1995) (providing that abstention doctrine may be appropriately invoked); Ada-Cascade Watch Co. v. Cascade Resource Recovery, Inc., 720 F.2d 897, 905-06 (6th Cir. 1983) (holding on specific facts of case that a federal court should abstain from second guessing a decision by a state agency that no other permits were needed); Davies, 43 ERC at 1229; see also Lake Carrier's Ass'n v. MacMullen, 406 U.S. 498 (1972); Brewer v. City of Bristol, 577 F. Supp. 519 (E.D. Tenn. 1983).}


155. \textit{See District of Columbia v. Schramm, 631 F.2d 854, 859-60 (D.C. Cir. 1980) (holding that federal courts can review an EPA veto of a state permit, but not an EPA decision not to veto a state permit).}


157. \textit{See id.}

158. \textit{See Coalition for Health Concern, 60 F.3d at 1194.}
Courts, in this instance, will generally require plaintiffs first to bring their case before the agency and then to court if necessary.¹⁵⁹

Obviously, these doctrines are essentially prudential matters which permit courts to shuttle complicated matters off to the relevant regulatory agencies. The reasons are obvious. In some cases, courts lack the necessary technical expertise.¹⁶⁰ In others, it is simply a reflection of the principle of federalism to defer to an existing state proceeding.¹⁶¹ In any event, it is simply poor judicial economy for a court to adjudicate a matter that is being, or should be, reviewed by an appropriate administrative agency.

At first blush, these doctrines might appear to offer polluters effective defenses. In practice, however, they are less than effective because they only require courts to look to see if an agency is, or should be, acting. This, of course, is precisely what the diligent prosecution and notice requirements do. Ultimately, if the agency is notified and refuses to do anything, or an action is proceeding but ineffectively, the doctrines do not divest a court of jurisdiction and the case may proceed.

Similarly, with the issue of mootness, if the subject matter of a dispute no longer exists, then a court has no power to hear the case, for federal courts do not give advisory opinions. Thus, if an agency compels a polluter to cease permanently (that is, the agency is diligent in its enforcement of the matter) then there is no case left upon which to proceed. Mootness is even less of a defense for the reason that, while wholly past violations will not support a citizen suit,¹⁶² the time of relevance for determining mootness is the time of filing of the suit.¹⁶³ Therefore, compliance subsequent to the initiation of a suit will not affect jurisdiction.

In sum, the occasional recourse made to these common law doctrines poses little concern for citizen plaintiffs. The issues addressed by these doctrines are in essence the same as those already covered by the two statutory requirements of notice and diligent prosecution. If the citizen group can meet the requirements listed

¹⁶⁰. See id. (acknowledging that an issue may require special competence of administrative agencies).
¹⁶¹. See Coalition for Health Concern, 60 F.3d at 1194 (finding that Kentucky had an overriding interest in the protection of its environment).
in the text of the laws, these prudential matters will rarely prove to be an additional barrier of substance.

III. Proposals

A review of the case law makes it abundantly clear that, more than two decades after the initial enactment of the relevant environmental statutes, the federal courts have failed to fashion a consistent and coherent body of law to guide public and private parties with respect to when and how citizen suits may be applied to protect human health, safety and the environment. The primary areas of concern have involved the notice issue\textsuperscript{164} and the diligent prosecution requirement,\textsuperscript{165} as well as the question of the applicability of various related common law and prudential doctrines.\textsuperscript{166}

The lack of consistency itself has created uncertainty which, in turn, has the potential to cause considerable disruption in the activities of environmental groups, government regulators and industry. Further, it appears as though the central problem with the citizen suit provisions (failure to define critical terms such as "diligent prosecution") was the result of attempting to paper over Congress's basic division during enactment of the Clean Air Act regarding the proper role of citizen plaintiffs in environmental enforcement. What was, for citizen activists and government regulators alike, a tragedy with respect to the Clean Air Act, became black comedy when Congress continued to use the same statutory language in each succeeding environmental law.

Furthermore, though Congress cannot be faulted for failing to recognize in 1972 that future lawyers would attempt to cloud the citizen suit issue by raising collateral doctrines, such as abstention, mootness, exhaustion of administrative remedies and primary jurisdiction, it is inexcusable that, when the use of these doctrines became clear, Congress continued to ignore them in drafting subsequent environmental legislation.

It is true that the United States Supreme Court has spoken with respect to the notice issue in \textit{Hallstrom}.\textsuperscript{167} This decision, while


\textsuperscript{166} See supra notes 150-59.

\textsuperscript{167} See \textit{Hallstrom}, 493 U.S. at 31 (holding that "the notice and sixty day delay
not foreclosing controversy, has limited debate on this element. However, the time has come for Congress, or the courts, to attempt a long overdue resolution of the remaining areas of difficulty.

This is not to say, however, that all authorities agree that change is needed. One commentator has even suggested that the legislative refusal to spell out in detail the relationship between private and public enforcement efforts is for the best.

'It very well may be that the Congress did the right thing by continuing the tension [between citizen as independent agent and as conscience of the regulatory agencies], not attempting to resolve it under a single consistent theory. Effective agency prods may be in need of a credible power to go it alone; and useful citizen scouts may work best when authorized to call in the agency troops. Perhaps also the best mutual efforts of official and unofficial enforcers over time requires an occasional setback for each, as where the agency is allowed to steal the thunder of the citizen initiative or is humiliated so thoroughly that a new boldness arises out of the ashes of past disgrace. That the combination of citizen as independent agent and as public conscience is a plausible one is suggested by the critical and empirical work that has been done on citizen action. For the most part, this describes a process that is closer to an adrenaline than a muscle mechanism. Citizen power is spent most usefully in initiatives that result in reinvigoration, reconsideration, and eventual takeover by the responsible agency. 168

As interesting as this position is, it utterly fails to comport with the day-to-day reality of public and private enforcement operations, let alone the economic realities of business. Put quite simply, law is not practiced in a vacuum. Citizen suits may be a vital part of the regulatory scheme, but they can be very expensive to initiate. For a small neighborhood environmental group trying to preserve natural resources in their community, a citizen suit can be a costly gamble.

Similarly, government regulators trying to decide which of several hundred cases they can afford (literally) to address cannot accept having to set aside high priority cases to handle perhaps important but secondary matters or, worse yet, having complex settlement discussions founder because of the well-meaning but poorly timed efforts of third parties. Furthermore, it is self-evident that uncertainty is a cost item for industry, a cost item that factors im-

168. Rodgers, supra note 18, at 64.
Immediately into jobs in a globally interconnected commercial environment. This is particularly true if one accepts that the relationship of regulatory agency to regulated industry is not properly one of predator to prey, but rather of symbiosis. Specifically, the purpose of regulation is not to destroy or punish, but to protect the environment—a goal that in general is best attained cooperatively.

If, however, it were possible to propose such a standard, it is suggested that citizens suits under the Clean Water Act, Clean Air Act, CERCLA and section 7001(a)(1)(A) of RCRA should be prohibited if a state or federal administrative agency has (1) filed suit in state or federal court under one of the above-referenced federal laws or an analogous state statute offering substantially similar penalties and citizen participation provisions, (2) entered into a consent order, filed in a state or federal court, addressing substantially the same violations advanced in the citizen suit, or (3) filed with a state or federal court an executed memorandum of understanding describing, in detail, the terms to be included in the eventual consent order. It is stressed that any consent order or memorandum of understanding under either options (2) or (3) should include clear and specific procedures to ensure citizen participation and review, fixed time schedules for compliance, and effective civil remedies and default provisions.

The proposed standard is justifiable on several grounds and offers important advantages over the current state of the law. The first option calls for a repetition of the terms of the statutes with additional clarifying language explaining what a state statute must include in order to be sufficiently similar to a federal law to bar a citizen suit. The primary advantage offered by this additional language is that it would remove any ambiguity as to when an action brought under a state law will bar a citizen suit under a federal law. The removal of this ambiguity itself would be a benefit to defendants and plaintiffs alike because the mere existence of ambiguity introduces uncertainty into a complex and expensive process.

It is therefore advanced that the citizen suit provisions of all federal environmental laws be amended to state that a citizen suit is barred by an action brought under a state law only if that law offers penalties substantially similar to those available under the closest analogous federal act (i.e., financial penalties within perhaps 10-20% of the federal law), includes citizen participation as of right, and specifies whether attorneys' fees will be recoverable.
The second option similarly builds on existing case law. Option (2) would require Congress to amend the citizen suit provisions to state expressly that a suit is barred if the relevant regulatory agency and the violator have entered into a consent order which covers the same violations, includes mandatory deadlines for remediation, and imposes strict penalties for failure to meet those deadlines. In addition, the consent order process must have mandatory provisions for citizen participation as of right.

The advantage of option (2) has been identified in those courts that have, in effect, already begun to employ it. As stated in *North & South Rivers Watershed Ass'n, Inc. v. Town of Scituate*, "[d]uplicative enforcement actions add little or nothing to compliance actions already underway, but do divert State resources away from remedying violations in order to focus on the duplicative effort."\(^\text{169}\) In other words, if a regulatory agency has resolved an issue short of litigation by employing a consent order, the need for any action by regulators or private citizens is gone. As one court described it, "[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."\(^\text{170}\)

In addition to providing statutory support for the logical proposition of barring citizen suits when a consent order has been achieved, option (2) also provides greater protection to citizen groups by requiring regulators to give private parties the right to participate, and prevents abuses such as were described in *New York Coastal Fishermen's Ass'n v. New York City Department of Sanitation*,\(^\text{171}\) where a court roundly criticized a state agency for taking twelve years to rectify a problem while imposing only trivial fines and granting repeated time extensions.\(^\text{172}\)

The third option, while apparently novel, simply provides a mechanism for recognizing the realities of modern environmental enforcement. As a general rule, a consent order is simply an agreement between the regulator and regulated which is subsequently approved by a court. Naturally, courts have little involvement in

\(^{169}\) See *North & S. Rivers Watershed Ass'n*, 949 F.2d at 555-56.


\(^{172}\) See *supra* notes 101-12 and accompanying text.
preparing such orders and rarely add to, or subtract from, the terms thereof.\textsuperscript{173}

However, formal consent orders often take a considerable amount of time and effort to prepare. Thus, some government agencies prefer to use, whenever possible, memoranda of understanding. These agreements can be much quicker to implement and are still binding upon the parties. If such memoranda contain the same terms and conditions as a consent order, these memoranda can provide the same protection to the environment as a formal consent order. If the parties have finalized all the important details of an administrative action, it should not matter precisely what form is used, so long as the form chosen provides the necessary protection to all parties, including the public, as described above.

The consequence of accepting this suggested approach fits well with the purpose of citizen suits generally: namely, to allow private parties to act only if government is unwilling or unable to do so. Furthermore, it entirely preserves the right of individuals or organizations interested in protecting the environment either to intercede in agency enforcement operations or to act on their own should the agency decide not to do so. It is true that this proposal presupposes that government can and will act decisively to protect the environment. But, as one court noted, "[t]he government, representing society as a whole, is usually in the best position to vindicate societal rights and interests."\textsuperscript{174} The government is certainly in a better position to ensure the systematic application of a truly uniform national standard and prevent segmenting or balkanizing the enforcement of the nation's environmental laws. Primarily, however, it offers one standard that is consistent with the language of the statutes, the experience of administrative agencies, and the purpose and intent of citizen suits generally.

\textsuperscript{173} See United States v. Bliss, 133 F.R.D. 559, 568 (E.D. Mo. 1990) (providing that courts review consent orders for substantive fairness and reasonableness).