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Hey You, Get Off [of] My Cloud: An Analysis of Citizen Suit Preclusions Under the Clean Water Act

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NOTES

HEY YOU, GET OFF [OF] MY CLOUD: AN ANALYSIS OF CITIZEN SUIT PRECLUSIONS UNDER THE CLEAN WATER ACT

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"[O]n June 22, 1969, Ohio's Cuyahoga River ignited in a conflagration fed by oil and other industrial wastes. When the rivers are on fire, you know things are bad." Drew Caputo, *A Job Half Finished: The Clean Water Act After 25 Years*, 27 ENVTL L. REP. 10574, 10576 (1997).

INTRODUCTION

Growing up as a child of the Sixties, I remember an article that was so shocking to me that its content remains a vivid memory to this day. Life magazine did a photographic essay on Lake Erie, one of the five Great Lakes, and reported that Erie's water was so polluted that it resembled pea soup. The illustration, as I recall, showed a beautiful sailboat attempting to sail through the muck that was once water.

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Congress enacted the Clean Water Act ("CWA")¹ in 1972, with the objective of "[r]estoration and maintenance of chemical, physical and biological integrity of [the] Nation's waters."² The CWA states that this goal will be met "through control of both point³ [i.e. "wastes delivered through pipes"] and nonpoint⁴ [i.e. "wastes delivered via runoff"] sources of pollution"⁵ in the Nation's waters.⁶

1. "This Act [enacting this chapter] may be cited as the 'Federal Water Pollution Control Act' (commonly referred to as the Clean Water Act)." 33 U.S.C. § 1251 (1972) (amended 1977, renumbered 1987) (comment in original).

2. *Id.*

3. Point sources are typically pipes: "[f]amiliar sources of point-source pollution include industrial outflow pipes from factories, and pipes discharging wastewater effluent from sewage treatment plants." Drew Caputo, *A Job Half Finished: The Clean Water Act After 25 Years*, 27 ENVTL L. REP. 10574, 10575 (1997).

The term 'point source' means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture. 33 U.S.C. § 1362(14) (1972) (amended 1996).

For an excellent investigation into the true nature of a 'point source'; specifically the question of whether a person can be a point source, see *United States v. Plaza Health Laboratories, Inc.*, 3 F.3d 643 (2d Cir. 1993).

4. Nonpoint sources may typically be polluted runoff: "[s]ources of polluted runoff include agricultural fields, urban pavement, and suburban lawns- any surface from which rainwater or snowmelt can carry disturbed soil or other pollutants that collect on a surface (such as pesticides, excess application of fertilizer, or oil that has dripped onto pavement) into water bodies." Caputo, *supra* note 3, at 10569.

5. "The term 'pollution' means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." 33 U.S.C. § 1362(19).

"The term 'pollutant' means dredged soil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt, and in-

The CWA addresses what private citizens can do, should the federal or state administrators not act against the violator; the "Citizen Suit" provision allows private citizens⁷ to initiate proceedings against a

dustrial, municipal, and agricultural waste discharged into water." *Id.* at § 1362(6).

6. The statute refers to waters as "navigable waters." 33 U.S.C. § 1362 (7)(1996). In fact, the term "navigable" is, statutorily speaking, a misnomer, because the test of whether waters are protected under the Clean Water Act does not consider whether they are "navigable" or not. While the Army Corp of Engineers initially interpreted the [CWA] as extending federal jurisdiction only to waters actually, potentially, or historically navigable, an interpretation that covered few wetland areas, this interpretation was deemed too restrictive. See *Natural Resources Defense Council v. Calloway*, 392 F. Supp. 685 (D. D.C. 1975). The court held that Congress had intended to extend federal regulatory authority to the limit of its Commerce Clause powers, which would cover areas such as wetlands as well. See *id.* See also ROBERT V. PERCIVAL ET AL., *ENVIRONMENTAL REGULATION LAW, SCIENCE, AND POLICY* 977 (2d ed. 1996).

7. "For the purposes of this section the term 'citizen' means a person or persons having an interest which is or may be adversely affected." 33 U.S.C. § 1365 (g) (1972). Of course, the issue of the citizen-plaintiff's standing (the plaintiff's ability to invoke court jurisdiction) is invariably raised: "the standing question is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf (citation omitted). The constitutional requirements for standing, injury in fact, causation, and redressability were clearly summarized in *Valley Forge Christian College v. Americans United*, 454 U.S. 464 . . . (1982)." *Atlantic States Legal Found. v. Universal Tool & Stamping Co.*, 735 F. Supp. 1404, 1410 (D. Ind. 1990). *Universal Tool* further illustrates the entities who potentially may sue as citizen-plaintiffs: "[t]his broad category of potential plaintiffs necessarily includes both plaintiffs seeking to enforce [CWA] statutes as private attorneys general, whose injuries are 'noneconomic' and probably noncompensatable [i.e. injuries to environmental, recreational or aesthetic interests], and persons like [the plaintiff in this case] who assert that they have suffered tangible economic injuries because of statutory violations." *Id.* at 1409. The court went on to say that "plaintiffs may sue so long as they can demonstrate an 'identifiable trifle' constituting actual or threatened injury, because such harm is sufficient to guarantee that plaintiffs

violator⁸ or against the Administrator⁹ if the Administrator fails to perform his statutory duties. The provision for citizen suits is not unique to the CWA; it is found in various forms within many statutes having environmental significance.¹⁰

The main focus of this Note will be to illustrate and comment upon how the various circuit courts have interpreted the plain meaning limitations to citizen suits as found in the CWA. "When an authoritative written text of the law has been adopted, the particular language of the text is always the starting point on any question concerning the application of the law."¹¹ However, this task is not as simple as it might seem at first blush:

Unlike mathematical symbols, the phrasing of a document, especially a complicated enactment, seldom attains more than approximate precision. If individual words are inexact symbols, with shifting

have a concrete interest in the outcome of the litigation." *Id.* at 1412, *citing* *United States v. SCRAP*, 412 U.S. 669, 689 n.14 (1973).

8. "Except as provided in subsection (b) of this section ['Notice'], any citizen may commence a civil action on his own behalf (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation." 33 U.S.C. § 1365 (a) (1972) (amended 1987).

9. "[A]ny citizen may commence a civil action on his own behalf . . . (2) against the Administrator where there is an alleged failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator." *Id.*

10. *See, e.g.*, The Clean Air Act, 42 U.S.C. § 7604 (1990) ("Citizen suits"); The Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6972 (1984) ("Citizen suits"); The Toxic Substances Control Act, 15 U.S.C. § 2619 (1992) ("Citizen's civil actions"); and The Solid Waste Disposal Act, 42 U.S.C. § 6972 (1984) ("Citizen suits").

11. 2A SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 45.01, at 1 (Norman J. Singer ed., 5th ed. 1992) (1891).

variables, their configuration can hardly achieve invariant meaning or assured definiteness A statute is an instrument of government partaking of its practical purposes but also of its infirmities and its limitations, of its awkward and groping efforts.¹²

With this in mind, Part I of this Note considers the various courts scrutiny of words in the statute, specifically referring to what circumstances may preclude or limit an otherwise properly filed citizen suit under the CWA. Part II focuses on two sets of seemingly opposite holdings by different circuits. Part III of this Note contains an in-depth analysis and observation of statutory interpretation geared toward determination of whether a specific citizen suit should be precluded under the statute. Finally, Part IV of this Note concentrates on an exploration of doctrinal provisions that come into play should a citizen suit be allowed.

I. STATUTORY UNDERPINNINGS

The CWA proceeds by stating that pollutants may not be discharged¹³ except according to the conditions set in

12. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 529 (1947), *quoted in* SUTHERLAND, *supra* note 11, at 32.

13. "[I]t is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited." 33 U.S.C. § 1251 (a)(3) (1972); *See also* 33 U.S.C. § 1311: "Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). "The term 'toxic pollutant' means those pollutants, or combinations of pollutants, including disease-causing agents, which after discharge and upon exposure, ingestion, inhalation or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will, on the basis of information available to the Administrator, cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring." 33 U.S.C. § 1362(13) (1996).

a federally issued permit¹⁴ called a National Pollutant Discharge Elimination System ("NPDES") permit.¹⁵ The several states may, upon approval by the Federal Administrator, administer their own permit program, called a State Pollutant Discharge Elimination System ("SPDES") permit.¹⁶ This SPDES program will, upon authorization, take the place of the NPDES,¹⁷ and will

14. "The Administrator is authorized, after public hearings, to permit the discharge of a specific pollutant or pollutants under controlled conditions associated with an approved aquaculture project under Federal or State supervision pursuant to section 1342 of this title [National pollutant discharge elimination system]." 33 U.S.C. § 1328 (a) (1972) (amended 1977). See *infra* note 15, for relevant text of this referenced section.

15. 33 U.S.C. § 1342 states, "the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants . . . upon condition that such discharge will meet either (A) all applicable requirements under sections 1311 ['Effluent limitations'], 1312 ['Water quality related effluent limitations'], 1316 ['National standards of performance'], 1317 ['Toxic and pretreatment effluent standards'], 1318 ['Records and reports; inspections'], and 1343 ['Ocean discharge criteria'] of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter." 33 U.S.C § 1342 (a)(1) (1972). Subsection (a)(2) goes on to state, "[t]he Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection." *Id.*

16. "At any time after the promulgation of the guidelines required by subsection (i)(2) of subsection 1314 of this title ['Guidelines for monitoring, reporting, enforcement, funding, personnel, and manpower'], the Governor of each State desiring to administer its own permit program for discharges [of pollution] into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law . . . [t]he Administrator shall approve each such submitted program unless he determines that adequate authority does not exist" 33 U.S.C. § 1342 (b) (1972).

17. "[T]he Administrator shall suspend the issuance of [NPDES] permits under subsection (a) of this section ['Permits for discharge of pollutants'] as to those discharges subject to such program unless he determines that the State permit program [SPDES] does not meet the requirements of subsection (b) of this section ['State per-

assume the authority to issue permits for pollution discharge.

Under the CWA, permit holders are responsible for monitoring and reporting pollutant levels in all discharges into navigable waters.¹⁸ These reports, called "Discharge Monitoring Reports" ("DMRs"), must be submitted at the intervals specified on the permit.¹⁹ If the holder of a SPDES permit violates the terms²⁰ of their permit, the Federal Administrator²¹ may notify the permit holder and their State environmental office of the violation.²² If the state²³ does not commence appropriate

mit programs'] or does not conform to the guidelines issued under section 1314 (i)(2) of this title ['Guidelines for monitoring, reporting, enforcement, funding, personnel, and manpower']. 33 U.S.C. § 1342 (c)(1).

18. "[T]he Administrator shall require the owner or operator of any point source [i.e. the permit holder] to (i) establish and maintain such records, (ii) make such reports, (iii) install, use, and maintain such monitoring equipment or methods (including where appropriate, biological monitoring methods), (iv) sample such effluents (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe), and (v) provide such other information as [the Administrator] may reasonably require." 33 U.S.C. § 1318 (a)(A) (1972).

19. "Monitoring results shall be reported at the intervals specified elsewhere in this permit Monitoring results must be reported on a Discharge Monitoring Report (DMR) or forms provided, or specified by the Director for reporting results of monitoring of sludge use or disposal practices." 40 C.F.R. § 122.51(l)(iii)(4)(i) (1993).

20. For example, exceeding the daily limitation of the pollutant "fecal coliform" in the discharge from a meat packing plant as reported in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found. Inc.*, 484 U.S. 49, 53 (1987).

21. The statute allows the Administrator to use whatever means she thinks appropriate to gather information that the permit holder has violated the terms of their permit: "[w]henever, on the basis of any information available to him." 33 U.S.C. § 1319 (a)(1) (1972) (amended 1977).

22. See, e.g., 33 U.S.C. § 1319 (a)(4): "[a] copy of any order issued under this subsection shall be sent immediately by the Administrator to the State in which the violation occurs and other affected States." *Id.*

enforcement action within 30 days,²⁴ the Administrator may issue an administrative order,²⁵ commence a civil action in a federal district court having jurisdiction over the violator,²⁶ and also seek criminal penalties against the violator.²⁷

Permit noncompliance under the CWA entails strict liability; thus a defendant's *intention* to comply or a *good faith attempt* to comply does not excuse the fact that the defendant violated the act. This process is designed to "avoid the necessity of lengthy fact finding, investigations, and negotiations . . . [because basing the action on] relatively narrow fact situations requiring a minimum of discretionary decision making or delay . . . [will result in] the issue before the court [being] a factual one of whether there had been compliance."²⁸ The CWA, to be successful, must mandate strict liability and presume unlawful discharges (i.e. violations of permit effluent limitations) will conclusively reduce water quality regardless of the actual amount of discharges because "definite proof of the proposition is often nearly impossible."²⁹

Citizen suits are meant to dovetail into the enforcement process prescribed by the CWA: "[t]he private en-

23. Assuming, *arguendo*, that the state has successfully initiated a permit program that supercedes the NPDES program. See *supra* note 15 for the statutory underpinning of state authority to issue permits under the CWA.

24. "Any order issued under this subsection shall be by personal service . . . and shall specify a time for compliance not to exceed thirty days." 33 U.S.C. § 1319 (a)(5)(A).

25. See 33 U.S.C. § 1319 (a)(3) noting the procedure for issuing an administrative order to comply with the terms of the permit.

26. See 33 U.S.C. § 1319 (b) for the Administrator's authority to commence a civil action against the violator. See also 33 U.S.C. § 1319 (d) for attachment of civil penalties to a violator.

27. See 33 U.S.C. § 1319 (c) for the procedure relating to *mens rea* for criminal penalties. See also *infra* note 133.

28. *Conn. Fund for the Env't v. Upjohn Co.*, 660 F. Supp. 1397, 1409 (D. Conn. 1987).

29. *Student Pub. Interest Research Group v. Georgia-Pacific Corp.*, 615 F. Supp. 1419, 1424 (D. N.J. 1985).

forcement provision of [the CWA] was designed to serve a twofold purpose - first to act as a spark to ignite agency enforcement and second to act as an alternative enforcement mechanism absent agency enforcement."³⁰ However, there is an intent for citizen suits to "play second fiddle" should the *proper* governmental enforcement action arise first: "Congress provided . . . that citizen suits should be subordinate to agency enforcement and devised restrictions to ensure that result . . . [so that] a defendant would not be subjected simultaneously to multiple suits, and potentially to conflicting court orders, to enforce the same statutory standards."³¹

Under section 1365, there are two broad statutory limitations (or "preclusions") to citizen suits. First, the citizen-plaintiff must give notice to specific parties at least 60 days before their lawsuit may be filed with the court having jurisdiction;³² secondly, a citizen-plaintiff may be barred from instituting a lawsuit if there is an ongoing action brought by an administrator.³³

30. *Upjohn*, 660 F. Supp. at 1403 *quoting* *Baughman v. Bradford Coal Co.*, 592 F. 2d 215, 218 (3rd Cir. 1978), *cert. denied*, 441 U.S. 961 (1979).

31. *Upjohn*, 660 F. Supp. at 1403 (citations omitted).

32. "No action [by the citizen-plaintiff] may be commenced (1) 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 the standard, limitation, or order." 33 U.S.C. § 1365 (b) (1972). Also the statute "preempts" 28 U.S.C. § 1332's diversity of citizenship: "[t]he district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation." 33 U.S.C. § 1365 (a)(2) (1972).

33. "No action [by the citizen-plaintiff] may be commenced . . . (B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right." 33 U.S.C. § 1365 (b)(1)(B)(1972).

A. Commencement under section 1365: "[i]f an Administrator or State has commenced . . . a[n] action"

The statutory word "commenced" is potentially subject to tremendous latitude in its precise meaning. One may 'commence' an action when counsel begins research on the case, starts preparing a summons and complaint, or has the paperwork delivered to the courthouse. However, courts have interpreted this facet of citizen suit preclusion very strictly; sometimes their conclusion rests on a determination of who, in a "race to the courthouse," can file their court papers first.³⁴ Courts seem to refer to the classical canons of statutory interpretation in their quest for the meaning of the word 'commence.'³⁵

For example, in *Long Island Soundkeeper Fund, Inc. v. N.Y. City Dept. of Env'tl. Protection*,³⁶ the citizen plaintiff, after giving the mandatory 60-day notice to all required parties, filed court papers at "8:36 a.m. on March 9, 1998."³⁷ The State administrator "filed its court action at 9:00 a.m. that same day,"³⁸ essentially 24 minutes later. The District Court held that the citizen suit was not precluded:

Indeed the State had the opportunity to preempt all private enforcement efforts, but chose instead, for whatever reason, to delay enforcement initiatives despite [citizen] plaintiffs' patient and deferential posture. To deny plaintiffs the opportunity now to seek compliance by the [defendant] as contemplated by Congress would essentially deprive them of the statutory right that Congress saw fit to confer to them [thus] a stay of these proceedings . . .

34. See *Long Island Soundkeeper Fund, Inc. v. N.Y. City Dept. of Env'tl. Protection*, 27 F. Supp 380, 383 (E.D.N.Y. 1998).

35. *Id.*

36. 27 F. Supp 380 (E.D.N.Y. 1998).

37. *Id.* at 382.

38. *Id.*

would effectively rewrite the citizen suit provision of the CWA.³⁹

While earlier in time, but nevertheless continuing this logic, the court in *Chesapeake Bay Found. v. American Recovery Co.*,⁴⁰ considered strict time constraints and commented on why this literal interpretation is essential.⁴¹ The defendant had violated the terms of its effluent discharge permits.⁴² After filing the statutorily required 60-day notice of intent to sue to the required parties, the citizen-plaintiff filed its suit "first, on January 23, 1984 at 12:34 p.m., and the government then filed its own action later that day at 3:52 p.m." a little over 3 hours later.⁴³ The Fourth Circuit, in a *per curiam* holding, refused to dismiss the citizen-plaintiff's suit, holding "[t]he sixty-day waiting period of U.S.C. § 1365 (b)(1)(a) gives the government the opportunity to act and to control the course of the litigation *if it acts within the* [statutorily mandated 60-day] *time period . . . [because] jurisdiction is normally determined at the time of the filing of a complaint.*"⁴⁴ Thus, even though there was a "parallel government suit", the Court of Appeals would not dismiss the citizen suit.⁴⁵

39. *Id.* at 385.

40. 769 F.2d. 207 (4th Cir. 1985).

41. *Id.* at 208.

42. *See Id.* at 209.

43. *Id.* at 208.

44. *Id.* (emphasis added).

45. While the Court of Appeals would not allow dismissal of a previously filed citizen suit because it was "not an appropriate remedy," *Id.* at 209, it did say, however, that "[t]he district court has available means, including consolidation, citizen intervention, U.S.C. § 1365 (b)(1)(B), and intervention by the Administrator, U.S.C. § 1365 (c)(2), to manage its own docket and to *protect defendants from duplicative litigation.*" *Id.* (emphasis added). However, since by the time of appellate review, the government and the defendant had already negotiated a consent decree that the citizen-plaintiff had no objections to, the court now saw the appeal as "moot," and did not remand the case to the district court. For fur-

Further considering the meaning of the word 'commence,' the court in *Conn. Fund for the Env't. v. Upjohn Co.*,⁴⁶ illustrated how inflexible the statutorily mandated rule must be.⁴⁷ In *Upjohn*, responding to the defendant violating the limits of its NPDES permit 1,374 times, the citizen-plaintiffs filed a federal complaint on August 6, 1985;⁴⁸ the State administrator filed his complaint on August 9, 1985.⁴⁹ The court began its analysis of whether the citizen suit may be precluded by stating that "the common meaning of the word [commence] is 'begin' or 'initiate,' but for the purposes of [section 1365] it must be interpreted as a term of art.⁵⁰ Specifically, an action is "'commenced' in federal court *when a complaint is filed.*"⁵¹ Further, "the verb tenses used in [section 1365] subsection (b)(1)(B) and the scheme of the statute demonstrate that the bar [to citizen suits] was not intended to apply unless the government files suit first . . . [thus it held that] the court must apply *an inflexible rule which determines jurisdiction from the time of filing the complaint.*"⁵² Thus, the court interpreted "commence" very literally and strictly. This is in accordance with the intent of the statute, because it first gives the governmental authorities a 60 day 'window' after the citizen group sends notice of its intent to sue, in which to file their claim. Any other interpretation of the meaning of the word 'commence' would effectively violate the intent of the statute.

Should the government not file an action in court, but merely send an administrative notice of violation or a similar communication to the violator, can this be con-

ther doctrinal analysis of when a citizen suit is not precluded, see *infra* Part IV.

46. 660 F. Supp. 1397 (D. Conn. 1987).

47. *Id.*

48. *Id.* at 1402.

49. *Id.*

50. *Id.* at 1403.

51. *Id.* at 1403 (emphasis added).

52. 660 F. Supp. at 1404 (emphasis added).

strued as a "commencement"?⁵³ Since the CWA never defines precisely what "commence" means, courts must interpret the meaning of the word from precedent and also context of the surrounding words. In *Pub. Interest Research Group, Inc. v. Elf Atochem*,⁵⁴ the state agency⁵⁵ issued the defendant a letter containing, *inter alia*, instructions to take corrective actions⁵⁶ for their violation of the terms of their permit. The district court held that since this letter merely "served to warn [the] defendant that an enforcement action might be initiated in the future"⁵⁷ the letter did not "commence" the enforcement proceeding since it made no mention of formal charges, penalties, or a hearing.⁵⁸

An example of a court evaluating first a "notice of violation," then parallel suits by a citizen-plaintiff and then the Federal Administrator is *Atlantic States Legal Found. v. Koch Refining Co.*⁵⁹ In *Koch Refining*, the citizen group,⁶⁰ noting that the defendant had violated the lim-

53. For a further exploration of the issue of commencement, see *infra* Part I.

54. 817 F. Supp. 1164 (D. N.J. 1993).

55. New Jersey has applied for and been approved by the EPA to administer its own SPDES program under the auspices of the New Jersey Dept. of Environmental Protection and Energy (NJDEPE). The NJPEDE had received authority from the EPA to administer the NPDES program in New Jersey in 1982. See *id.* at 1168.

56. The letter to the defendant read, in part, "you are DIRECTED to institute measures to correct the deficienc(ies) . . . [f]ailure to fully comply with the above will result in the initiation of enforcement action by this Department and/or the U.S. Environmental Protection Agency." *Id.* at 1173 (capitals in original) (emphasis added).

57. *Id.* at 1173.

58. Additionally, the court noted several previous instances where a similar letter was sent to the defendant and no enforcement action in a court ensued. See *id.*

59. 681 F. Supp. 609 (D. Minn. 1988).

60. The court noted that the citizen-plaintiff, Atlantic States Legal Foundation, Inc. was "dedicated to protecting and restoring natural resources, particularly water resources," *Id.* at 610, and stated that, while a New York Corporation, it had "members in

its of its effluent permit for several years, filed all statutory notices with the required parties.⁶¹ Some time after this, the state agency issued a notice of violation to the defendant.⁶² The district court noted that the issuance of a violation notice from the State administrator to the defendant "did not amount to commencing an action 'in a court' of the United States within the meaning of 33 U.S.C. § 1365(b)(1)(B)," dismissing the issue without further comment.⁶³ On July 13, 1997, after the sixty day waiting period, the citizen-plaintiffs filed their complaint with the court.⁶⁴ Exactly three months after that, the federal Administrator "commenced its own action against [the defendant]."⁶⁵ The court concluded that the citizen action "was properly filed under section 1365,"⁶⁶ and even though the (then) recently decided *Gwaltney* case⁶⁷ was advancing the supplemental rather than leading role for citizen suits, the holding "does not . . . create a judicial gloss on the plain language of section 1365 . . . [because] '[a]bsent a clearly expressed legislative intent to the contrary [the] language [of the statute] must ordinarily be regarded as conclusive.'"⁶⁸

Similarly, in *Pub. Interest Research Group v. N.J. Expressway Auth.*,⁶⁹ after notices sent by the State regarding defendant's violations, the defendant entered

various states (including Minnesota)," *id.*, illustrating the "identifiable trifle" concept. See *supra* note 7.

61. *Id.* at 610-11 n.1.

62. See *id.* at 611 n.2.

63. *Id.* at 611 n.2. The defendant in this case "[did] not contend otherwise", so, unfortunately, the court did not elaborate on its reasoning as to why the notice of violation was not a commencement.

64. See *id.* at 611.

65. *Id.*, citing the Minnesota District Court case, *U.S. v. Koch Refining Co.*, No. CIVIL 3-87-708 (D. Minn. 1987).

66. *Id.* at 612.

67. See *infra* note 89 and accompanying text for more information on the *Gwaltney* case.

68. *Koch Refining*, 681 F. Supp. at 613.

69. 822 F. Supp. 174 (D. N.J. 1992).

into a "Memorandum of Understanding" (MOU) with the State environmental agency.⁷⁰ The citizen-plaintiffs brought their action subsequent to this "proceeding".⁷¹ The district court, considering the issue of preclusion of the citizen suit, held that the issuance and signing of the MOU was not the commencement of an enforcement action because it was not issued in court,⁷² because the MOU issued under state law was not "comparable" to the federal statute,⁷³ and because there were no penalties assessed against the defendant.⁷⁴

However, where the administrative order issued more closely resembles a court action, some courts have held that citizen suits may be precluded. In *Ark. Wildlife Fed'n v. ICI Americas, Inc.*,⁷⁵ the defendant consented to enter into a Consent Administrative Order ("CAO") several months prior to an action brought by a citizen-plaintiff. The CAO stated that it was in full settlement of civil penalties for the defendant's violations of the CWA, and also provided that "interested third parties

70. The terms of the Memorandum of Understanding (MOU) were that the defendant would not have to pay monetary penalties for the violation of his permit, but instead required him to construct new piping to channel effluent to an offsite wastewater treatment plant and to submit a schedule for this construction. Additionally, the MOU "substantially relaxed both the interim and final effluent limitations contained in the permit and indicated that these new relaxed limitations would remain in effect until [the defendant could connect to the off-site POTW facility]." *Id.* at 178.

71. The court stated, "[t]he Department . . . began its 'proceeding' against defendant by sending the proposed MOU along with a cover letter, which neither specified the amount of penalty to be imposed nor advised of the right to a hearing." *Id.* at 184 n.13.

72. *See supra* note 63.

73. The court said, "[w]hile the federal law requires notice to the public of enforcement actions along with the opportunity to comment on any proposed order and to participate in a hearing . . . no such provisions for public involvement exist in the state statute or regulations." *Id.* at 184 n.14.

74. *See id.* at 184.

75. 29 F.3d 376 (8th Cir. 1994). *See infra* notes 85-87 and accompanying text for a further discussion of the issues in this case.

had a right to intervene . . . certain notice and hearing procedures became available to interested third parties . . . [and] [m]oreover, [defendant] became subject to further penalties for failure to comply with the CAO."⁷⁶ The Eighth Circuit held that "states are allowed some latitude in selecting the specific mechanisms of their enforcement program,"⁷⁷ and since the CAO would allow intervention, notice, and assessment of future penalties, the issuance of a CAO was *equivalent* to a court action, therefore "commencement."⁷⁸

Thus, for issues of "who filed first" in a court action, the first prong of citizen suit preclusion usually consists of a fairly mechanical determination of which party (i.e. the government or the citizen-plaintiffs), after the statutorily mandated notice and waiting period, delivered their papers into the hands of a court clerk and thereby filed with the court. According to some of the above holdings (where a 'strict interpretation' is used) the word "commence" can be interpreted to mean, "stamped as entered by the court." If the government files first, the citizen suit may be precluded; if the citizen-plaintiff files first, he, without more, may not be precluded from bringing suit against the violator. Conversely, if an Administrative Order entered into by the government sufficiently resembles a court action, it may (in some jurisdictions) be deemed to be a "commencement" of an action.

B. *Diligent Prosecution under section 1365: "[i]f the Administrator or State has commenced and is diligently prosecuting a[n] . . . action in a court."*

Under section 1365, if, at the time of citizen suit commencement, the EPA or the State is "diligently

76. *Id.* at 380.

77. *Id.*

78. *Id.*

prosecuting a civil or criminal action in a court”⁷⁹ an otherwise properly brought citizen suit may nevertheless be precluded. Courts pondering the meaning of the word “diligently” have found an, albeit rebuttable, presumption of diligence;⁸⁰ it has been held that “[t]he court must presume the diligence of the state’s prosecution of a defendant absent persuasive evidence that the state has engaged in a pattern of conduct . . . that could be considered dilatory, collusive or otherwise in bad faith.”⁸¹

Illustrating this presumption, in *North and South Rivers Watershed Assoc. Inc. v. Town of Scituate*,⁸² the court concluded that even the issuance of an Administrative Order is diligent prosecution when the Order represents “substantial, considered and ongoing response to the [defendant’s] violation.”⁸³ The court moved far away from the ‘literal’ statutory interpretation as found above by the courts considering the word “commence,” stating, “[t]he 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.”⁸⁴

Additionally, diligence cannot be measured in terms of the citizen-plaintiff’s values or standards but instead, due deference must be given to the State or Federal agency.⁸⁵ In *Ark. Wildlife Fed’n v. ICI Americas, Inc.*,⁸⁶ the court held “[i]t would be unreasonable and inappro-

79. 33 U.S.C. § 1365 (b)(1)(B) (1972). See *supra* note 33 for the complete text of this section.

80. See *Conn. Fund for the Env’t v. Contract Plating Co.*, 631 F. Supp. 1291, 1293 (D. Conn. 1986).

81. *Id.*

82. 949 F.2d 552 (1st Cir. 1991).

83. *Id.* at 557.

84. *Id.* at 556.

85. See *Ark. Wildlife Fed’n v. ICI Americas, Inc.*, 29 F.3d 376 (8th Cir. 1994).

86. *Id.*

priate to find failure to diligently prosecute simply because [the defendant/violator] prevailed in some fashion or because a compromise [with the government agency] was reached."⁸⁷ Thus, this logic directly links back to *Scituate*, "[w]here an agency has specifically addressed the concerns of an analogous citizen's suit, deference to the agency's plan of attack should be particularly favored."⁸⁸

Further, the legislative history of citizen suits notes that "the great volume of enforcement actions [are intended to] be brought by the State and that citizen suits are proper only 'if the Federal, State, and local agencies fail to exercise their enforcement responsibility.'"⁸⁹ Thus, a claimed lack of diligence must rise to the level of a catastrophic failure by the governing agency for a citizen-plaintiff to defeat preclusion based only on the diligence prong under the CWA. For example, in *Atlantic States Legal Found., Inc. v. Universal Tool & Stamping Co.*⁹⁰ the apparent willingness of the State agency to "bend its procedures on [defendant's] behalf," the "lenient penalty assessment of only \$10,000 for the hundreds of reported violations, despite statutory authority for penalties of \$25,000 per violation" and the statement by the defendant's president that the state's "administrative proceeding had little effect upon [defendant's] efforts to comply with its permit [and] that it was [the citizen plaintiff's] threat of a lawsuit that spurned the

87. *Id.* at 380, citing *Contract Plating*, 631 F. Supp. at 1294: "[t]he mere fact that the settlement reached in the state action was less burdensome to the defendant than the remedy sought in the [citizen suit] is not sufficient in itself to overcome the presumption that the state action was diligently prosecuted." *Id.* (emphasis added).

88. *Scituate*, 949 F.2d at 557.

89. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987), quoting S. Rep. No. 92-414, at 64 (1971), reprinted in 2A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 1482 (1973).

90. 735 F. Supp. 1404 (D. Ind. 1990).

defendant to action"⁹¹ led the court to conclude that the state's proceeding was not "diligent prosecution under the [CWA]."⁹²

Similarly, in *N.Y. Coastal Fisherman's Assoc. v. N.Y. City Dep't of Sanitation*,⁹³ the defendant was responsible for the maintenance of a previously closed landfill that had been discharging leachate⁹⁴ on surrounding properties since 1982.⁹⁵ The State, after investigating the sources of the complaints, had entered into an Order of Consent with the defendant in 1985, and had entered into a second Order of Consent in 1990 that required a remedial plan be filed with the State by 1995.⁹⁶ The defendant, meanwhile had curtailed allowing the leachate to merely discharge on neighbor's properties and had, amazingly, devised and implemented a plan to discharge the leachate directly into the nearby Bay, *apparently with State approval*.⁹⁷ The court, calling the entire mess a "bureaucratic and political nightmare," scathingly classified the State's involvement as "a pen pal, not a prosecutor."⁹⁸ The court held the State's action was not diligent, because the twelve year period that the defendant had to merely submit a proposal for elimination of the pollution discharge was "simply too long to rectify a

91. *Id.* at 1416-17.

92. *Id.* at 1417.

93. 772 F. Supp. 162 (S.D.N.Y. 1991).

94. "Leachate refers to that substance which is created when, over a period of time, compression of the solid waste and other refuse contained in the landfill, forces liquid from the refuse The resultant liquid, or leachate, takes on the properties of certain constituents of the refuse. Leachate typically is very concentrated, high in metal and organic constituents." *Id.* at 163 n.1, *citing* Hudson River Fishermen's Ass'n v. County of Westchester, 646 F. Supp. 1044, 1046 n.2 (S.D.N.Y. 1988).

95. In 1979, "the landfill was closed, but not effectively capped, [and since] 1982 complaints about leachate streams and ponds were lodged by individuals living in the vicinity of the landfill." *Coastal Fishermen's Ass'n*, 772 F. Supp. at 163.

96. *See id.* at 163-64.

97. *See id.* at 164-68.

98. *Id.* at 168.

problem that has been known about since 1983 . . . [and further, it] is simply incomprehensible that the discharge of leachate into Eastchester Bay, which was to be a temporary measure adopted to remedy the problem, should continue for seven years."⁹⁹

Curiously, while other environmental statutes allow preclusion of citizen suits *either* for actions in a court or through administrative proceedings,¹⁰⁰ section 1365 only refers to "courts" and no other express alternative.¹⁰¹ Nevertheless, courts have still had some confusion as to

99. *Id.* at 169.

100. *See, e.g.*, Toxic Substances Control Act, 15 U.S.C. § 2619 (b)(1)(B) (1976) (amended 1992) ("if the Administrator has commenced and is diligently prosecuting a proceeding for the issuance of an order under section 2615 (a)(2) of this title to require compliance with this chapter or order or if the Attorney General has commenced and is diligently prosecuting a civil action in a court of the United States to require compliance with this chapter.") *Id.* (emphasis added); Endangered Species Act, 16 U.S.C. § 1540 (g)(2)(A) (1973)(amended 1988) ("(ii) if the Secretary has commenced action to impose a penalty pursuant to subsection (a) of this section; or (iii) if the United States has commenced and is diligently prosecuting a criminal action in a court of the United States or a State to redress a violation of any such provision or regulation.") *Id.* (emphasis added); Marine Protection, Research and Sanctuaries Act, 33 U.S.C. § 1415 (g)(2) (1972) (amended 1992) ("(B) if the Attorney General has commenced and is diligently prosecuting a civil action in a court of the United States . . . or (C) if the Administrator has commenced action to impose a penalty pursuant to subsection (a) of this section, or if the Administrator, or the Secretary, has initiated permit revocation or suspension proceedings . . . or (D) if the United States has commenced and is diligently prosecuting a criminal action in a court of the United States or a State to redress a violation of this subchapter.") *Id.* (emphasis added); and Resource Conservation and Recovery Act, 42 U.S.C. § 6972 (b) (1976) (amended 1984) ("if the Administrator . . . (i) has commenced and is diligently prosecuting an action under section 6973 of this title . . . (ii) is actually engaging in a removal action removal action under section 104 . . . (iii) has incurred costs to initiate a Remedial Investigation and Feasibility Study under section 104 . . . or (iv) has obtained a court order (including a consent decree) or issued an administrative order under section 106.") *Id.* (emphasis added).

101. *See supra* note 33 for relevant text of § 1365 (b).

what the meaning of the words "in a court" is, even though the words are expressly stated in the statute.¹⁰²

In an early case of first impression,¹⁰³ the court in *Baughman v. Bradford Coal Co.*,¹⁰⁴ acknowledged 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."¹⁰⁵ The Third Circuit was concerned, however, about the perceived necessity to "provide for citizens' suits in a manner that would be least likely to clog already burdened federal courts and [be] most likely to trigger governmental action which would alleviate any need for judicial relief."¹⁰⁶ Thus, for the practical justification of easing clogged dockets of the federal courts, the court in *Baughman* set aside the plain language of the statute,¹⁰⁷ holding "[i]t follows that to constitute a 'court' in which proceedings by the State will preclude private enforcement actions under [the Clean Air Act], a tribunal must have the power to accord relief which is substantially

102. See, e.g., *Baughman v. Bradford Coal Co.*, 592 F.2d 215 (3rd Cir. 1979); see also *infra* notes 105-109. But see *Friends of the Earth v. Consol. Rail Corp.*, 768 F.2d 57 (2nd Cir. 1985); see also *infra* notes 110-17.

103. While the court in this case was actually construing the Clean Air Act, it looked to the Clean Water Act for guidance because the statutory text is substantially similar. See *infra* note 107 for the relevant text of the Clean Air Act.

104. 592 F.2d 215 (3rd Cir. 1979).

105. *Id.* at 217, *citng* *United States v. Frantz*, 220 F.2d 123, 125 (3rd Cir. 1955).

106. *Baughman*, 592 F.2d at 218, *citng* *City of Highland Park v. Train*, 519 F. 2d 681, 690-91 (7th Cir. 1975), *referring to* Remarks of Senator Muskie, 116 Cong. Rec. 32926, 33102 (1970) and Remarks of Senator Hart, *Id.* at 33183.

107. The court quoted the relevant section of the Clean Air Act: "no such action may be commenced . . . 'if the Administrator or State has commenced and is diligently prosecuting a civil action in a court of the United States to require compliance with the standard.'" *Baughman*, 592 F.2d at 217, *citng* 42 U.S.C. § 7604 (b)(1)(B). For a brief discussion relevant to the potential dangers in a court 'usurping' a legislative function and its relation to the Separation of Powers doctrine, see *infra* Part IV.

equivalent to that available to the EPA in federal courts under the Clean Air Act."¹⁰⁸ Consequently, *Baughman* adopted the "Alice in Wonderland" approach to statutory interpretation.¹⁰⁹

Conversely (and thus more toward 'classical' statutory interpretation), in *Friends of the Earth v. Consol. Rail Corp.*¹¹⁰ enforcement actions by the State culminated in consent orders.¹¹¹ These orders were posited by the defendant to be the "functional equivalent of a diligently prosecuted action in a court and therefore [they should]

108. *Id.* at 219. Moreover, other courts elaborated on what specific powers are necessary to allow the tribunal to be the functional equivalent of a court: "[t]he *Baughman* test requires that (1) the state agency have coercive powers to compel compliance [with statutory limitations] and (2) [that] there be procedural similarities to a suit in federal court with citizens having the right to intervene." *Atlantic States Legal Found. v. Universal Tool & Stamping Co.*, 735 F. Supp. 1404, 1414 (D. Ind. 1990) (italics added).

109. "When I use a word," Humpty Dumpty said in a rather scornful tone, "it means just what I choose it to mean- neither more nor less." "The question is," said Alice, "whether you can make words mean so many different things." "The question is," said Humpty Dumpty, "which is to be master- that's all." LOUIS CARROLL, *THROUGH THE LOOKING-GLASS* 106-09 (Schocken Books 1987) (1872), cited in *Conn. Coastal Fisherman's Assoc. v. Remington Arms Co.*, 989 F.2d 1305, 1308 (D. Ind. 1993), stating that the meaning Congress had intended for several key words as contained in RCRA have an "Alice in Wonderland' air about [them]." *Id.* Apparently, Mr. Carroll's work is a favorite of other legal scholars as well; Professor Singer, in his revision of Sutherland's classic "Statutes and Statutory Construction" also uses a reference to Mr. Dumpty: "[t]his is not to say that custom or convention does not establish standard or usual meanings in language usage. Thus in Lewis Carroll's Alice in Wonderland, Humpty Dumpty can use the word 'glory' to mean a 'nice knock down argument' if he wants to, but if he wants Alice to understand him he would do better to use words which in everyday speech are more generally understood to have that meaning." See SUTHERLAND, *supra* note 11, § 45.07 at 32.

110. 768 F.2d 57 (2nd Cir. 1985).

111. In this case there were actually two separate citizen suits against the same defendant, although they were originally argued separately, that were consolidated for opinion because they arose from similar facts and presented a similar legal question. *Id.* at 58.

operate to bar [citizen-plaintiff's] suits"¹¹² as inspired by the *Baughman*¹¹³ decision. While the court felt the facts in the *Friends of the Earth* case did not meet the *Baughman* test, this was irrelevant because the court held that "the language [i.e. the words "in a court" was] clear and unambiguous, [and thus] judicial inquiry is complete¹¹⁴ except in 'rare and exceptional circumstances' . . . [where] 'only the most extraordinary showing of contrary intentions from [the legislative history] would justify a limitation on the plain meaning of the statutory language.'"¹¹⁵ Although the court recognized the obvious danger that unlimited public actions might disrupt the implementation of the Act and overburden courts,¹¹⁶ it nevertheless stated that "Congress made clear that citizen groups are not to be treated as nuisances or troublemakers but rather as welcomed participants in the vindication of environmental interests."¹¹⁷ Thus, a "court is a court and an administrative consent order is not."

*Sierra Club v. Chevron U.S.A., Inc.*¹¹⁸ considered the merits of both the *Baughman* and the *Friends of the Earth* holdings.¹¹⁹ The State Administrator had issued an order requiring the defendant to cease violating its

112. *Id.* at 61.

113. See *supra* notes 104-08 and accompanying text for the relevant material on the *Baughman* test.

114. For some extremely interesting research materials on the science of statutory interpretation and the intent of the legislature, see ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 14-18 (Princeton University Press 1997). Judge Scalia states that, "[b]y far the greatest part of what I and all federal judges do is to interpret the meaning of federal statutes and federal agency regulations." *Id.* at 14-15. In his book, Judge Scalia goes on to illustrate the several "classic" treatises in the field of statutory interpretation, some of which are quoted in this Note.

115. *Friends of the Earth*, 768 F.2d at 62-63, quoting *Garcia v. United States*, 469 U.S. 70, 75 (1984).

116. The court's precise concern in *Baughman*, *supra* note 104.

117. *Friends of the Earth*, 768 F.2d at 62.

118. 834 F.2d 1517 (9th Cir. 1987).

119. *Id.* at 1521, 1524-25.

permit and to build a new wastewater treatment facility.¹²⁰ Subsequent to this, but not before a citizen suit had been filed, the State assessed fines against the defendant for recent violations.¹²¹ After the court analyzed the contrary holdings of both *Baughman* and *Friends of the Earth* cases, it noted that Congress, in other environmental acts, had references to *either courts or administrative actions*.¹²² This proved that Congress, if it intended, could have easily written both alternatives into the plain language of section 1365, which clearly could "dispell[] any ambiguity in the term 'courts' as used in section 1365 [; moreover, defendant] has cited no legislative history that would justify the extraordinary step of ignoring the plain language of [Section 1365]." ¹²³ The court denied preclusion, stating "33 U.S.C. § 1365 unambiguously requires that action be in a literal 'court,' so that agency action outside of a court will never bar a citizen enforcement suit."¹²⁴

In light of the above cases, "[i]t is well settled that 'the starting point for interpreting a statute is the language of the statute itself,'" ¹²⁵ thus it may be postulated that the meaning of words in a statute may come from surrounding words, and also from the wording of similar statutes.¹²⁶ The word "court" has a 'plain meaning' to all

120. See *id.* at 1520.

121. For a timeline of the events of this case, see *id.* at 1519-20.

122. For examples of these other environmental statutes that have the alternatives of either courts or administrative actions in their wording, see *supra* note 100.

123. *Chevron*, 834 F.2d at 1525.

124. *Id.* at 1524.

125. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 56 (1987), quoting *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

126. "Where the meaning of a statute has not been settled, courts use [several] tools: (1) the *wording* of the statutory section at issue; (2) any *statutory context* that might indicate the legislature's intent: other sections of the same statute, other statutes addressed to the same subject matter, the heading of the section at issue, and

who hear it; thus, “[w]here the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion.”¹²⁷ Since other, similar environmental statutes clearly use either courts or administrative proceedings as a bar to citizen suits, including only “court” in section 1365 evinces a clear intent by Congress to preclude citizen suits solely in the event that the government is diligently prosecuting a suit against the violator *in a court*. Any other interpretation would eviscerate the plain meaning of the statute.

However, the practicality (or reasonableness) of this strict interpretation still remains to be seen: “[i]t is fundamental . . . that departure from the literal construction of a statute is justified when such a construction would produce an absurd result and would clearly be inconsistent with the purposes and policies of the act in question.”¹²⁸

C. *Prosecution under section 1319: “the Administrator [or State] has commenced and is diligently prosecuting an action under this subsection . . . shall not be the subject of a civil penalty action under . . . section 1365 of this title.”*

Formalistically speaking, while *Baughman* was an incorrect statutory interpretation of the words “in a court”, nevertheless, it did presage the practical reality of section 1365’s rigidity which resulted in additional cases (where extensive adjudication was not necessary) and added to an already overburdened federal court

the statute’s title and preamble (if any); (3) the historical context: the *events and conditions* that might have *motivated* the legislature to act; (4) the context created by announcements of *public policy* in other statutes and case law . . .” RICHARD K. NEUMANN, JR., *LEGAL REASONING AND LEGAL WRITING: STRUCTURE, STRATEGY, AND STYLE* 139 (Little, Brown and Company, 2d ed. 1994) (emphasis in original).

127. SUTHERLAND, *supra* note 11 § 46.01, at 81.

128. *Id.* § 45.12, at 61.

system.¹²⁹ In 1987, Congress amended the CWA by adding section 1319(g)¹³⁰ which, *inter alia*, allowed preclusion of citizen suits for certain kinds of administrative actions *not* "in a court."

Violations under the CWA may be enforced by the Administrator in several ways. First, the Administrator may issue a compliance order¹³¹ that orders the violator to cease and desist his permit violations. Also, the Administrator may commence a civil¹³² or criminal¹³³ action

129. See *supra* discussion on *Baughman* notes 104-08 and accompanying text for the court's incorrect statutory interpretation, in terms of classical statutory interpretation, of the words "in a court."

130. The relevant text of this section is "[a]ction taken by the Administrator or the Secretary, as the case may be, under this subsection shall not affect or limit the Administrator's or Secretary's authority to enforce any provision of this chapter; except that any violation . . . (i) with respect to which the Administrator or the Secretary has commenced and is diligently prosecuting an *action under this subsection*, (ii) with respect to which a State has commenced and is diligently prosecuting an action under a State law *comparable to this subsection*, or (iii) for which the Administrator, the Secretary, or the State has issued a final order not subject to further judicial review and the violator has *paid a penalty assessed under this subsection*, or such comparable State law, as the case may be, shall not be the subject of a civil penalty action under subsection (d) of this section ['Civil penalties; factors considered in determining amount'] or section 1321(b) of this title ['Oil and hazardous substance liability'] or section 1365 of this title ['Citizen suits']." 33 U.S.C. § 1319 (g) (1987) (emphasis added).

131. "Whenever on the basis of any information available to him the Administrator finds that any person is in violation of . . . any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title ['Permits for discharge of pollutants'] by him or by a State or in a permit issued under section 1344 ['Permits for dredged or fill material'] of this title by a state, he shall issue an order requiring such person to comply with such section or requirement." 33 U.S.C. § 1319 (a)(3) (1972) (section references omitted).

132. "The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section." 33 U.S.C. § 1319 (b).

against the violator, seeking an injunction, penalties, or imprisonment. Finally, the Administrator may assess an administrative penalty¹³⁴ against the violator that encompasses two classes of civil penalties. Additionally, private citizens may initiate actions against violators for either injunctive relief or penalties that will be deposited into the United States Treasury.¹³⁵

133. See 33 U.S.C. § 1319 (c) for criminal penalties for negligent violations (subsection (1)); knowing violations (subsection (2)); knowing endangerment (subsection (3)); and false statements (subsection (4)) for the criminal *mens rea* requirements of this portion of the CWA enforcement procedures.

134. "Whenever on the basis of any information available . . . the Administrator [or the Secretary of the Army] finds that any person has violated . . . any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or in a permit issued under section 1344 of this title by a State . . . the Administrator or Secretary, as the case may be, may, after consultation with the State in which the violation occurs, assess a class I civil penalty or a class II civil penalty under this subsection." 33 U.S.C. § 1319 (g) (1987). The section goes on to describe the classes of penalties (subsection (2)); determining the penalty amount (subsection (3)); and rights of interested persons (subsection (4)). *Id.*

135. "Although the statute provides that a citizen sues 'on his own behalf,' any penalties recovered from such an action are paid into the United States Treasury. Unlike a *qui tam* action, where a volunteer plaintiff can recover part of a penalty, in this action, a plaintiff recovers nothing. Any benefit from the lawsuit, whether injunctive or monetary, inures to the public or to the United States." *Chevron*, 834 F.2d at 1522 (italics added). The court, while basically correct in its assertion, has missed one small point: under § 1365, the citizen plaintiff may sue to recover, of course not *penalties*, but his own *attorney fees* and "[t]he court, in issuing any final order in any action brought pursuant to this section may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate." 33 U.S.C § 1365 (d) (1972). Case law has refined this to mean award of attorney fees to "prevailing parties." "[t]hese [attorney] fees are available even if the citizen's claims are dismissed after termination of a parallel agency enforcement action, so long as the citizen suit played a role in bringing about the successful termination of the agency action." *Old Timer v. Blackhawk-Central City Sanitation District*, 51 F. Supp. 2d 1109 (D.

The language of section 1319(g) states that civil suits brought by citizen-plaintiffs may be precluded if the Administrator or State has commenced and is diligently prosecuting an "action under this subsection", which, by inference, translates to an "administrative penalty[y]" action, *since these words are the subsection's title*. In cases where something other than an administrative penalty action (for example a Compliance Order) has arisen, there is a decided circuit split as to whether this other action can also preclude an otherwise properly brought citizen suit; in essence, what do the words "administrative penalty" actually mean. The two parts below explore, statutorily speaking, a 'narrow' interpretation or a 'broad' interpretation of precisely when and how an administrative penalty action may preclude a citizen suit.

II. THE CIRCUIT SPLIT

A. *The Ninth Circuit: Consistent Refinement; Narrow Scope*

Ninth Circuit cases considering attempts by the defendant at citizen suit preclusion are good examples of holdings in successive cases that logically proceed and further explore and refine the original holding. The logic can be clearly tracked, and the expansion of the holding is easily identifiable. An example of this progression, the initial question in *Washington Public Interest Re-*

Colo. 1999); *see also* Atlantic States Legal Found., Inc. v. Eastman Kodak Co., 933 F.2d 124 (2nd Cir. 1991) ("Although the case may be subject to dismissal, the function of the citizen suit—the cessation of violations of the Clean Water Act— will have been served . . . [and since] the existence of the citizen suit was a motive for the polluter's settlement [the court finds] the citizen suit plaintiff is therefore a prevailing party [and may be awarded attorney fees].") *Id.* at 128. Since attorney fees are not usually awarded to the prevailing party (as they are in England), it may be postulated that these are 'penalties' in this specific situation.

search Group v. Pendleton Woolen Mills ("Washington PIRG")¹³⁶ was whether an administrative compliance order¹³⁷ issued before the filing of a CWA based citizen suit could preclude the suit.¹³⁸ The court noted that the administrative compliance order was issued pursuant to section 1319(a) ("State enforcement; compliance orders"), not section 1319(g) ("Administrative penalties")¹³⁹ and that "the imposition of an administrative penalty requires elaborate procedures including hearings as well as public notice and comment, none of which [the compliance order requires]."¹⁴⁰ Additionally, "if Congress had intended to preclude citizen suits in the face of an administrative compliance order, it could easily have done so, as it has done in certain other environmental statutes."¹⁴¹ The court held that it may not look beyond

136. 11 F.3d 883 (9th Cir. 1993).

137. The EPA issued order "required [defendant] to prepare a report describing the causes of the violations and identifying those actions necessary to bring it into compliance . . . [further, it] required [defendant] to make those physical improvements identified as necessary . . . [finally, the order] included the threat of a sanction of \$25,000 per day if [defendant] violated [the order's] terms." *Id.* at 884-85.

138. The court could not make any factual findings as to whether the defendant continued to violate its permit limitations after the administrative compliance order was issued; the court apparently deemed this irrelevant in its holding since it did not remand the case to the district court for a finding on this specific factual item (although it did remand to the district court for other reasons). *See id.*

139. While *Washington PIRG* was decided some 3 years before *UNOCAL*, *see infra* note 143, there is a continuation of logic to even individual provisions in the federal statutes being "comparable" to § 1319 (g). However, it can be argued that the logical "scrutiny" occurred precisely reverse of what one would envision: it might be expected that the State provisions would be construed first, and then the federal as an extension of the logic between federal-state "comparability."

140. *Washington PIRG*, 11 F.3d at 885.

141. *Id.* at 886, *citing* Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6972 (b)(2)(B)(iv) (1976) ("barring citizen suit when the EPA has issued an abatement order"); *also citing* Comprehensive Environmental Response, Compensation, and Liability

the plain language of the statute; thus, "the . . . statute does not bar citizen suits *absent an administrative penalty action*."¹⁴²

Continuing this logic, in *Citizens for a Better Environment- Cal. v. Union Oil Co* ("UNOCAL"),¹⁴³ responding to the defendant's violation of its permit discharge limitations, the State issued a cease and desist order ("CDO")¹⁴⁴ and subsequently entered into a settlement agreement with the defendant who agreed to, *inter alia*, make a payment of \$780,000.¹⁴⁵ As a counter argument to the citizen suit filed some three months after the settlement was executed, the defendant sought preclusion by arguing that the money paid was a penalty, and that the CDO was comparable to an administrative penalty action.¹⁴⁶ However, the court agreed with the citizen-plaintiff's arguments and interpreted the sum paid as a "payment" instead of a "penalty" because: (1) the defendant himself insisted on classifying the financial transfer as a "payment" and not a "penalty" at the time of the settlement;¹⁴⁷ (2) by classifying the sum as a payment (and thus outside the context of the penalty language in the statute), the defendant "avoided a significant level of

Act (CERCLA), 42 U.S.C. § 9659 (d)(2) (1986) ("barring citizen suit when the EPA is 'diligently prosecuting an action . . . to require compliance"). *Id.*

142. 11 F.3d at 886 (emphasis added).

143. 83 F.3d 1111 (9th Cir. 1996).

144. The CDO stated that, "[t]he Regional Board has considered the various enforcement and penalty options available to it regarding the violation [of the NPDES permit] Under the circumstances detailed [in the case Findings] above, the Regional Board has determined that the most appropriate course of action is settlement of the litigation and issuance of a cease and desist order." *Id.* at 1116 n.1.

145. *Id.* at 1116.

146. *See id.*

147. "[C]ounsel for [defendant] . . . stated . . . that [defendant] would not, at the time of the settlement of the state lawsuit, sign on to paperwork that characterized it as a penalty because of the punitive and bad conduct implications that the general public takes from that term." *Id.* at 1116.

scrutiny as to the nature and amount of a penalty;"¹⁴⁸ and (3) while administrative penalties are mandated to be paid within 30 days from their being imposed, the defendant "was not required to make half of its payment until a year after the settlement was entered into."¹⁴⁹ The Ninth Circuit concluded that the CDO was merely a "settlement made to avoid an enforcement action [and thus was] the price of avoiding the stigma of a formal enforcement action."¹⁵⁰ Since there was no "penalty," there cannot be an administrative *penalty* action. Therefore, the citizen suit that arose after the settlement agreement but before the sum was paid in full, could not be precluded.

Additionally, the Ninth Circuit, in *UNOCAL*, pondered the meaning of "State law comparable¹⁵¹ to [administrative penalties listed in § 1319]" in terms of a penalty assessed under a *related State provision* and not the state provision that is actually comparable to section 1319; thus, questioning whether a state's decision not to utilize the comparable state law penalty provision (and use a similar, but "non-comparable" provision) negates the "comparability" of the state action.¹⁵² The court held the

148. *Id.* For example, the court stated that there was "no assurance that [defendant] has fully disgorged the benefit it receives [sic] from violating effluent standards." *Id.*

149. *UNOCAL*, 83 F.3d at 1116.

150. *Id.*

151. The court stated, "[i]t is undisputed that the penalty provision in § 13385 of the California Water Code is comparable to the federal Clean Water Act penalty provision of 33 U.S.C. § 1319." *Id.* at 1116-17.

152. In essence, if one penalty provision is "comparable," are all penalty provisions "comparable" or should we consider each provision for "comparability"? A strict construction of this question could conclude that all provisions must be considered independently; merely because one part is "comparable" does not mean that all parts are. See, e.g., *Washington PIRG*, *infra* notes 136-42. Accord, *SUTHERLAND*, *supra* note 11 § 47.02, at 138: "[i]f the meaning of any particular phrase or section standing alone is clear no other section or part of the act may be applied to create doubt." *Id.*, *citing* *United States v. Batchelder*, 581 F.2d 626 (1978). However, a

related state provision was not "comparable" for several reasons.¹⁵³ First, "this is the plainest reading of the statutory language."¹⁵⁴ Second, due to the various notice and assessment provisions under section 1319, unless the penalty is assessed using a "comparable" state provision, "there is no guarantee that the public will be given the requisite opportunity to participate [in the proceeding] or that the penalty assessed is of the proper magnitude."¹⁵⁵ Lastly, a more liberal interpretation may lead to citizen suit preclusions that are broader¹⁵⁶ than Congress intended.

Continuing this progression, the court in *Knee Deep Cattle Co. v. Bindana Inv. Co.*¹⁵⁷ provided a refinement of

more liberal interpretation of the statute might find that as long as the overall goals of the state and federal statutes are the same, specific provisions in the state statutory scheme can be interpreted within the context of its overall comparability with the federal statute. See, e.g., *Scituate*, *supra* notes 82-84; see also *Ark. Wildlife*, *supra* notes 75-78 and 85-87.

153. See *UNOCAL*, 83 F.3d at 1118 (discussing the elements of this "rule").

154. *Id.* The court went on to elaborate by quoting several sources: "the starting point for interpreting a statute is the language of the statute itself." *Id.* at n.4, quoting *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found. Inc.*, 484 U.S. 49, 56 (1987). Additionally, "[a]bsent a clearly expressed legislative intention to the contrary, that language [as stated in the statute] must ordinarily be regarded as conclusive." *UNOCAL*, 83 F.3d at 1118 n.4, quoting *Consumer Prod. Safety Comm'n v. GTE Sylvania Inc.*, 447 U.S. 102, 108 (1980). Therefore, "[i]f the intent of Congress is clear, that is the end of the matter, for the court . . . must give effect to the unambiguously expressed intent of Congress." *UNOCAL*, 83 F.3d at 1118 n.4, quoting *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984).

155. *UNOCAL*, 83 F.3d at 1118.

156. For example, an action outside of the statutorily limited scope of preclusion based on administrative penalty actions, and perhaps allowing preclusion where a mere Consent Order has been executed. The court further elaborated on this, stating "[n]othing in the language and structure of . . . § 1319 (g)(6)(A) in any way suggests that Congress intended such a dichotomy." *Id.*

157. 94 F.3d 514 (9th Cir. 1996).

the administrative penalty issue.¹⁵⁸ In *Knee Deep*, the defendant violated the terms of its permit, and the State issued a Notice of Noncompliance (“NON”) followed by a Notice of Permit Violation (“NPV”)¹⁵⁹ and a Notice of Civil Penalty (“NCP”) which assessed a civil penalty for one such violation that was later paid by the defendant.¹⁶⁰ Subsequent to this, the defendant and the State privately entered into a Stipulation and Final Order (“SFO”)¹⁶¹ which settled defendant’s past violations without penalty.¹⁶² Several months after the SFO execution, the State issued Penalty Demand Notices for violations occurring after the SFO, *but did not impose these penalties for violation of defendant’s NPDES permit*. In a later hearing to dismiss the subsequent citizen suit, the Ninth Circuit held that the SFO was not “comparable” to section 1319(g) because, to preclude a citizen suit, “the comparable state law must contain penalty provisions and a penalty must actually have been assessed under [that portion of] the state law.”¹⁶³

Building on the several previous cases, the Ninth Circuit further refined its preclusion test in *Sierra Club v. Hyundai America, Inc.*¹⁶⁴ Though the facts are similar to *Knee Deep*, there is an added twist: the penalties were

158. *Id.* at 517.

159. “The NPV notified [defendant] that [his] reports showed discharges exceeding its permit limitations, and required [defendant] to submit a written proposal to bring the facility into compliance with the permit or face penalties.” *Id.* at 515.

160. *Id.*

161. “The SFO outlined a plan to upgrade [defendant’s facility] at a cost of \$175,000 to \$200,000 [and also] set penalties for non-compliance with [agreed] interim [permit] limits as well as for violations of the compliance schedule.” *Id.*

162. The SFO did, however, “reserve . . . the [State’s] right to proceed against [defendant] for any past or future violations not settled in the SFO.” *Id.*

163. *Knee Deep*, 94 F.3d at 516 (emphasis added), citing *UNOCAL*, 83 F.3d at 1115; also citing *Washington PIRG*, 11 F.3d at 883.

164. 23 F. Supp. 2d 1177 (D. Or. 1977).

assessed by the State *after* the notice of intent to bring a citizen suit under the CWA.¹⁶⁵ The district court held that "the provisions of [state] law that [state administrators] acted under before plaintiff's notice of intent to sue must contain penalty provisions, and any penalty *must have actually been assessed before the notice of intent to sue* as well."¹⁶⁶

Thus, the Ninth Circuit has consistently refined and narrowed the scope of citizen suit preclusion under the CWA, using a strict interpretation of the statute's language. This logic seems to agree with Justice Scalia's partial dissent in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found. Inc.*¹⁶⁷ in which, discussing whether subject matter jurisdiction arose from a reading of the language of the statute, he argued that it "depends on the state of things at the time of the action brought"; if it existed when the suit was brought, 'subsequent events cannot ous[t]' the [meaning of the statute's plain words]."¹⁶⁸

B. *Other Circuits: One Step Backward or Have We Gone Too Far . . . With a "Twist"*

Conversely, cases that support citizen-plaintiff preclusion independent of penalties being assessed under section 1319 seem to be motivated by the court's concern that too narrow a scope of preclusion will result in elimination of federal and state administrators' discretion; essentially "tying their hands" by preventing the structuring of a compliance procedure as they see fit.

As an example of the above phenomenon, in *Sierra Club v. Colo. Refining Co.*,¹⁶⁹ the State agency, responding to years of violations by the defendant, issued a No-

165. See *id.* at 1178-80.

166. *Id.* at 1181 (emphasis added).

167. 484 U.S. 49 (1987).

168. *Id.* at 69, quoting *Mollan v. Torrance*, 22 U.S. (9 Wheat.) 537, 539 (1824).

169. 852 F. Supp. 1476 (D. Colo. 1994).

tice of Violation and Cease and Desist Order ("NOV").¹⁷⁰ The State agency and the defendant were also in the process of "discussing the appropriate penalties to be assessed for [defendant's past] permit violations . . . [and] [citizen-plaintiff's] representative attended the last [such] meeting . . . where penalty amounts were discussed."¹⁷¹ Additionally, for another violation of groundwater seepage, the defendant (and its adjacent neighbor not named in the instant suit) entered into an Administrative Order on Consent with the EPA.¹⁷² At the defendant's court action requesting dismissal of the subsequent citizen suit, the court began its analysis using, among other things, the seminal case of *Gwalt-*

170. "The NOV ordered [defendant], *inter alia*, to cease these violations [reflected in the NOV] and to submit a detailed statement of the measures taken to achieve compliance with the NOV . . . [additionally,] [t]he NOV indicated that [the State agency] had the authority to impose penalties under the [comparable State law] for violating the NPDES permit or the NOV." *Id.* at 1478 (italics added). The court had already ruled "that the NPDES permit was issued to [defendant] under 'comparable state law' within the meaning of the CWA." *Id.* at 1484 n.10, *citng* *Sierra Club v. Colo. Refining Co.*, 838 F. Supp. 1428, 1436 (D. Colo. 1993).

171. *Colo. Refining*, 852 F. Supp. at 1478.

172. "One of the objectives of the Consent Order was to 'perform Interim Measures at the Facilities necessary to minimize or eliminate any releases of hazardous waste or hazardous constituents from or at the Facilities and to mitigate or eliminate any threats to human health or the environment from any such releases . . . The Consent Order required [defendant and his neighbor] to implement RCRA Facility Investigation and Corrective Measures Study which were 'necessary to (1) fully characterize the sources of contamination; (2) characterize the potential pathways of contaminant migration; (3) define the degree and extent of contamination; (4) identify actual or potential receptors; and (5) support the development of remediation alternatives from which corrective measures will be selected by the [Federal and State] Agencies' . . . The Consent Order required the [Federal and State Agencies] to review and approve 'all Design Plans, Work Plans, and any draft or final reports submitted pursuant to this Consent Order' . . . and authorized these agencies to request [defendant and his neighbor] to perform additional work to accomplish the objectives of the order." *Id.* at 1479.

ney: "[t]he primary function of the provision for citizen suits is to enable private parties to assist in enforcement efforts where Federal and State Authorities appear unwilling to act It follows that 'the citizen suit [under section 1365] is meant to supplement rather than to supplant governmental [enforcement] action' Presumably, then, when it appears that governmental action under either the Federal or comparable State Clean Water Acts begins and is diligently prosecuted, the need for citizen's suits vanishes."¹⁷³ Since the governmental action had

[D]evised a plan of attack of [defendant's] unpermitted discharges into groundwater [,] [d]eference should be given to this plan . . . [because] [d]uplicative actions aimed at exacting financial penalties in the name of environmental protection at a time when remedial measures are well under way do not further . . . the goal [of restoring and maintaining the physical and biological integrity of the nation's waters].¹⁷⁴

Thus, the plaintiff's argument to ignore the ongoing governmental agency action was an attempt "to balkanize federal and state water pollution statutes and the agencies which give them effect."¹⁷⁵ The court added, "[t]he 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."¹⁷⁶ Finally, regarding the plaintiff's argument that the only governmental actions that would be able to preclude citizen suits are administrative *penalty* actions, the court examined the statute seemingly with a microscope and proved that it could

173. *Id.* at 1483, quoting *Gwaltney*, 484 U.S. at 60-61.

174. *Id.*, citing *Scituate*, 949 F.2d at 555-56.

175. *Colo. Refining*, 852 F. Supp. at 1483.

176. *Id.* (emphasis added). This might be the precise definition of the word "dispositive" used in *Kodak*, *infra* note 180.

scrutinize statutes with the best of them: “[t]he difference in the language of [§ 1319(g)(6)(A)(i) and § 1319(g)(6)(A)(ii)] indicates that, whereas § 1319(g)(6)(A)(i) only precludes a citizen suit where the administrator or state is diligently prosecuting an action for administrative penalties, § 1319(g)(6)(A)(ii) *does not contain this limitation.*”¹⁷⁷ Thus, citizen suits can be barred by a state agency having *authority* to assess civil penalties “regardless of whether the agency *has actually assessed* such penalties.”¹⁷⁸

Similarly, in *Atlantic States Legal Found. v. Eastman Kodak Co.*,¹⁷⁹ the defendant’s DMRs revealed that it had repeatedly exceeded permit limits for discharges of certain pollutants.¹⁸⁰ The citizen-plaintiffs filed three separate notices of intent to sue all required parties, ultimately filing its complaint approximately three months

177. *Id.* at 1485 (emphasis added). A line of cases (albeit with contrary results) using a similar kind of ‘microscopic’ statutory interpretation was developed by the Ninth Circuit and discussed *supra* notes 107-33 and accompanying text.

178. *Id.* (emphasis added). Thus *mere authority* to assess civil penalties (i.e. “comparability”) is sufficient; this approach having the theoretical effect of essentially rewriting the title of the statute to “*Potential Administrative penalties.*”

179. 933 F.2d 124 (2nd Cir. 1991) (“*Kodak I*”). This is the *first* of two such actions involving the same plaintiffs and defendants. The second, *Atlantic States Legal Foundation v. Eastman Kodak Co.*, 12 F.3d 353 (1994) (“*Kodak II*”), concerned the issue of “whether private [i.e. citizen] groups may bring a citizen suit pursuant to [33 U.S.C. § 1365] to stop the discharge of pollutants not listed in a valid permit issued pursuant to the [CWA]”. *Id.* at 354. For a thoughtful article analyzing the issues presented in *Kodak II*, see Joanna Bowen, Note, *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.: The Second Circuit Affirms the NPDES Permit as a Shield and Tries to Sink the Clean Water Act*, 12 PACE ENVTL. L. REV. 269 (1994).

180. “According to [citizen-plaintiff], these reports reveal at least twenty-seven permit violations over [the period covered in the plaintiff’s complaint], including excessive discharges of cyanide, xylene, suspended solids, methylene chloride, lead, zinc, nickel, silver, cadmium, dichloropropane, and chloroform.” See *Kodak I*, 933 F.2d at 126.

after its third notice was sent.¹⁸¹ Between the plaintiff's second and third notices of intent to sue, the State agency and the defendant entered into both a civil consent order¹⁸² for full settlement of all civil liabilities, and a criminal plea agreement¹⁸³ for release of any further criminal liability, ultimately agreeing to pay *more than \$2 million dollars in penalties and fines*.¹⁸⁴ In the subsequent citizen suit summary judgement appeal, the Second Circuit, in an extremely pithy holding, stated that the issue was "[w]hether [a citizen suit] may continue in the face of a dispositive¹⁸⁵ administrative and criminal settlement."¹⁸⁶

The court began its analysis by stating that citizen suits must be narrow in scope: "a citizen suit under the

181. The court explained, "[plaintiff] did not file its complaint until August 11, 1989, because in exchange for additional time during which to discuss the [plaintiff's] allegations, [defendant] waived any defenses that it might have had relating to [plaintiff's] delay in commencing its action." *Id.* at n.2.

182. "Under the terms of that order, [defendant] agreed to pay a penalty of \$1 million . . . [;] submit a report to the [State] summarizing the history of its operations in Rochester; prepare and submit a management practices code in order to enhance public awareness of the dangers associated with the facility and inform the public of plans for responding to spills or excess releases; pay for the costs of on-site monitoring by state employees; and submit to a comprehensive environmental audit." *Id.* at 126.

183. Under the agreement, [defendant] admitted to one count of unlawful dealing in hazardous wastes and another count of failing to notify the [State agency] of excessive releases in a timely fashion. In addition, the company agreed to pay a fine totaling \$1 million and to provide \$150,000 in support for local emergency planning committees." *Id.* at 126.

184. *See id.*

185. According to Webster, the word "dispositive" means: "1. archaic: having the capacity or quality of giving a tendency or inclination to something. 2: disposing or belonging to the disposition or direction of something; of or belonging to disposal or control." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 655 (3d ed. 1986). However, the precise definition remains troubling to me; see *supra* note 176, for what seems to be a potentially more useful definition.

186. *Kodak I*, 933 F.2d at 127.

[CWA] may neither be addressed wholly to past violations nor seek to recover fines and penalties¹⁸⁷ that the government has elected to forego.”¹⁸⁸ Thus, “[a] citizen suit must be prospective in nature and must supplement, not supplant, state enforcement of the [CWA].”¹⁸⁹ According to the court, the purpose of citizen suits is “to stop violations of the Clean Water Act that are not challenged by appropriate state and federal authorities.”¹⁹⁰ However, the court was concerned that if citizen suits were allowed to proceed *even though a settlement*

187. But did the government “forgo” any penalty amounts? The case background section states “[a]ccording to [plaintiff], these [DMRs] reveal at least twenty seven permit violations” *Id.* at 126. CWA § 1319 (g)(2) states, “the maximum amount of *any* class I civil penalty under this subparagraph shall not exceed \$25,000.” *Id.* (emphasis added). Assuming, *arguendo*, that *each* (and thus, under the statute, *any*) of the 27 violations were class I, the total penalty would be $27 \times \$25,000 = \$675,000$, or \$325,000 less that the reported civil penalty paid to the state. Thus, it seems possible that the government *did not forego any penalties* in this case. Perhaps the defendant should have avoided the government’s settlement offer, and negotiated with the citizen-plaintiffs directly.

188. *Kodak I*, 933 F.2d at 127, referring to *Gwaltney*, 484 U.S. at 61. Justice Marshall’s ‘infamous’ (as viewed by some) text referred to is: “[t]he danger [of permitting citizen suits for past violations undermining the supplementary role envisioned by Congress] is best illustrated by an example . . . Suppose the Administrator agreed not to assess or otherwise seek civil penalties on the condition that the violator take some extreme corrective action . . . that it otherwise would not be obliged to take. If citizens could file suit, months or years later, in order to seek the civil penalties that he Administrator chose to forego, then the Administrator’s discretion to enforce the Act in the public interest would be curtailed considerably.” *Id.* (emphasis added). It is also ironic that this ‘infamous’ quote would be attributed to none other than Justice Thurgood Marshall, the “godfather of civil rights,” since “[e]nvironmental movements have borrowed extensively from the tactics of the civil rights movement.” Friday Chibembudu Adikema, Casenote, *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation Inc.: Broadening Citizen’s Locus Standing in Environmental Suits: The Legacy of Justice Thurgood Marshall*, 20 S.U. L. REV. 69, 80 (1993)

189. *Kodak I*, 933 F.2d at 127, referring to *Gwaltney*, 484 U.S. at 59-60.

190. *Kodak I*, 933 F.2d at 127.

agreement between the government and the violator was reached (i.e. "challenged by appropriate state and federal authorities"), this would tend to discourage the government from settling, thus contributing to under-enforcement of the CWA by government.¹⁹¹ The court held that "a citizen suit pursuant to [33 U.S.C. § 1365¹⁹²] may not revisit terms of the settlement reached by competent state authorities *without regard to the probability* of the continuation of the violations alleged in its complaint"¹⁹³ remanding the case to the district to determine whether the alleged violation was continuing.¹⁹⁴ Curiously, in the last paragraph of its opinion, the court then allowed the citizen plaintiffs to seek an award of expenses and attorney fees, explaining, "when the polluter's settlement with state authorities follows the proper commencement of a citizen suit, one can, absent contrary evidence, infer that the existence of the citizen suit was a motive for the polluter's settlement and that the citizen suit plaintiff is therefore a prevailing party."¹⁹⁵

While previous to, but essentially echoing *Kodak*, the Eighth Circuit in *EPA v. City of Green Forest*¹⁹⁶ pondered preclusion of a citizen suit against a polluter relative to a later filed action and consent decree by the EPA.¹⁹⁷ Additionally, the citizen suit had proceeded to trial and

191. *See id.*

192. The court here ignored the plain language of § 1365 "in a court," discussed *supra* in Part III. Since this case was decided several years after the addition of § 1319 (g), the court could have used the administrative penalty provision as a rationale for precluding the citizen suit.

193. *Kodak I*, 933 F.2d at 127 (emphasis added).

194. It can be inferred that if the violation is continuing, the citizen suit may not be precluded, but if the violation has "ceas[ed] and [there has been] eliminated any realistic prospect of [violations] recurr[ing]," then the citizen suit must be dismissed. *Id.* at 128.

195. *Id.* at 128.

196. 921 F.2d 1394 (8th Cir. 1990).

197. *Id.* at 1403.

resulted in a judgement against the polluter.¹⁹⁸ The court stated "we are faced squarely with the question whether citizen's claims brought prior to a government action are properly dismissed when a consent decree is entered in a later-filed EPA action."¹⁹⁹ While the court acknowledged that other circuits had reached a result contrary to its holding,²⁰⁰ the court opined, "[s]ince 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"²⁰¹ because "the CWA was not intended to enable citizens to commandeer the federal enforcement machinery."²⁰² In response to the plaintiff's claims about the terms of the consent, the court held, "[w]hile the citizens might have preferred more stringent terms than those worked out by the EPA, such citizens are no more aggrieved than citizens who are precluded from commencing an action in the first instance because of pending agency action."²⁰³ Finally, the court held that the low amount of penalty assessed per violation²⁰⁴ by

198. "[A]fter a six-week trial, the jury . . . found [defendant] guilty of 43 CWA violations . . . [later] the court assessed \$43,000 against [defendant] for CWA violations." *Id.* at 1400. For the trial judge's opinion assessing penalties, see *Work v. Tyson Foods, Inc.*, 720 F. Supp. 132 (W.D. Ark. 1989).

199. *Green Forest*, 921 F.2d at 1403.

200. The court cited as examples *Atlantic States Legal Found., Inc. v. Koch Refining Co.*, 681 F. Supp. 609 (D. Minn. 1988) ("holding that district court had 'no discretion' to dismiss a properly filed citizen suit when a government enforcement action was later brought covering the same claims." *Green Forest*, 921 F.2d at 1404) and *Sierra Club v. Coca-Cola Corp.*, 673 F. Supp. 1555 (M.D. Fla. 1987) ("consent decree entered into by the EPA and the defendant did not require dismissal of the Sierra Club action for the same CWA violations when the Sierra Club, a third party in the case, did not consent." *Green Forest*, 921 F.2d at 1404).

201. *Id.* (emphasis added).

202. *Id.* at 1402, quoting *DuBois v. Thomas*, 820 F.2d 943, 949 (8th Cir. 1987).

203. *Id.* at 1404.

the trial court was not an abuse of discretion since "the amount of penalty to be levied is discretionary with the district court . . . [thus] its determination, based solely on the good faith efforts of [the defendant] to comply with the law [is not an abuse of discretion]."205

The "twist" came precisely two years (to the day) after *Kodak* was decided. The Second Circuit again revisited and refined the citizen suit preclusion issue in *Atlantic States Legal Found. v. Pan American Tanning Corp.*,²⁰⁶ resulting in what seems, at first blush, to be a "circuit split within the circuit." In *Pan American*, the defendant violated the terms of a permit issued by a local (not federal or state) agency.²⁰⁷ The local agency brought enforcement proceedings, with the defendant ultimately entering into a settlement order, agreeing to pay fines and penalties totaling \$7,300²⁰⁸ and to accelerate its efforts to improve its pollution treatment system.²⁰⁹ Some four months before the execution of the settlement order, the citizen plaintiffs filed their complaint,²¹⁰ alleging, *inter alia*, that "[o]f the 173 violations, plaintiffs claimed that 34 had occurred since they filed the complaint."²¹¹ The court first analyzed pursuant to moot-

204. The court "assess[ed] only a \$1,000 fine per violation." *Id.* at 1407. Additionally, the court noted that the "jury was made aware, through counsel's questions, that it could find more than 700 violations of the CWA if it so chose," the jury only found 43 violations. *Id.*

205. *Green Forest*, 921 F.2d at 1404, quoting *Atlantic States Legal Found. v. Tyson Foods, Inc.*, 897 F. 2d 1128, 1142 (11th Cir. 1990).

206. 993 F.2d 1017 (2nd Cir. 1993).

207. *Id.* at 1018.

208. The amounts were: two appearance tickets where the local court imposed a total fine of \$700; settlement order execution had an agreed penalty of \$4,100; and penalties for additional violations were \$2,500. See *id.* at 1019.

209. See *id.*

210. "Plaintiffs requested declaratory and injunctive relief, civil penalties, the right to monitor [defendant's] compliance for a limited period and attorney's fees." *Pan American*, 993 F.2d at 1019.

211. *Id.* (emphasis added).

ness doctrine, as discussed in *Gwaltney*,²¹² exactly which *portions*²¹³ of a citizen suit might be subject to preclusion. While *Kodak* had “treat[ed] citizen suits as a whole and require[d] dismissal of the *entire suit* when there is no ‘realistic prospect that violations alleged in [the] complaint will continue,’”²¹⁴ *Pan American* held that since there were ongoing violations at the time citizen-plaintiffs filed suit, “[u]nder these circumstances, civil penalties²¹⁵ can still be imposed, though only for post-

212. “Longstanding principals of mootness . . . prevent the maintenance of suit when ‘there is no reasonable expectation that the wrong will be repeated.’ In seeking to have a case dismissed as moot, however, the defendant’s burden ‘is a heavy one.’” *Id.*, quoting *Gwaltney*, 484 U.S. at 66 (other citations omitted).

213. Citizen suits typically consist of requests for injunctive and declaratory relief as well as a request for civil penalties. The court stated that “[g]enerally when a plaintiff seeks both injunctive relief and damages or penalties [i.e. civil relief], the Supreme Court has long directed courts to analyze a mootness claim directed at one form of relief separately from a mootness claim directed at the other.” *Id.* at 1020 (citations omitted) (emphasis added). Thus follows my use of the word “portions.”

214. *Id.* at 1021, *misquoting Kodak*, 933 F.2d at 127-28. What *Kodak* actually said was, “Nor may the citizen suit proceed *merely for the purpose of further investigating and monitoring the state compromise* absent some realistic prospect of the alleged violations continuing.” *Id.* (emphasis added).

215. Here, the court infers that civil penalties may be precluded under special circumstances. However, the court never addresses whether injunctive relief may be precluded. Since U.S.C. § 1319 expressly states that the diligent action by a federal or state agency in assessing administrative penalties “shall not be the subject of a *civil penalty*,” 33 U.S.C. § 1319 (g)(6)(A) (1987) (emphasis added), and never states anything about *injunctive relief*, it can be inferred that injunctive relief cannot ever be precluded (*see infra* note 256 and accompanying text for a brief discussion of the statutory rule regarding specific mention of one thing implies the exclusion of others not mentioned). Case law supports this inference. *See, e.g.*, *Coalition for a Liveable W. Side v. N.Y. City Dep’t of Env’tl. Protection*, 830 F. Supp 194, 196 (S.D.N.Y. 1993) (“I conclude that this [citizen suit] action is not barred by § 1319 (g)(6) because the clear language of that provision precludes only citizen suits seeking civil penalties . . . [Since] [t]his complaint seeks only injunctive relief . . . [a]ccordingly this suit is not barred by § 1319(g)(6).”); *see also* N.Y.

complaint violations²¹⁶ and for violations that were ongoing at the time plaintiffs filed suit."²¹⁷ Finally, since the agency was not federal or state, but merely a local agency, the court noted that this agency was accorded "less deference than [the CWA accords] those of state and federal agencies . . . [and thus] only federal or state civil or administrative penalty actions can preclude citizen suits."²¹⁸

Thus, one logical concern of citizens in the face of "broad" citizen suit preclusion, that "regulators often [would] become too close to the industries they regulated, and [may] lack[] the aggressiveness that concerned individuals would bring to the lawsuits"²¹⁹ seems to have been addressed in the Second Circuit. While *Kodak* seemingly broadened the scope of citizen suit preclusions, allowing preclusion for a settlement that ostensibly was substantially similar to what could be expected should the citizen suit prevail, *Pan American* again narrowed the scope of preclusion because the result would not have been substantially similar to a successful citizen suit.

Coastal Fishermen's Assoc. v. N.Y. City Dep't of Sanitation, 772 F. Supp. 162, 169 (S.D.N.Y. 1991) "[w]e note that the limitation [i.e. preclusion] on citizen suits . . . relates only to actions for civil penalties, not injunctive or declaratory relief." *Id.* Also there exists sparse but relevant legislative history to support this: "[n]o one may bring an action to recover civil penalties under . . . [§ 1365] of this Act for any violation with respect to which the Administrator has commenced and is diligently prosecuting an administrative civil penalty action . . . this limitation would not apply to . . . an action seeking relief other than civil penalties (e.g. . . . an injunction or declaratory judgement)." H.R. Rep. No. 1004, 99th Cong., 2d Sess. at 133 (1986), *quoted in Livable W. Side*, 830 F. Supp. at 196 n.1.

216. Thereby squaring its opinion with the *Gwaltney* "wholly past violations" test. See *Gwaltney*, 484 U.S. at 64.

217. *Pan American*, 993 F.2d at 1021.

218. *Id.* at 1022, *referring to* N.Y. Pub. Interest Group, Inc. v. Limco Mfg. Corp., 697 F. Supp. 608, 610-11 (E.D.N.Y. 1987).

219. William Glaberson, *Citizens' Lawsuits, Once a Useful Weapon Against Polluters, Losing Clout*, FORT WORTH STAR-TELEGRAM, June 13, 1999, available in 1999 WL 6239525.

III. EXPLORING THE "TWIST": STATUTORY INTERPRETATION AND BEYOND

It is in this Circuit split between the Ninth and Second Circuits that a seemingly fertile ground for exploration of exactly when (and how) judges should interpret a statute exists: *should judges strive to achieve a reliable science of statutory interpretation as it applies to environmental statutes?*

While many times the bulk of what judges do relates to 'interpreting' or 'constructing' statutes,²²⁰ there seems no definite theory as to how to accurately and consistently achieve this:

Do not expect anybody's theory of statutory interpretation, whether it is your own or somebody else's, to be an accurate statement of what courts actually do with statutes. The hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation.²²¹

This ambiguity in exactly what rules (if any) to apply may result in 'judicial legislation'; accordingly this interpretation power given to judges under the Federal Constitution comes with a *caveat*. Use of this power may either *underpin* or *undermine*²²² the foundations of

220. See, e.g., SCALIA, *supra* note 114, at 14-18.

221. HENRY M. HART, JR & ALBERT M. SACKS, *THE LEGAL PROCESS* 1169 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994), quoted in SCALIA, *supra* note 114, at 14.

222. These are both building construction terms, and since I was previously a general contractor for almost 10 years, I feel qualified enough not to rely on citation for this footnote: "Underpinning" is a process used when constructing a new building next to an existing one where, if the existing building's footings (the wider portion at the base of the foundation wall- analogous to one's foot) is at a higher level, excavating for the new building below this level may cause the building to collapse (i.e. to be "undermined"). Thus an extension (or "underpinning") of the existing footings to

the doctrine of Separation of Powers²²³ depending on the care exerted by the judiciary, because if a judge interprets or constructs a statute *unnecessarily*, he tends to usurp the power of the legislative branch.²²⁴ Thus, in its essence the question is, when should judges "interpret" and/or "construct"²²⁵ a statute and when should judges

the same level of the new building's footing is necessary for safety reasons, or, to prevent "undermining."

223. "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. . . . We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices [i.e. the Executive, Legislative, and Judicial Branches] in such a manner as that each may be a check on the other—that the private interest of every individual may be a sentinel over the public rights." THE FEDERALIST No. 51, at 356 (James Madison).

224. "The judiciary, on the contrary, has no influence over either the sword [i.e. the Executive] or the purse [i.e. the Legislature]; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL but merely judgement; and must ultimately depend on the aid of the executive arm even for the efficacy of its judgement." THE FEDERALIST No. 78, at 490 (Alexander Hamilton).

225. Interestingly, there is even disagreement between the "classic" treatises on whether the acts of "interpretation" and "construction" are *interchangeable*, or whether they are *completely different concepts*. Black, in his "classic" treatise on statutory construction, under the chapter entitled "Definition of Terms," states, "there is a substantial difference between interpretation and construction as methods for the exegesis [i.e. the exposition, critical analysis, or interpretation of a word or literary passage] of written laws. In strictness, interpretation is limited to exploring the written text, while construction goes beyond and may call in the aid of extrinsic considerations. . . . Interpretation . . . is the art of finding out the true sense of any form of words . . . [in] the sense which their author intended to convey . . . [while c]onstruction . . . is the drawing of conclusions, respecting subjects that lie beyond the direct expressions of the text, from elements known from and given in the text; conclusions which are in the spirit, though not within the letter, of the text." HENRY CAMPBELL BLACK, HANDBOOK ON THE

decline to do so, the ultimate goal being not to violate the doctrine of Separation of Powers. Should this be discretionary with the judge (essentially *ad hoc*) or should there be a clear set of rules as to when statutory interpretation should “kick in”?

This question has intrigued legal thinkers both here and abroad for many years.²²⁶ Some 400 years ago in England, Lord Coke provided a foundation for a philosophy favoring legislative supremacy in interpreting statutes:

[F]or the full and true interpretation of all statutes in general . . . four things are to be considered – 1st.
What was the common law before the making of the

CONSTRUCTION AND INTERPRETATION OF THE LAWS 3 (West Publishing Co., 2d ed. 1911), *cit*ing LIEBER, HERMENEUTICS, 11 (1839). However, Sutherland, as revised by Professor Singer, in his “updated classic” treatise summarizes Black’s (and thus Lieber’s) observations on the distinction between interpretation and construction, then states, “[t]his distinction is not helpful. It is generated from the *obsolete idea that words ‘mean’ something in themselves*. In fact it has been held that judicial behavior in resolving statutory issues does not differ according to whether it is characterized as construction or interpretation. . . [therefore, i]n this work, the terms ‘interpretation’ and ‘construction’ are used interchangeably.” 2A SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 45.03, at 21 (Norman J. Singer editor, 5th ed. 1992) (1891) (emphasis added), *cit*ing, *inter alia* LIEBER, HERMENEUTICS, 11 (1839), *reprinted in* HART, 5 CLASSICS IN LEGAL HISTORY REPRINT SERIES (Marshy & Jacobstein eds. 1970); Roscoe Pound, *Spurious Interpretation*, 7 COLUM. L. REV. 379 (1907); and OGDEN & RICHARDS, THE MEANING OF MEANING 12 (1936) (other citations omitted). While I, in theory, am attracted to the “classical” point of view that interpretation and construction have different roles to play in statutory interpretation, in my humble opinion I nevertheless agree with Sutherland that, *truly nowadays, words have no meaning* (as an illustration of this consider the evolution of the word “bad.” Perhaps 25 years ago, if I said a musical group was “bad” I meant that they did not play well, were discordant, etc. However, nowadays, if I say a musical group is “bad” I most probably mean that they were “really good.” If I want to communicate that the group is the opposite of good, I may say, “they stink” (not referring to their personal hygiene, but whether their music appeals to me).

226. See *infra* notes 227-30 and accompanying text.

act? 2nd. What was the mischief and defect for which the common law did not provide? 3rd. What remedy the [government] hath resolved and appointed to cure the disease of the [community]? And 4th. The true reason for the remedy.²²⁷

Because of the magnitude of responsibility assigned to judges in this area, it is important to "recognize the necessity of care in the consideration of any means of explanation outside of the statute itself, because of the possibility of error in the broad field in which judgment must operate."²²⁸ Typically in an area that so directly and forcefully affects the functioning of our society, we enact certain unambiguous (or as near to unambiguous as possible) rules²²⁹ or canons to ensure that both a consistency is achieved and that all come to understand exactly what is required of them. It follows that a "subject so important as the . . . interpretation of the laws [should not] be left to the mere arbitrary discretion of the judiciary. This would be to put in their hands power really superior to that of the Legislature itself."²³⁰

227. *Heydon's Case*, 76 Eng. Rep. 637 (1584), cited in *Sutherland*, *supra* note 225, at 22.

228. FRANCIS J. MCCAFFREY, *STATUTORY CONSTRUCTION: A STATEMENT AND EXPOSITION OF THE GENERAL RULES OF STATUTORY CONSTRUCTION* 2 (1953).

229. However, Professor Sedgwick, in his treatise criticizes *reliance upon rules* for statutory construction stating, "[w]hat is required in this department [i.e. rules or no rules for statutory construction] of our science is not formal rules or nice terminology, or ingenious classification; but that through intellectual training, that complete education of the mind, which lead to a correct result, wholly independent of rules, and, indeed, almost unconscious of the process by which the end is attained." SEDGWICK, *CONSTRUCTION OF STATUTORY AND CONSTITUTIONAL LAW* 192 (2nd ed.). This approach seems to miss a critical point: how many judges possess the required "intellectual training"? This ignores the reality that many judges may be appointed for reasons *other* than their "intellectual training" or their "unconscious . . . process[es]."

230. *McCaffrey*, *supra* note 228, at 3.

The Supreme Court has traditionally “held that the Constitution does not require a ‘hermetic division’²³¹ of all the branches, and that some crossover for convenience and efficiency is both inevitable and permissible . . . [thus] absolute separation is not required [; however,] substantial separation is.”²³² The next step of the analysis is determining whether “substantial separation” may include the judiciary interpreting, or even re-writing statutes more or less whenever it desires to. Interestingly, it was Justice Blackmun who put this determination quite succinctly, “we have not hesitated to strike down provisions of law that . . . *undermine the authority*

231. For example, in *Mistretta v. United States*, 488 U.S. 361 (1989), Justice Blackmun, writing for the majority opinion stated, “the Framers did not require – and indeed rejected – the notion that the three Branches must be entirely separate and [distinct]. Separation of powers, [Madison] wrote, ‘[d]oes not mean that these [three] departments ought to have no *partial agency* in, or no *control* over the acts of each other’, but rather ‘that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted.” *Id.* at 380, quoting THE FEDERALIST No. 47 (James Madison) (emphasis in original). Judge Blackmun, the author of *Roe v. Wade*, further illustrated this “flexible approach” by using a quote from *Buckley v. Valeo*: “the greatest security against tyranny – the accumulation of excessive authority in a single branch – lies not in a hermetic division between the Branches, but in a carefully crafted system of checked and balanced power within each branch.” 424 U.S. 1, 121 (1976). However, this “flexible system” may prove for our use to be so “flexible” as to be almost useless. For guidance, we might turn to Justice Scalia’s dissent in *Mistretta* for a more useful approach: “the regrettable tendency of our recent separation-of-powers jurisprudence [is] to treat the Constitution as though it were no more than a generalized prescription that the functions of the Branches should not be commingled too much – how much is too much to be determined, case-by-case, by this Court. The Constitution is not that. Rather, [it] is a prescribed structure, a framework, for the conduct of government.” *Mistretta*, 488 U.S. at 426.

232. Charles S. Abell, Note, *Ignoring the Trees for the Forests: How the Citizen Suit Provision of the Clean Water Act Violates the Constitution’s Separation of Powers Principle*, 81 VA. L. REV. 1957, 1965 (1995), citing *Mistretta*, 488 U.S. at 380 (Scalia, J. dissenting).

and independence of one or another coordinate branch."²³³ Further,

[S]tatute law is the will of the legislature; and the object of all judicial interpretation of it is to determine what intention is conveyed, either expressly or by implication, by the language used . . . [t]he wisdom, policy, or expediency of legislation is a matter with which the courts have nothing whatever to do²³⁴

This directs us to the rule that, only in certain circumstances where the intent of the legislature is not reasonably obvious or inferable, is the judiciary within the scope of their powers to perform an analysis that attempts to extract the meaning from the text of the statute.²³⁵

233. *Mistretta*, 488 U.S. at 382 (Blackmun, J.) (emphasis added).

234. BLACK, *supra* note 225, citing MAXWELL, INTERPRETATION 1 (emphasis added).

235. As an example of this, consider the following: Mom sends her two children Dick and Jane to the deli. In scenario 1, Mom merely says "go to the deli and buy some food." In scenario 2, Mom says "go to the deli and buy some milk and something for breakfast." In scenario 3, Mom says, "go to the deli and buy milk, eggs, sugar, and bread." In scenario 4, Mom says "go to the deli and buy a refrigerator." Dick and Jane, in scenario 1, would need first to realize that "food" is too large a category, and also the practical reality that they were given a finite quantity of money with which to buy food. Thus Dick and Jane might begin by thinking what has Mom bought in the past (i.e. "legislative history"), has Mom said that bread is almost gone (i.e. "legislative statements"), etc, to try to determine Mom's intent. In scenario 2, Dick and Jane must buy some milk (the quantity could be based on what Mom *usually buys*), and something else limited to a typical breakfast food, say eggs (i.e. plain or literal meaning of the words 'breakfast food'). If Dick and Jane come back with ice cream, they probably have usurped (thus *undermining*) Mom's directions (hence her *power*) because ice cream (in my example here) isn't a typical breakfast food. In scenario 3, Dick and Jane have been given fairly unambiguous instructions, and had better come back with milk, eggs, sugar and bread; the quantities would probably be based on what Mom usually buys (an inference of intent). In scenario 4, Dick and Jane are faced with an *absurdity*- they cannot buy a refrigerator at

As discussed in Part I.C. of this Note, an action falling within 33 U.S.C. § 1319 may successfully preclude an action brought pursuant to 33 U.S.C. § 1365, the citizen suit provision of the CWA. Unfortunately, the various circuits have not agreed as to a definite area that is unanimously *within* the statute, leading to a premise that some courts have correctly interpreted the intent of the statute, and some have not.²³⁶ The question is what standard should be used to determine who is correct (and in agreement with the Separation of Powers doctrine) and who is not. As an example of the cases, I propose to consider whether *Kodak*²³⁷ is within the statute. Essentially, the facts in *Kodak* state that the citizen group filed its complaint to sue in August 1989, the DEC and the defendant entered into a civil consent order, criminal fee agreement, agreed to pay a penalty of \$1,000,000, and agreed to pay a fine of \$1,000,000 in April 1990; some 8 months later.²³⁸ The court held that this was sufficient to preclude a properly brought citizen suit.²³⁹

Since statutes are created by the legislature to govern the general public, it follows that the general public would be expected to understand, without translation, *from the writing itself* what is expected of them. For the general public to understand the words, they must be constructed in accordance with the public's *meaning* of

the local dell. Thus, depending on their perception of Mom's purpose they could attempt to "construct" what Mom really wants, or they could just return home empty handed and tell Mom that refrigerators were not available today. However, Mom would probably not appreciate this response, since some sort of logical "construction" would be more appropriate.

236. See Bowen, *supra* note 179, at 300.

237. 933 F.2d 124 (2nd Cir. 1991); see *supra* notes 179-95 and accompanying text for a discussion of the facts of this case.

238. 933 F.2d at 126.

239. See *id.* at 127.

words.²⁴⁰ This means that these words must have a literal meaning:

The doctrine of literalness is fundamental to both the writing and interpretation of statutes. Every statute has a literal meaning, unless it has no meaning that makes sense. The literal meaning is that which the words express, taking them in their natural and ordinary sense; that is, giving to words of common use their commonly accepted meaning and to technical words their proper technical connotation.²⁴¹

The dictionary is regarded as a repository of the common meanings of words; thus unless the statute specifically defines otherwise, reference to it will be liberal in determining the meanings of various words in the CWA.

First, in section 1319 subsection (B), the statute clearly states that the limitations (or preclusions) in this part will not apply if either a notice to sue or a civil action has been filed by a citizen group *before* commencement of the Administrative penalty action.²⁴² In *Kodak*,

240. While I previously have agreed with and argued that words have no meaning, I intend this in a more overall sense of significant amounts of time and thus *ultimately* have no meaning. Essentially my argument is that words may potentially transform their meaning *over the passage of time*. However, in the case of statutes that also are enacted, discarded, or modified and directly reflect people's value systems, it still may be postulated that words in a statute have a *meaning here and now* and that we can use the current meanings of words in our analysis of the statute.

241. See MCCAFFREY, *supra* note 228, at 3-4.

242. "The limitations contained in subparagraph (A) ["Limitation on actions under other sections," referring to, *inter alia*, section 1365] on civil penalty actions under section 1365 of this title ["Citizen suits"] shall not apply with respect to any violation for which - - (i) a civil action under section 1365 (a)(1) ["Authorization, jurisdiction"] of this title has been filed prior to commencement of an action under this subsection, or (ii) notice of the alleged violation of section 1365 (a)(1) of this title has been given in accordance with section 1365 (b)(1)(A) of this title ["Notice"] prior to commencement of an action under this subsection and an action under section 1365 (a)(1) of this title with respect to such alleged violation

the citizen group had sent one notice to sue²⁴³ and filed one citizen suit action²⁴⁴ before the Administrative penalty action arose.²⁴⁵ Unmistakably, the citizen group action preceded any administrative action noted by the court and thus, in accordance with the plain meaning of the statute, the citizen suit should not have been precluded.

Second, the title of the subsection is not "Penalties," but "Administrative penalties," thus specifically mentioning *exactly one kind of penalty* to the exclusion of any other penalties. The adverb "Administrative" is defined as "pertaining to administration;"²⁴⁶ the suffix "-tion" is defined as "something [administer]ed."²⁴⁷ Additionally, it is an Administrator "who administers, or who executes, directs, manages, distributes, or dispenses, as in . . . civil . . . affairs."²⁴⁸ Since the CWA defines the Administrator of the EPA as the entity to administer all parts of the CWA,²⁴⁹ the *only kind of operative penalty* that this subsection applies to is *one issued by the Administrator*. Additionally, the statute mandates through its use of the present indicative of the word "have" (in

is filed before the 120th day after the date in which the notice is given." 33 U.S.C. § 1319 (g)(6)(B) (1987).

243. "On April 17 1989, [the citizen group] informed [defendant], [and the state and federal administrators] that it intended to sue [defendant] for violating the terms of its regulatory permit." *Kodak*, 933 F.2d at 125.

244. "[Citizen group] . . . file[d] its complaint [on] August 11, 1989." *Id.* at 126 n.2.

245. *Kodak* states "on April 5, 1990, after several months of private negotiations, Kodak and the DEC entered into [civil consent, criminal plea agreement, a penalty agreement, and a fine agreement]." *Id.* at 126.

246. WEBSTER'S DELUXE UNABRIDGED DICTIONARY 25 (2d ed. 1979) (emphasis added).

247. *Id.* at 1913.

248. *Id.* at 25.

249. "Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency (hereinafter in this chapter called 'Administrator') shall administer this chapter." 33 U.S.C. § 1251 (d) (1987).

"has paid a penalty assessed under this subsection"²⁵⁰) that the penalty must be paid *before* the citizen suit arises to enable the administrative penalty to preclude the citizen suit.²⁵¹ In *Kodak*, the court reported that "[the defendant] agreed to pay a *penalty* of \$1 million . . . [also] the company agreed to pay a *fine* totaling \$1 million."²⁵² As stated above, the only type of administrative action is a penalty action, thus this eliminates the administrative fine action as enabling preclusion of the citizen suit. Moreover, the facts of the case make it obvious that the penalty was merely agreed, and to be actually paid at a much later date after the citizen suit arose, so the penalty agreement timing is contrary to the plain meaning of the statute. Thus, the penalty agreement cannot successfully preclude the citizen suit.

Third, section 1319(g), titled "Administrative penalties" expressly specifies two classes²⁵³ of penalties: Class I,²⁵⁴ which has a maximum of 25,000 for *any* penalty, and Class II²⁵⁵ that has a maximum of \$125,000 for (again) *any* penalty. The statute does not specify *any other classes* of penalties. "It is a general rule of statutory

250. 33 U.S.C. § 1319 (g)(6)(A) (1987).

251. See Part II.1, specifically *Knee Deep*, *supra* notes 157-63 and accompanying text for the Ninth Circuit's analysis of this concept.

252. *Kodak*, 933 F.2d at 126 (emphasis added).

253. "[T]he Administrator or Secretary . . . *may* . . . assess a class I civil penalty or a class II civil penalty under this subsection." 33 U.S.C. § 1319 (g)(1) (1987) (emphasis added). Note the use of the word "may" and not "shall." This infers that the imposition of this Administrative penalty is *discretionary* with the Administrator.

254. "The amount of a class I civil penalty under paragraph (1) may not exceed \$10,000 per violation, except that the maximum amount of any class I civil penalty under this subparagraph shall not exceed \$25,000." 33 U.S.C. § 1319 (g)(2)(A).

255. "The amount of a class II civil penalty under paragraph (1) may not exceed \$10,000 per day for each day during which the violation continues; except that the maximum amount of any class II civil penalty under this subparagraph shall not exceed \$125,000." 33 U.S.C. § 1319 (g)(2)(B).

construction that *expressio unius est exclusio alterius*. That is to say, the specific mention of one person or thing implies the exclusion of other persons or things."²⁵⁶ Thus, it may be held that outside of these maximum penalty amounts is not within the statute, hence unable to preclude an otherwise properly brought citizen suit.

Section 1319 subsection (2), "Classes of penalties" has some ambiguity that may bear directly upon whether a case is, in terms of 'classical' statutory interpretation, rightly or erroneously decided. The statute reads that a penalty for a violation may not exceed a certain amount (\$10,000 per violation or per day) except that the maximum amount of any of the 2 classes of civil penalties may not exceed a certain amount (\$25,000 or \$125,000).²⁵⁷ Are the "maximum amount[s]" in the statute (e.g. "shall not exceed \$25,000" or "shall not exceed \$125,000") a *total* or are they *sub-totals for each penalty*? Essentially the question is, *does the word "any" mean "all" in this statute?* This is tricky because the preceding sentence refers to an amount per violation or amount per day and one would expect the next part of the logic to mandate a total. According to Webster, the word "any" means "1. one (no matter which) of more than two . . . 2. some (no matter how much, how many, or what kind) . . . 4. *Every*."²⁵⁸ "Every" can also mean "all" and seems to logically fit into the context of the subsection as a whole, where the words "one" and "some" when substituted in the statute in lieu of the word "any" seem to render the logic of the statute absurd. Thus, it can be concluded that the maximum amount for *all* Class I administrative penalties to enable a citizen suit preclusion is \$25,000, and for Class II penalties \$125,000. *Kodak's* penalty amount exceeded

256. McCaffrey, *supra* note 228, at 50-51, *citing* Wallace v. Swinton, 64 N.Y. 188 (1876).

257. 33 U.S.C. § 1319 (g)(2) (1987).

258. Webster, *supra* note 185, at 83 (emphasis added).

the statutory limit, thus disallowing preclusion of the citizen suit.²⁵⁹ Conversely, even if the word "any" is interpreted to mean "each," the facts stated that there were 27 violations. Assuming each violation was Class I, 27 X \$25,000 (maximum) = a maximum of \$675,000; still lower than the reported penalty paid of 1 million dollars.²⁶⁰ Again, according to the rationale above, the citizen suit should not have been precluded.

Thus, it is evident that, pursuant to 'classical' statutory construction (which the Ninth Circuit has so consistently illustrated) that *Kodak* was improperly decided. This would be the end of the matter if it were not for two seemingly small points: (1) Following *Kodak*, the Second Circuit *should* have followed its own precedent and allowed citizen suit preclusion in the subsequent case of *Pan American Tanning Corp.*²⁶¹ an atrocious case that demonstrated the Second Circuit's excellent jurisprudence by completely ignoring its own holding in *Kodak* and denying citizen suit preclusion for a somewhat similar set of facts; and (2) the fact that *one million dollars* was paid as a penalty in *Kodak*.

The sum of one million dollars seems in some way (to me anyway), a magical number, especially when one pauses to realize that the executives of Kodak had to account to their Board of Director for this penalty amount. It can be surmised that someone at Kodak had a lot of explaining to do since the stockholder's profits were down, and also that someone's job was on the line if this ever happened again.²⁶² Thus, the penalty amount may have achieved its intended purpose, cor-

259. In *Kodak* more than \$1,000,000 was paid. *Kodak*, 933 F.2d at 126.

260. See *supra* note 187 for the facts regarding amount of violations.

261. 933 F.2d 1017 (2nd Cir. 1993). For an analysis of the facts in this case see *supra* notes 206-19 and accompanying text.

262. Based on my understanding of basic business principles, a \$1,000,000 penalty will cause shareholders to, least of all, demand an explanation if not action.

rect statutory interpretation or not, by ensuring that one more company will not pollute again. While this intent may be a purely economic purpose, and ostensibly contrary to Deep Ecology's moral revulsion of pollution, the result in the short run may be the same: the restoration and maintenance of chemical, physical and biological integrity of the Nation's waters. This is the essential paradox that makes the study of Law so fascinating.

IV. RES JUDICATA; OR, WHAT HAPPENS SHOULD THE CITIZEN SUIT PROCEED?

While the above text attempts to analyze cases where the issue is to "preclude or not to preclude" the citizen suit, with the exception of *Chesapeake Bay Found. v. American Recovery Co.*,²⁶³ none of these cases shed any light on how the court should structure the ensuing litigation should the citizen suit not be precluded. A very recent case provides some interesting analysis as to how the court should proceed in this situation. In *Old Timer, Inc. v. Blackhawk-Central City Sanitation*,²⁶⁴ the defendant violated the effluent limitations of his permit, and received in response a Notice of Violation and Cease and Desist Order ("NOV/CDO") from the state agency.²⁶⁵ Some four months after the NOV was issued, the plaintiff filed suit pursuant to section 1365(b).²⁶⁷ Three months subsequent to the citizen suit filing, the state and the defendant executed a Civil Penalty Order agreement requiring the defendant to pay a civil penalty

263. 769 F.2d 207 (4th Cir. 1985). See *supra* note 45, for relevant text supporting available means a court has to protect defendants from duplicative litigation.

264. "The Old Timer is a tourist attraction offering the opportunity to pan for gold in North Clear Creek." *Old Timer*, 51 F. Supp. 2d 1109 (D. Colo. 1999).

265. *Id.*

266. *Id.* at 1111.

267. See *id.*

of \$85,000.²⁶⁸ In the consolidated motions to dismiss and summary judgment, the court reviewed the circuit split²⁶⁹ regarding the citizen suit preclusion for "Administrative penalties" pursuant to section 1319(g), and concluded²⁷⁰ that "[b]ecause the [state agency] had not yet commenced an action for administrative penalties or assessed such penalties before [defendant] filed its suit, § 1319(g)(6) does not preclude this citizen action."²⁷¹

The court then considered separately whether injunctive relief and civil penalties were mooted²⁷² by the subsequent events in the case. In terms of injunctive relief, it said "[a] claim for injunctive relief becomes moot when there is no reasonable expectation that the polluter will continue to pollute in the future . . . I conclude, therefore, that [citizen-plaintiff's] claim for injunctive relief is moot because the [defendant] has shown it is now in

268. See *id.* at 1110.

269. The court stated, "[b]efore the [plaintiff] commenced its suit, the only action initiated by the [state agency] was the issuance of a compliance order to the [defendant]. Case law is split on whether this is sufficient to preclude a citizen suit under § 1319 (g)(6)(A)(iii)." *Id.* at 1110, comparing *UNOCAL*, 83 F.3d at 1118; *Washington PIRG*, 11 F.3d at 883; *Friends of Santa Fe County v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 1347 (D. N.M. 1995); *Molokai Chamber of Commerce v. KuKui Inc.*, 891 F. Supp. 1389, 1403-05 (D. Haw. 1995); and *Pub. Interest Research Group*, 822 F. Supp. at 184; with *Scituate*, 949 F.2d at 555-57; *Colo. Refining*, 852 F. Supp. at 1484-85; and *N.Y. Coastal Fisherman's Assoc.*, 772 F. Supp. at 165.

270. For the complete analysis of what factors the court used to reach its conclusion, see *Old Timer*, *supra* note 264, at 1115-16.

271. *Id.* at 1115.

272. The court stated, "[m]ootness is a jurisdictional question derived from Article III of the United States Constitution, which restricts the exercise of judicial power to instances where a 'case or controversy' exists." *Id.* at 1116. The relevant text of the Constitution states, "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States . . . to Controversies between two or more States;-- between a State and Citizens of another State;-- [and] between Citizens of different States." U.S. Const. art III, § 2, cl. 2.

compliance and that its permanent improvements²⁷³ make it unlikely that the discharge violations at issue in this case will continue."²⁷⁴ However, the court concluded differently for the civil penalty claim:

Citizens file actions [under the CWA] primarily to deter future violations by the named defendant and other potential polluters and the imposition of penalties significantly enhances the deterrent effect of a citizen suit . . . the requested civil penalties do not simply provide [defendant] 'psychic satisfaction' by vindicating an 'undifferentiated public interest' in enforcing the law, [therefore] the claim is not moot.²⁷⁵

Thus, the request for civil penalties by the citizen-plaintiff so far had "survived" preclusion and mootness "attacks." In analyzing civil penalty survival pursuant to the doctrine of *Res Judicata*, however, the court found that the State's Civil Penalty Order assessed penalties for many of the same violations at issue in the case.²⁷⁶ Since "a state and its private citizens are in privity when the state, acting as *parens patriae*, brings an action for damage to a public resource . . . *res judicata* bars . . . those violations covered by the [Civil Penalty Order]."²⁷⁷ Thus, only new violations after the Civil Penalty Order, or other violations not addressed by the Order could be maintained.

273. During the trial, apparently the defendant provided sufficient evidence of treatment plant upgrades to lead the court to conclude that these had already corrected the problem underlying defendant's permit violations.

274. *Old Timer*, *supra* note 264, at 1116, referring to *Gwaltney*, 484 U.S. at 66.

275. *Id.* at 1117, quoting *Natural Resources Defense Council, Inc. v. Texaco Ref. & Mfg. Inc.*, 2 F.3d 493, 503 n.9 (3rd Cir. 1993).

276. *Id.* at 1118.

277. *Old Timer*, *supra* note 264, at 1118, referring to *Satsky v. Paramount Communications, Inc.*, 7 F.3d 1464 (10th Cir. 1993) (italics added).

Interestingly, the ultimate result in this case is quite similar to the result achieved in two cases that have been subjected to tremendous criticism by the legal community: *Gwaltney* (“[p]ermitting citizen suits for wholly past violations of the Act could undermine the supplementary role envisioned for the citizen suit.”²⁷⁸) and *Kodak* (“[w]e hold that a citizen suit cannot proceed solely for the purpose of challenging the terms of a settlement reached by state officials so long as the settlement reasonably assures that the violations alleged in the citizen suit have ceased and will not recur.”²⁷⁹)

CONCLUSION

There is a concern among environmentalists recently that the scope of citizen suit preclusion is becoming broader, thus it is becoming “harder and harder for . . . citizen suits to get into court.”²⁸⁰ The specific concern is that the citizen suit “standing” has been made stricter, because “[t]he courts have gradually increased the legal tests for when such [citizen] suits are permitted, often relying on a requirement . . . [that] has long been interpreted as giving people legal standing to bring suits only when a plaintiff has a stake in a real dispute.”²⁸¹

278. *Gwaltney*, 484 U.S. at 60. Of course, the subsequent history and ultimate result of *Gwaltney* is quite complicated, because the Supreme Court remanded the case to the Court of Appeals, (*Gwaltney II*, 844 F.2d 170 (4th Cir. 1988)), who remanded the case back to the District Court (*Gwaltney III*, 688 F. Supp. 1078 (Dist. Ct. Va. 1988)). The defendant subsequently appealed the District Court’s holding (*Gwaltney IV*, 890 F.2d 690 (4th Cir. 1989)).

279. *Kodak*, 933 F.2d at 125. See *supra* notes 179-95 for relevant text and background of the case.

280. William Glaberson, *Citizens’ Lawsuits, Once a Useful Weapon Against Polluters, Losing Clout*, FORT WORTH STAR-TELEGRAM, June 13, 1999, available in 1999 WL 6239525, quoting John D. Escheverria, director of the Environmental Policy Project at Georgetown University Law Center.

281. *Id.* For a very brief discussion on standing, see *supra* note 7.

On March 1, 1999, the United States Supreme Court granted *certiorari* to a case that will bring this issue of standing to the court's analysis: *Friends of the Earth, Inc. v. Laidlaw Envtl. Services*.²⁸² Citizen suits are ripe for analysis by the Supreme Court, because of the numerous unresolved issues, circuit splits, and lack of any significant cases giving direction about where the law should go since the 1987 decision in *Gwaltney*. Hopefully, the Supreme Court will attempt to resolve the inconsistent holdings in the circuits and preserve this important protection for our natural resource.

282. 149 F.3d 303 (4th Cir. 1998), *cert. granted*, 119 S. Ct. 1111 (1999).

