

## DEFENDING CITIZEN SUITS

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### Introduction

The major federal environmental statutes enacted between 1970 and 1980 all contain provisions allowing private citizens to bring suit against alleged violators of the statutes.<sup>1</sup> Citizen suits against alleged polluters, until recently, were primarily brought

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<sup>1</sup> *See, e.g.*, Clean Water Act (“CWA”), 33 U.S.C. §1365; Toxic Substances Control Act (“TSCA”), 15 U.S.C. §2619; Endangered Species Act (“ESA”), 16 U.S.C. §1540(g); Solid Waste Disposal Act, 42 U.S.C. §6972(a)(1)(B); Resource Conservation and Recovery Act of 1976 (“RCRA”) §7002); Clean Air Act (“CAA”), 42 U.S.C. §7604, Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”) 42 U.S.C. §9659. Among the major environmental statutes, only the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§136 *et seq.* lacks a citizen suit provision.

By way of example, the Clean Air Act’s citizen suit provision, 42 U.S.C. § 7604, on which all of the other statutory citizen suit provisions cited above are based, provides:

(a) Authority to bring civil action; jurisdiction

Except as provided in subsection (b) of this section, any person 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 have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation,

**(2)** against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator, or

**(3)** against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C of subchapter I of this chapter (relating to significant deterioration of air quality) or part D of subchapter I of this chapter (relating to nonattainment) or who is alleged to have violated (if there is (...continued)

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evidence that the alleged violation has been repeated) or to be in violation of any condition of such permit.

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(b) Notice

No action may be commenced--

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

(A) prior to 60 days after the plaintiff has given notice of the violation (i) to the Administrator, (ii) to the State in which the violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil 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 person may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to 60 days after the plaintiff has given notice of such action to the Administrator, except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of [section 7412\(i\)\(3\)\(A\)](#) or [\(f\)\(4\)](#) of this title or an order issued by the Administrator pursuant to [section 7413\(a\)](#) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

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(f) "Emission standard or limitation under this chapter" defined

For purposes of this section, the term "emission standard or limitation under this chapter" means--

(1) a schedule or timetable of compliance, emission limitation, standard of performance or emission standard,

(2) a control or prohibition respecting a motor vehicle fuel or fuel additive, or

(3) any condition or requirement of a permit under part C of subchapter I of this chapter (relating to significant deterioration of air quality) or part D of subchapter I of this chapter (relating to nonattainment), [section 7419](#) of this title (relating to primary nonferrous smelter orders), any condition or requirement under an applicable implementation plan relating to transportation control measures, air quality maintenance plans, vehicle inspection and maintenance programs or vapor recovery requirements, [section 7545\(e\)](#) and [\(f\)](#) of this title (relating to fuels and fuel additives), [section 7491](#) of this title (relating to visibility protection), any condition or requirement under subchapter VI of this chapter (relating to ozone protection), or any requirement under [section 7411](#)

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under the Clean Water Act because the permitting and self-reporting enforcement mechanisms provided easy pickings for citizen plaintiffs. However, the predominance of the Clean Water Act citizen suit may soon elapse as the Clean Air Act permitting and self-monitoring structure take effect. Moreover, the courts are witnessing an increasing number of injunctive actions brought under the Imminent and Substantial Endangerment section of RCRA's citizen suit provision. Citizen suits have also served as vehicles to trigger district courts' supplemental jurisdiction, and are often accompanied by a panoply of common law claims sounding in tort.

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or [7412](#) of this title (without regard to whether such requirement is expressed as an emission standard or otherwise); or

**(4)** any other standard, limitation, or schedule established under any permit issued pursuant to subchapter V of this chapter or under any applicable State implementation plan approved by the Administrator, any permit term or condition, and any requirement to obtain a permit as a condition of operations.

which is in effect under this chapter (including a requirement applicable by reason of [section 7418](#) of this title) or under an applicable implementation plan.

**(g) Penalty fund**

**(1)** Penalties received under subsection (a) of this section shall be deposited in a special fund in the United States Treasury for licensing and other services. Amounts in such fund are authorized to be appropriated and shall remain available until expended, for use by the Administrator to finance air compliance and enforcement activities. The Administrator shall annually report to the Congress about the sums deposited into the fund, the sources thereof, and the actual and proposed uses thereof.

**(2)** Notwithstanding paragraph (1) the court in any action under this subsection to apply civil penalties shall have discretion to order that such civil penalties, in lieu of being deposited in the fund referred to in paragraph (1), be used in beneficial mitigation projects which are consistent with this chapter and enhance the public health or the environment. The court shall obtain the view of the Administrator in exercising such discretion and selecting any such projects. The amount of any such payment in any such action shall not exceed \$100,000.

Citizen suits and the notices of intent to sue that precede them should be given prompt and vigorous attention because they have the potential to cause things to unravel for an unprepared defendant. In addition to the imposition of substantial penalties, injunctive relief and attorneys' fees, the institution of such suits may bring unwanted attention from embarrassed governmental agencies and concomitant disclosure requirements. As citizen suits enter the 21<sup>st</sup> Century, a defendant in one of these actions will have access to a relatively well-established body of case law concerning potential defenses. These defenses include challenging a plaintiff's standing to maintain the suit, examining whether the citizen-plaintiff has fulfilled the statutory prerequisites for notice and, for most citizen suit provisions, asserting that the alleged violations are not "ongoing".

Other defenses, while also well established in case law, may be less intuitive. The United States Supreme Court has stated that the structure of the citizen suit provisions clearly indicates Congress' intention for such provisions to "supplement rather than to supplant" the enforcement powers of governmental agencies.<sup>2</sup> That Congressional intent is reflected in the statutory bar against bringing a citizen suit where an agency is "diligently prosecuting" a civil action, or, in more limited cases, an administrative proceeding, against the alleged violator. It is further reflected in the requirement that a potential plaintiff provide the alleged violator, as well as federal and state governmental officials, with detailed notice of any intended claims and wait a prescribed number of days before bringing an action, thus allowing government enforcement to preempt the need for litigation. Courts have additionally applied the "supplement but not supplant"

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<sup>2</sup> *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, 484 U.S. 49, 60 (1987).

dictate beyond strict application of the diligent prosecution bar and notice requirement defense through application of the mootness doctrine and the doctrine of res judicata/collateral estoppel. Thus, even once a citizen suit is commenced, courts often will dismiss it as moot when the defendant can demonstrate that government enforcement has resulted in the cessation and remediation of the alleged violation. In essence, a court in such instances finds that it is unnecessary to provide relief beyond that already effected by a governmental agency.

This article will focus on the defenses – diligent prosecution and mootness – that are tied to actions taken by the government or the alleged violator to remedy the condition or occurrence that forms the basis of the citizen suit. Experience has shown that the defendant who takes proactive measures upon learning of a violation is the defendant who will fare best in defending a citizen suit. Such measures can be taken at any point in the process: before receiving notice of a potential citizen suit, after receiving notice of the citizen suit but before litigation has been commenced, or even after the commencement of litigation. Of course, the earlier remedial measures are put in place the better are one's chances of successfully defending the citizen suit. However, regardless of when such measures are implemented, if they are effective at remedying the violation, they may be equally effective at averting a citizen suit altogether, or at least result in short circuiting a citizen enforcement effort after it is commenced.

The proactive approaches suggested for heading off citizen suits do not only include unilateral measures by an alleged violator to remedy such violations. They also include working with governmental regulators in order to receive approvals for any suggested remedial measures. This is especially important when the remedy is not

simply closing a plant, but requires measures that will be implemented over a longer period. In such cases having such an approach memorialized in an enforceable court degree may prove critical in fending off a citizen suit that is little more than a “me too action.” In that way, a defendant can lessen the possibility that other measures will be required, reduce litigation costs, and also eliminate or reduce an award of attorneys’ fees to citizen plaintiffs.

### I. Taking Immediate Action: The Investigation

The citizen suit requirement that the plaintiff provide prior notice before commencing litigation allows the potential defendant some time, albeit brief, to investigate the alleged violation in cases where the potential defendant is previously unaware of it. In other cases, the violation may be self-reported, such as in a CWA State Pollutant Discharge Elimination System (“SPDES”) permit, or otherwise obvious even before the notice of the citizen suit is received in the mail.

Whatever the case may be, a defendant should not squander the critical interval between the time of the violation and the actual commencement of a citizen suit. The actions taken during that time period very well could head off the citizen suit by sowing the seeds for a diligent prosecution or mootness defense.

Most citizen suit provisions require notice to the alleged violator, to the U.S. Environmental Protection Agency (“EPA”) Administrator, and often to the environmental agency of the state in which the violation is alleged to have occurred, sixty days before an action can be commenced.<sup>3</sup> Federal regulations under the CAA,<sup>4</sup> the CWA,<sup>5</sup> CERCLA,<sup>6</sup>

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<sup>3</sup> See, e.g., 33 U.S.C. §1365(b); 15 U.S.C. §2619(b)(1)(A); 16 U.S.C. §1540(g)(2); 42 U.S.C. §9659(d)(1); 42 U.S.C. §7604(b). Under RCRA §7002(b)(2), 42 U.S.C. §6972(b)(2), citizen suits brought alleging an “imminent and substantial endangerment” (...continued)

and RCRA,<sup>7</sup> set forth the required contents of such notices. Essentially, a notice of intent to sue under these statutes must alert the alleged violator as to the specific standard, regulation, permit condition, or order violated; the activity constituting the violation; and the time and place of the alleged violation. If the notice is adequate, it should allow the alleged violator to investigate whether, in fact, the potential claims have any merit.<sup>8</sup>

A. The Type Of Alleged Violation

As noted previously, in many cases the violation alleged in a notice of intent to sue is “self-reported” and thus practically impossible to impeach on a factual basis. Permits issued under the CAA and the CWA require permittees to monitor the emissions or effluent discharges covered by the permit, keep records, and make periodic reports to EPA or the state agency empowered to administer a state program.<sup>9</sup> The EPA or state agency has the obligation to make such reports available to the public.<sup>10</sup> Permit holders must sign and certify the reports,<sup>11</sup> and as a practical matter, liability will attach as soon

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to health or the environment require 90 days advance notice; if the action alleges a violation of the statute’s hazardous waste management provisions, however, it may be brought immediately after notice is given.

<sup>4</sup> 40 C.F.R. § 54.

<sup>5</sup> 40 C.F.R. § 135.

<sup>6</sup> 40 C.F.R. § 374.

<sup>7</sup> 40 C.F.R. § 254.

<sup>8</sup> Failure to follow the notice requirements will result in dismissal of the action, pursuant to the Supreme Court’s decision in *Hallstrom v. Tillamook County*,<sup>8</sup> 493 U.S. 20 (1989) in which the Court upheld dismissal of claims for which the plaintiffs provided timely notice to the alleged violator, but not to the state or the EPA. Thus, if counsel believes the notice clearly does not meet applicable statutory and regulatory requirements, one option to consider is waiting until commencement of the action and moving to dismiss on that ground.

<sup>9</sup> See 40 C.F.R. § 122.41(j) (regulations under the CWA); 40 C.F.R. §§ 70.6(a)(3), 71.6(a)(3) (regulations under the CAA).

<sup>10</sup> 33 U.S.C. §§ 1318(b); 42 U.S.C. §§ 7414(c).

<sup>11</sup> 40 C.F.R. §§ 70.6(a)(3)(iii)(A), 71.6(a)(3)(iii)(a), 122.41(j)(3).

as a court reaches the merits of the action, as arguing that one's monitoring technique was flawed will rarely enjoy any success.<sup>12</sup> Moreover, CERCLA and the Emergency Planning and Community Right to Know Act<sup>13</sup> impose immediate notification requirements for unpermitted releases of hazardous substances.<sup>14</sup>

Thus, where the potential plaintiff's information derives from a monitoring or release report admitting the exceedance of a permit emission or effluent limit, an attack on the substance of the allegation will be an uphill battle. The permittee, on notice of the violation from the time it submits the report, becomes a sitting duck for a citizen suit in cases where the government regulator fails to act, especially where the permit violations are chronic, rather than isolated circumstances. In such cases, it makes sense to proactively open up a line of communication with the government regulator and negotiate a consent order that resolves claims for past violations and implements measures to avoid future violations.

If a citizen suit is not based on a permit violation, but rather on an unpermitted discharge or creation of an "imminent and substantial endangerment to the environment," the alleged violator may not even be aware of the problem. Obviously, such cases present no opportunity to take action prior to the receipt of a citizen suit notice letter. Once put on notice of an alleged violation, however, the potential defendant should promptly investigate the accuracy of alleged non-self reported violations, because they

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<sup>12</sup> See *Sierra Club v. Union Oil Co. of California*, 813 F.2d 1480, 1491-92 (9th Cir. 1987), *vacated* 485 U.S. 931, *reinstated and amended on other grounds*, 853 F.2d 667 (9th Cir. 1988) (holding that "when a permittee's reports indicate that the permittee has exceeded permit limitations, the permittee may not impeach its own reports by showing sampling error").

<sup>13</sup> 42 U.S.C. §§ 11001 *et seq.*

<sup>14</sup> 42 U.S.C. §§ 9603, 11004.

may be based on inaccurate data. For example, environmental agency files will often contain reports reflecting discharges in excess of SPDES permit limits. However, those reports may be based on “grab” samples, as opposed to the composite sampling required by the permit. However, if after an investigation the violation is verified, quick action with a government regulator again may be more advantageous than waiting for commencement of a citizen suit, in which context negotiating a resolution may be more cumbersome and payment of attorneys’ fees will be likely.

B. Ongoing Or Wholly Past Violations?

When investigating potential claims set forth in a citizen suit notice letter, it is critical to determine when the violations are alleged to have occurred. The CWA and most of the other environmental statutes providing for citizen suits create causes of action against “any person who is alleged to be in violation” of the statute or a permit issued pursuant thereto. In *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*,<sup>15</sup> a CWA case, the U.S. Supreme Court interpreted this language to cover only allegations of “a state of either continuous or intermittent violations – that is, a reasonable likelihood that a past polluter will continue to pollute in the future.”<sup>16</sup> Thus, citizens cannot bring suit alleging only wholly past violations that are not likely to recur.<sup>17</sup>

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<sup>15</sup> 484 U.S. 49 (1987).

<sup>16</sup> 484 U.S. at 57.

<sup>17</sup> As a result of statutory amendments in 1990, the CAA now provides for citizen suits against a person “who is alleged to have violated ... or be in violation of” an emission standard or limitation. 42 U.S.C. §7604(a)(1). Courts have interpreted this amendment to supercede the *Gwaltney* holding and to allow citizen suits under the CAA for wholly past permit violations. See, e.g., *United States v. American Electric Power Service Corp.*, 137 F.Supp.2d 1060, 1066 (S.D. Ohio 2001). However, in certain circumstances, for example where the facility has ceased operations altogether, the defendant may still be able to invoke a mootness defense, as discussed further in Section II.C., *infra*. Citizen suits brought under RCRA’s “imminent and substantial endangerment” provision, 42 (...continued)

The *Gwaltney* defense is most likely to succeed where, among other scenarios, the facility from which violations are allegedly emanating has ceased operations. In *Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co., Inc.*,<sup>18</sup> for example, the plaintiff organization brought claims under the CWA against a shooting club for illegal discharges of target debris and lead and steel shot. Because the target shooting components of the club had been closed before commencement of the action, and the plaintiff failed to produce any evidence indicating that they might reopen, the Second Circuit dismissed the claims under *Gwaltney*.<sup>19</sup> A defendant can also achieve success on a summary judgment motion where an operating facility has been in compliance for a substantial amount of time after incorporating measures to prevent further violations.<sup>20</sup> As the violator will typically undertake such measures in the context of a consent order entered into with an administrative agency, the potential availability of this defense reflects the importance of quick engagement with enforcers upon receipt of a notice of intent to sue, as discussed in detail, *infra*.

#### C. The Plaintiffs' Basis for Standing

An investigation of the potential plaintiffs and their basis for standing to bring suit is also worthwhile, and may even result in a successful motion to dismiss in some cases.

The Supreme Court's decision in *Friends of the Earth, Inc. v. Laidlaw Environmental*

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U.S.C. §6972(a)(1)(B), also do not require the allegation of ongoing conduct, though the endangerment itself must be ongoing. *Gwaltney*, 484 U.S. at 57 n.2.

<sup>18</sup> 989 F.2d 1305 (2d Cir. 1993).

<sup>19</sup> *Id.* at 1311-13.

<sup>20</sup> See *Arkansas Wildlife Federation v. Bekaert Corp.*, 791 F.Supp. 769, 781 (W.D. Ark. 1992).

*Services (TOC), Inc.*<sup>21</sup> established a broad avenue for potential plaintiffs, in particular environmental organizations, in holding that in order to establish the actual injury required for Article III standing, no actual harm to the environment must be alleged, as long as one or more of the organization’s members have used an area allegedly “affected” by the defendants’ violations, and their aesthetic or recreational enjoyment of the area has been diminished thereby.<sup>22</sup>

In applying Laidlaw, the Courts of Appeals have generally found citizen standing when the plaintiff (or, if the plaintiff is an organization, at least one of its members) has curtailed his or her recreational use of an area because of a belief that it is contaminated.<sup>23</sup> However, *Laidlaw* and its progeny have not done away with the standing inquiry in environmental citizen suits altogether. Even the Supreme Court’s opinion in *Laidlaw* examined the affidavits of the plaintiff organization’s members for evidence that they had actually curtailed use of the area where the illegal discharge had allegedly occurred.<sup>24</sup> In applying *Laidlaw*’s principles, courts have denied standing in cases where the plaintiffs’ factual averments reveal only a tenuous or hypothetical relationship with the “affected area.” For example, in *Mancuso v. Consolidated Edison Co. of New York, Inc.*,<sup>25</sup> the Second Circuit denied standing to plaintiffs who had only traveled to the area of concern in order to obtain evidence to support their lawsuit. In

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<sup>21</sup> 528 U.S. 167 (2000).

<sup>22</sup> *Id.* at 180-85.

<sup>23</sup> See *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 154-57 (4th Cir. 2000); *Ecological Rights Foundation v. Pacific Lumber Co.*, 230 F.3d 1141, 1148-53 (9th Cir. 2000).

<sup>24</sup> 528 U.S. at 181-84.

<sup>25</sup> 2002 U.S. App. LEXIS 211 (2d Cir. Jan. 2, 2001).

*Puerto Rico Campers' Association v. Puerto Rico Aqueduct and Sewer Authority*,<sup>26</sup> the court found insufficient to establish actual injury affidavits stating that the members of the plaintiff organization recreated on beaches which lay “near,” but not directly on, the body of water into which the discharge occurred.<sup>27</sup> The court noted that the plaintiff had failed to provide any evidence of the path pollutants would take to reach the area its members frequented.<sup>28</sup>

Thus, initial investigation of a claim should include some analysis of where the plaintiff or its members live and the likelihood that they (or anyone, for that matter) use areas proximate to the client’s facility for recreational or aesthetic purposes. For example, if the plant is situated within a large stretch of industrial uses isolated from recreational areas, standing may be a viable defense against an environmental organization seeking to bring a citizen suit. However, the cases reflect that the viability of a standing defense can often turn on the sophistication of the plaintiff in drawing connections between its members, a geographic area, and the defendant’s operation, a factor which will not come into play until an action is commenced.

## II. Heading Off The Potential Citizen Suit

In addition to arming oneself with any other legal and factual defenses that can be marshaled in defense of a citizen enforcement action, defense counsel faced with a notice of intent to sue letter should also consider the structure and “gap-filling” purpose of citizen suit provisions in taking action prior to the commencement of litigation. As noted previously, in the event that a thorough investigation makes clear that a violation has

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<sup>26</sup> 219 F.Supp.2d 201 (D. Puerto Rico 2002).

<sup>27</sup> *Id.* at 212-13.

<sup>28</sup> *Id.* at 213.

occurred, one principal avenue of averting a potentially very costly litigation may be to cooperate with the governmental agency responsible for enforcing the violated permit or law. If undertaken properly, this route can offer the advantage of providing the defendant with a “diligent prosecution” defense, or, if the resolution with the government regulator occurs after commencement of the citizen suit, of providing a mootness defense or defense premised on collateral estoppel.

A. Settling With The Citizen Plaintiff

While inviting a governmental enforcement action will of course not absolve the violator of liability, it has many advantages over defending a citizen suit when there is little question that a violation has occurred. On the other hand, it does not preclude settling the threatened or pending citizen suit. Such settlement will likely require that the regulator and citizen plaintiffs agree on an appropriate remedy.

Moreover, as a practical matter, it is unlikely that a citizen suit will resolve itself without the involvement of the government regulator. Accordingly, it makes sense to begin that negotiation earlier in the process, rather than attempting to resolve the matter with the citizen suit plaintiff and then presenting a remediation plan to the government regulator. Spurring the government enforcement also may have other benefits, as the defendant will be dealing with an entity that is familiar with approving remediation and mitigation measures suitable for settlement of complex environmental issues. If a resolution is quickly reached, it can also pressure the citizen plaintiffs to resolve their lawsuit, thereby eliminating a drawn out litigation after which the defendant could end being responsible for paying the legal fees of both sides.

## B. The Diligent Prosecution Bar and the Importance of a Judicial Decree

Where the goal is to limit exposure to a citizen suit, the preferred mechanism for memorializing a settlement between a violator and the government regulator should always be a judicial, rather than administrative, consent order/decreed. If the resolution is memorialized in a judicial consent decree before the citizen suit notice period is over, and the settlement is found sufficient to resolve the violations, it will likely preclude a citizen action altogether under the “diligent prosecution” bar. However, even when an agreement on penalties and abatement measures is not reached before the commencement of a citizen suit, such settlement is still worth pursuing because of the possibility of mooting a citizen suit even after commencement of the action. Both of these possible outcomes, as well as their ramifications with respect to demands for attorneys’ fees, are discussed in the following sections.

The CWA bars a citizen suit if a governmental enforcement authority “has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State” for the same violation that is the subject of the citizen action.<sup>29</sup> Once an agency commences a judicial action, even if it is subsequent to a citizen’s notice of intent to sue, citizen suits are barred absent a showing that the prosecution has not been “diligent.” A consent order signed by a judge that addresses all violations in terms of penalties as well as abatement measures should unequivocally satisfy the diligence standard, thus protecting the violator from independent citizen actions.<sup>30</sup>

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<sup>29</sup> 33 U.S.C. § 1365(b)(1)(B). Similar provisions are contained in other statutes. *See, e.g.*, CAA, 42 U.S.C. § 7604(b)(1)(B); RCRA, 42 U.S.C. § 6972(b)(1)(B); CERCLA, 42 U.S.C. § 9659(d)(2).

<sup>30</sup> *See, e.g., Epicenter of Steubenville, Inc. v. City of Steubenville*, 924 F.Supp. 845 (S.D. Ohio 1996.)

Administrative consent orders, on the other hand, carry much less preclusive weight. Significantly, most federal courts have determined that EPA or state administrative actions and resulting administrative consent orders (not entered in a court proceeding) do not preclude citizen suits because of the limiting language “in a court.”<sup>31</sup> In the CWA amendments of 1987, Congress added Section 309(g)(6)(A),<sup>32</sup> which provides limited protection against citizen suits based on the same violations that are the subject of an administrative prosecution commenced by EPA or a state agency. This provision both empowers EPA to impose administrative penalties for violations of the Act, and bars citizen suits alleging violations either subjected to administrative enforcement by the EPA under the section, or “with respect to which a State has commenced and is diligently prosecuting an action under a State law *comparable to*” the section.

Unfortunately, the requirement that state enforcement proceedings be “comparable” to EPA proceedings brought under the CWA has severely limited successful application of the administrative due diligence defense. Different courts have taken vastly different approaches in assessing the degree of “comparability” required in

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<sup>31</sup> See *Texans United for a Safe Economy Education Fund v. Crown Central Petroleum Corp.*, 207 F.3d 789 (5th Cir. 2000); *Jones v. City of Lakeland, Tennessee*, 224 F.3d 518 (6th Cir. 2000); *Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517, 1525 (9th Cir. 1987); *Friends of the Earth v. Consol. Rail Corp.*, 768 F.2d 57, 62 (2d Cir. 1985). The Third Circuit, in contrast, has held that administrative actions can bar citizen suits under the “in any court” provision where the regulator has the power to accord the type of relief imposed by a court and the “substantial equivalent” of a diligently prosecuted action in a court. *Student Public Interest Research Group v. Fritzche, Dodge & Olcott*, 759 F.2d 1131, 1136-38 (3d Cir. 1985); *Baughman v. Bradford Coal Co.*, 592 F.2d 215, 219 (3d Cir. 1985). The relevance of the latter two cases is questionable after the 1987 amendments to the CWA added a separate “diligent prosecution” bar for certain administrative enforcement proceedings, as discussed *infra*. See *L.E.A.D. v. Exide Corp.*, 1999 WL 124473, \*32, n.28 (E.D. Pa.).

<sup>32</sup> 33 U.S.C. § 1319(g)(6)(A).

order to make use of the defense. The contrasting interpretations of the statute adopted by different courts are epitomized in the cases *North & South Rivers Watershed Ass'n v. Scituate*<sup>33</sup> and *Citizens For A Better Environment-California v. Union Oil Co.*<sup>34</sup>

In *North & South Rivers*, which involved unpermitted discharges from a town's sewage treatment plant, the town had agreed to upgrade its plant pursuant to an administrative order issued by the Massachusetts Department of Environmental Protection. Two years later, but before the agency had accepted final plans for the upgrade, a citizens' group brought suit seeking injunctive relief and civil penalties based on the same violations. They argued that the state's administrative prosecution was not comparable to section 309(g) because the state action did not assess civil penalties against the defendant. The First Circuit Court of Appeals rejected this reading of the statute, holding that "[w]hile the specific statutory section under which the State issued its Order does not, itself, contain a penalty provision ... another section of the same statute does contain penalty provisions," and thus the state statutory scheme as a whole was "comparable to" the federal scheme.<sup>35</sup>

The Ninth Circuit rejected this reasoning in the *Union Oil* case. In that case, the defendants, in settlement of some permit violations, had received a cease-and-desist letter from the California Regional Water Quality Control Board allowing additional time to comply with certain obligations and requiring payment of \$2 million in penalties. Thereafter, the plaintiff filed a citizen suit, which the defendants challenged as barred under Section 309(g). Rather than examining the statutory scheme as a whole, the Ninth

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<sup>33</sup> 949 F.2d 552 (1st Cir. 1991).

<sup>34</sup> 83 F.3d 1111 (9th Cir. 1996).

<sup>35</sup> 949 F.2d at 556.

Circuit held that its comparability assessment was limited to the particular enforcement provision at issue.<sup>36</sup> The court opined that “the holding of [*North & South Rivers*] leads to the anomalous conclusion that state administrative enforcement actions would more broadly preclude citizen suits than the administrative enforcement actions of the EPA.”<sup>37</sup>

More recently, in, *Lockett v. EPA*<sup>38</sup> the Fifth Circuit adopted the standard first articulated by the Eighth Circuit in *Arkansas Wildlife Federation v. ICI Americas, Inc.*<sup>39</sup>, which also closely resembles the broader construction of *North and South Rivers*, that in order to be “comparable” with regard to public notice and opportunity to comment, the state provision must afford “significant citizen participation” and provide interested citizens “a meaningful opportunity to participate at significant stages of the decision-making process.”

In the *Lockett* case, the court held that the state statute under which the Louisiana Department of Environmental Quality (DEQ) had brought an administrative penalty action against the defendant was comparable to Section 309(g) because persons aggrieved by a DEQ order could intervene in an adjudicatory hearing requested by the violator, or petition for a hearing if none was held; proposed settlements were also subject to public notice and comment. The court rejected the citizen plaintiff’s argument that the discretion granted DEQ in determining whether to permit an intervention or hold a hearing reduced the public’s opportunity to participate, holding that this discretion was circumscribed as well as subject to judicial review, and did not exceed the discretion

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<sup>36</sup> See 83 F.3d at 1118.

<sup>37</sup> *Id.*

<sup>38</sup> 319 F.3d 678 (5th Cir. 2003).

<sup>39</sup> 29 F.3d 376 (8th Cir. 1994).

granted to EPA as to whether or not to grant a petition for a hearing with respect to an administrative order issued under Section 309(g).

The *Lockett* court also held that the Louisiana scheme provided for comparable public notice, although, unlike under the CWA, notice of civil penalties, notices of violation, and compliance orders was only sent on a periodic basis to persons who requested to be put on a mailing list. (EPA must publish notice of a proposed order prior to the assessment of any penalty).<sup>40</sup> Dissimilarly, in a decision issued only one day prior to *Lockett*, the Eleventh Circuit held that an Alabama statute failed the comparability test because it did not require pre-penalty public notice.<sup>41</sup> The court also found objectionable the fact that the Alabama statute imposed a 15-day deadline for aggrieved parties to petition for a public hearing, after notice was published.<sup>42</sup>

Other cases have turned on the public notice requirements provided in the state law under which an enforcement action has proceeded. In *Saboe v. Oregon*,<sup>43</sup> the district court rejected the plaintiff's argument that Oregon law was not comparable to Section 309(g) because the state statute at issue did not provide for mandatory prior public notice of regulatory enforcement orders in the same manner as set forth in Subsection 309(g)(4). The court stated that "[c]omparable state law, as used in Section 1319(g)(6), does not mean that the state's regulatory authority or processes must be identical to the federal provisions."<sup>44</sup> A narrower view on comparability is exemplified by *L.E.A.D. v. Exide*

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<sup>40</sup> 33 U.S.C. §1319(g)(4)(a).

<sup>41</sup> *McAbee v. City of Fort Payne*, 318 F.3d 1248, 1257 (11th Cir. 2003).

<sup>42</sup> *Id.*

<sup>43</sup> 819 F.Supp. 914 (D. Or. 1993).

<sup>44</sup> *Id.* at 917 (citations omitted).

*Corp.*,<sup>45</sup> which held that a state enforcement action was not “comparable” to Section 309(g) where the state scheme provided for public comment on permit conditions at the time permits were issued, but contained no public participation provisions with respect to issuance of civil penalties for actual violations of those conditions.<sup>46</sup> The Eleventh Circuit has directly tied comparability in terms of public participation to when an administrative action is construed to have “commenced,” holding that “for purposes of § 1319(g), an administrative action ‘commences’ at the point when notice and public participation protections become available to the public and interested parties.”<sup>47</sup>

Considering the important role of the states in issuing and enforcing many environmental permits, the uncertain effect of settling a violation administratively makes this a dubious protection against citizen suits under the CWA, regardless of the longevity of governmental activity in the matter. Most significantly, for a potential defendant in receipt of a notice of intent to sue where governmental enforcers have not taken action with regard to the violation, Section 309(g) will offer no protection whatsoever. The bar specifically does not apply when notice of the citizen suit has been filed “prior to the commencement of an action under this subsection,” and the citizen suit is commenced before the 120th day after the date notice is effected.<sup>48</sup>

Moreover, even where a governmental enforcement entity has taken action prior to notice of an impending citizen suit, the case law is inconsistent with respect to when an administrative enforcement action will be considered to have “commenced” under

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<sup>45</sup> 1999 WL 124473 (E.D. Pa.).

<sup>46</sup> *Id.* at \*31.

<sup>47</sup> *Friends of Milwaukee’s Rivers v. Milwaukee Metropolitan Sewerage District*, 382 F.3d 743, 756 (2004).

<sup>48</sup> 33 U.S.C. §1319(g)(6)(B).

Section 309(g). In *Public Interest Research Group of New Jersey v. ELF Atochem North America, Inc.*,<sup>49</sup> for example, the court held that Section 309(g) did not bar a citizen suit where the New Jersey Department of Environmental Protection and Energy had served the defendant a “Compliance Evaluation Inspection Report” ordering corrective actions before the citizen plaintiff sent its notice of intent to sue, but did not issue its “Administrative Order and Notice of Civil Administrative Penalty Assessment” until after notice was served. The court held that the administrative action “commenced” with issuance of the administrative order, because only that document provided formal notice of the violations alleged, the amount of the penalty to be imposed, and the right to a hearing (the elements required to commence a civil penalty under the New Jersey Water Pollution Control Act).<sup>50</sup> In contrast, in *Sierra Club v. Colorado Refining Co.*,<sup>51</sup> the court held that a compliance order similar to the one issued prior to notice in *ELF Atochem* constituted commencement of the state enforcement action, triggering the Section 309(g) bar.<sup>52</sup>

The above cases how illustrate the unsettled nature of the administrative diligent prosecution defense makes it a minefield for the defendant relying upon it in defense of a CWA citizen suit. Again, by acting cooperatively with a government enforcement agency, a CWA defendant may be able to avoid the uncertainties of that defense altogether by seeking a judicially-endorsed resolution of the matter. Of course, that assumes that the government enforcement agency will oblige by transforming their administrative enforcement action into a judicial enforcement action.

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<sup>49</sup> 817 F.Supp. 1164 (D.N.J. 1993).

<sup>50</sup> *Id.* at 1172.

<sup>51</sup> 852 F. Supp. 1476 (D. Colo. 1994).

<sup>52</sup> *Id.* at 1485.

### C. Rendering The Citizen Suit Moot Or Otherwise Precluded After It Is Commenced

Even if the defendant fails to negotiate a judicial consent decree with the enforcement agency prior to commencement of a citizen suit, or if the agency decides to pursue enforcement solely through an administrative process, the possibility remains of rendering the pending action moot through ultimate resolution of the violations with the governmental body. Again, in this context, the finality of a court order setting forth the penalties and injunctive relief will likely provide a more viable source of protection than an administrative settlement, and therefore is the recommended approach.

The reason for seeking a judicial order in this context is that courts have held that a court order, even if issued after the commencement of a citizen suit, can have a collateral estoppel effect on claims based on the same violations for which the court order grants relief. For example, in *U.S. Environmental Protection Agency v. City of Green Forest, Arkansas*,<sup>53</sup> the Eighth Circuit held that a citizen suit was precluded under the doctrine of *res judicata* by a consent decree agreed upon in a later-filed action brought by the EPA alleging the same CWA violations. The court held that the EPA's action was a *parens patriae* action (*i.e.*, brought in the name of all citizens), noting that “[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.”<sup>54</sup>

Resolution of a judicial enforcement action commenced after filing of a citizen suit can also render the citizen suit moot. In *Chesapeake Bay Foundation v. American*

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<sup>53</sup> 921 F.2d 1394 (8th Cir. 1990), *cert. denied sub nom. Work v. Tyson Foods, Inc.*, 502 U.S. 956 (1991).

<sup>54</sup> *Id.* at 1404. *See also Old Timer, Inc. v. Blackhawk-Central City Sanitation District*, 51 F.Supp.2d 1109, 1117-19 (D. Colo. 1999).

*Recovery Company, Inc.*,<sup>55</sup> a citizen group and EPA filed actions on the same day regarding the same CWA violations, the government filing a few hours after the organization. The trial court dismissed the citizen suit without opinion. Thereafter, EPA and the defendant settled the government's suit in a consent order assessing penalties. The Eighth Circuit held that the district court had erred because, as the EPA action was filed after the citizen suit, it could have had no preclusive effect under 33 U.S.C. § 1365(b)(1)(B).<sup>56</sup> However, the court held that the subsequent consent order and the fact that the defendant planned to cease operations in the near future mooted the citizen suit.<sup>57</sup>

A defendant asserting that its voluntary action has led to the cessation of violations must meet the difficult burden of proving that “subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.”<sup>58</sup> However, in the context of a settlement agreement with a government agency that requires the defendant to implement measures to abate the violations, courts often defer to the agency's determination that the terms of the settlement provide a sufficient guaranty that the violations will cease.

For example, in *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.*,<sup>59</sup> the New York State Department of Environmental Conservation (“DEC”) reached a

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<sup>55</sup> 769 F.2d 207 (8th Cir. 1985).

<sup>56</sup> *Id.* at 208-09.

<sup>57</sup> *Id.*

<sup>58</sup> *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 189 (2000) (citation omitted). See also *Puerto Rico Campers' Ass'n v. Puerto Rico Aqueduct and Sewer Authority*, 219 F.Supp.2d 201, 219-21 (D. P.R. 2002) (holding, in an action alleging unpermitted discharges into the Mameyes River, that “[t]he only possible basis for a finding of mootness” would be if the defendant “sealed off the [violating] plant in a manner which absolutely impairs, under all circumstances, discharging into the Mameyes River”).

<sup>59</sup> 933 F.2d 124 (2d Cir. 1991).

settlement with a CWA violator subsequent to the commencement of a citizen suit. Holding that “[a] citizen suing pursuant to Section 505 of the Act thus may not revisit the terms of a settlement reached by state authorities without regard to the probability of a continuation of the violation alleged in the complaint,” the Second Circuit remanded the case to the district court for a determination of whether the “violations are in fact continuing, or giving some deference to the judgment of the state authorities, the terms of the settlement are such that a realistic prospect of continuing violations exists.”<sup>60</sup> If the district court found in the negative, the case would be dismissed as moot.<sup>61</sup> Following the reasoning of *Eastman Kodak*, the Eighth Circuit in *Comfort Lake Ass’n, Inc. v. Dresel Contracting, Inc.*<sup>62</sup> held that in the context of compliance activities mandated by a settlement agreement with a government agency, the burden of proof switches to the citizen plaintiff to prove “there is a realistic prospect that the violations alleged in [its] complaint will continue notwithstanding” the terms of settlement, or claims for injunctive relief will be dismissed as moot.<sup>63</sup> The court further held that the enforcement agency’s determination as to the appropriate penalties to impose for violations of a National Pollutant Discharge Elimination System permit at a construction site for a Wal-mart store was “entitled to considerable deference,” and concluded that “an administrative enforcement agreement between [the agency] and the polluter will preclude a pending citizen suit claim for civil penalties if the agreement is the result of a diligently

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<sup>60</sup> *Id.* at 127-28.

<sup>61</sup> *Id.* at 128.

<sup>62</sup> 138 F.3d 351 (8th Cir. 1998).

<sup>63</sup> *Id.* at 355.

prosecuted enforcement process, however informal.”<sup>64</sup> Counsel negotiating a settlement agreement with an administrative agency may garner some valuable advice from this opinion, as the court noted language in the agreement which mooted the civil action to the effect that “there is no likelihood that ... permit violations will recur at the Wal-mart site.”<sup>65</sup>

Defense counsel should take note that the mootness issue with regard to claims for civil penalties is likely to turn on whether the consent order or agreement entered into with government enforcers disposes of all of the same violations alleged by the citizen plaintiffs. In *Eastman Kodak*, the consent order stated that it was “(in full settlement of all civil and administrative claims and liabilities that might have been asserted by the [DEC] against Kodak ... for any violations ... that occurred at [the violating facility] prior to the effective date of this Order.”<sup>66</sup> The civil penalties imposed totaled more than \$2 million.<sup>67</sup> In *Comfort Lake*, the settlement agreement recited that “(it covers all ... Permit violations that occurred at the Wal-mart construction site and that were known by [the state enforcement agency] as of the effective date of this Agreement.”<sup>68</sup> In contrast, the Second Circuit in *Atlantic States Legal Foundation, Inc. v. Pan American Tanning*

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<sup>64</sup> *Id.* at 357. Contrast *Public Interest Research Group of New Jersey, Inc. v. Elf Atochem North America, Inc.*, 817 F.Supp. 1164, 1171-72 (D.N.J. 1993). In *Elf Atochem*, the court specifically declined to follow *Eastman Kodak*'s deference to an environmental enforcement agency's determination with regard to civil penalties. The court held that where abatement measures required by an administrative order render claims for injunctive relief moot, even where the order imposes penalties, claims for additional civil penalties can survive: “The possibility that substantial additional penalties may be imposed – just like the possibility of penalties where none have yet been paid – creates a sufficient case or controversy to avoid mootness.”

<sup>65</sup> 138 F.3d at 354. This fact was relatively self-evident in that case, as by the time of the agreement construction was completed at the permit had terminated.

<sup>66</sup> 933 F.2d at 126.

<sup>67</sup> *Id.*

<sup>68</sup> 138 F.3d at 354.

*Corp.*,<sup>69</sup> distinguishing the case before it from *Eastman Kodak*, refused to dismiss the citizen plaintiff's claims for civil penalties under the CWA where the settlement agreement between the defendant and a municipal authority "did not cover all of the violations plaintiffs allege and assessed small fines of only \$6,600."<sup>70</sup> (The court also noted that "the Act accords the enforcement actions of local agencies less deference than it does those of state and federal agencies.")<sup>71</sup> Thus, in negotiating a settlement, counsel should make sure that the agreement contains specific language announcing that it disposes of all possible violations that could be raised in a citizen suit complaint.

D. Mootness And Citizen Suits Alleging "Imminent And Substantial Endangerment": The *87th Street Owners* Example

Significantly, the availability of the mootness defense where there is no reasonable likelihood that violations will recur depends on the principle announced in *Gwaltney*, discussed *supra*, that the courts lack subject matter jurisdiction over citizen suits alleging wholly past violations of the CWA (based on a reading of language contained in most of the federal environmental statutes). However, the Supreme Court in *Gwaltney* itself distinguished "imminent and substantial endangerment" claims under RCRA, which can be based on wholly past conduct as long as the condition founding a claim continues to exist.<sup>72</sup> Thus, in the RCRA context, an administrative determination that the offensive conduct will not recur will not absolve a citizen suit defendant from liability. However, cooperation with enforcement agencies in remediation of the "endangering" condition can result in dismissal of an action on the simple basis that once

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<sup>69</sup> 993 F.2d 1017 (2d Cir. 1993).

<sup>70</sup> *Id.* at 1022.

<sup>71</sup> *Id.*

<sup>72</sup> *See Gwaltney*, 484 U.S. at 57 n.2.

the endangerment is removed through an agency-supervised clean-up, a court cannot provide the citizen plaintiff with any further relief.<sup>73</sup>

This possibility was exemplified in *87th Street Owners Corp. v. Carnegie Hill-87th Street Corp.*<sup>74</sup>. In the events leading up to the case, a residential cooperative in Manhattan discovered oil seeping into the cellar of its building. The cooperative reported the spill to the DEC, the agency responsible for investigating and remediating oil spills, and indicated that it believed the oil had emanated from the underground storage tank belonging to a neighboring building. DEC initiated an investigation of the extent of contamination, and of its possible source, and proceeded to install remedial systems to remove the leaking oil. The owner of the neighboring building cooperated fully with these efforts. However, the cooperative brought an “imminent and substantial endangerment” citizen suit under 42 U.S.C. § 6972(a)(1)(B) against the owner of the neighboring building.

On the defendant’s motion for summary judgment, the court dismissed the action. While finding that there were issues of material fact as to whether an “imminent and substantial endangerment” continued to exist, the court held that there was no relief it could offer to the plaintiff in addition to the remedial efforts DEC had already undertaken. The court noted that “in order to obtain injunctive relief, plaintiff would have to identify some action that defendant could be ordered to take that is not already in place thanks to the action of the state agency and that would improve the situation in

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<sup>73</sup> The Supreme Court has held that RCRA does not permit “a private cause of action to recover the prior cost of cleaning up toxic waste that does not, at the time of suit, continue to pose an endangerment to health or the environment.” *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 481 (1996).

<sup>74</sup> 2002 WL 1836758 (S.D.N.Y. 2002).

some way.”<sup>75</sup> As the plaintiff did not assert that DEC’s remediation effort was insufficient or that the defendant had not cooperated in it, there was no basis for awarding injunctive relief.

The plaintiffs in *87th Street Owners Corp.* were most interested in obtaining a ruling that the defendant would be responsible for any remediation costs that DEC might seek to recoup from the parties in the future. The court held that such declaratory relief did not fall within the scope of RCRA’s “imminent and substantial endangerment” provision, which is limited to suits to restrain activities creating or exacerbating the hazard, or to improve or eliminate existing hazards.<sup>76</sup>

This case illustrates the point that potential defendants to “imminent and substantial endangerment” citizen suits who cooperate in a government-ordered clean up may be able to knock out citizen suits based on an environmentally-hazardous condition, even where the government-ordered cleanup is ongoing and has not fully remediated the hazardous condition. Of course, the defendants in *87th Street Owners Corp.* were benefited by the fact that the remediation in that instance was relatively straightforward and that the plaintiff, despite repeated requests from the Court, had been “unable to describe a single action that defendant could be ordered to take to reduce or eliminate any

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<sup>75</sup> *Id.*, slip op. at 7.

<sup>76</sup> *Id.* at 11. The Court noted that although it had broad powers under RCRA to order remediation, those powers were granted only to restrain hazardous waste handling or disposal that threatened the imminent and substantial endangerment, “or order actions that may be ‘necessary’ to eliminate that danger.” *Id.* The Court went on to observe that since the actions that allegedly created the danger occurred in the past, there were no activities to “restrain.” In addition, the Court found that the plaintiff had failed, despite repeated requests from the Court during oral argument, to describe a single action the defendant could take that had not already been ordered or undertaken by DEC. *Id.*

risk its past actions may have caused, that is not already being undertaken by DEC.”<sup>77</sup> In cases where plaintiffs can show a legitimate dispute about whether the government-ordered clean up will address the condition, a grant of summary judgment in favor of the defendant may not be as easy to achieve.

An apposite counterpoint to *87th Street Owners’ Corp.* is the recent Third Circuit decision in *Interfaith Community Organization v. Honeywell International, Inc.*,<sup>78</sup> in which the court expansively construed the term “imminent and substantial endangerment.” *Interfaith Community Organization* involved a site near the Hackensack River formerly used to dispose of the waste of a chrome manufacturer, which contained high concentrations of hexavalent chromium, a known carcinogen and environmental toxin. The New Jersey Department of Environmental Protection (“NJDEP”) ordered remediation of the site, and two years later the owner, Honeywell International, constructed an interim measure in the form of a concrete cap over part of the site and a plastic liner over the remainder. The cap was intended to last only five years (pending the development and implementation of a more permanent remedy) and was in constant need of repair. Moreover, as Honeywell had told NJDEP, the interim cap would not prevent all discharges to the river.

Three years later, in 1993, Honeywell signed a consent order with NJDEP in which Honeywell agreed to pay \$60 million toward a permanent remedy which would be put in place through an agency-supervised remedy-selection process. However, apparently NJDEP never followed through with enforcing the consent order. In 1995, Interfaith Community Organization brought its RCRA citizen suit alleging an imminent

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<sup>77</sup> *Id.*

<sup>78</sup> 399 F.3d 248 (3rd Cir. 2005), *petition for cert. filed* (May 19, 2005) (No. 04-1560).

and substantial endangerment, and after a bench trial the district court found that such an endangerment did exist and ordered Honeywell to clean up the site by excavating and removing the contamination.

In affirming the decision, the Third Circuit held that the district court had actually imposed too high a standard with respect to what constituted an “imminent and substantial endangerment.” First, the court held that a living population need not be endangered; rather the endangerment must accrue to either a population or merely to the environment itself. Second, the court rejected the district court’s construction of the law that in order to show a “substantial endangerment” a plaintiff must show that a contaminant is present at levels above that considered acceptable by the state.

In affirming the district court’s determination that the Honeywell site did pose an imminent and substantial endangerment, the Third Circuit focused on the interim measure’s demonstrated lack of functionality. The court noted in particular Honeywell’s concession that it could not prevent all discharges to the river, as well as the cap’s chronic state of disrepair and the fact that it was only intended to last five years, and NJDEP’s failure to enforce the 1993 consent order. Thus, this case exemplifies how even where some state-sanctioned remedial measures have been implemented, citizen plaintiffs may still be able to establish the existence of an imminent and substantial endangerment.

#### E. Precluding The Award Of Attorneys’ Fees

Even if it has successfully defeated a citizen’s claim for injunctive relief and civil penalties through a mootness or *res judicata* defense, a defendant may still find itself in

the frustrating position of paying the plaintiff's attorneys' fees.<sup>79</sup> The federal environmental statutes generally provide for the discretionary award of attorneys' fees and costs to any prevailing party or substantially prevailing party.<sup>80</sup> A plaintiff can be considered "substantially prevailing" "if its citizen suit was the catalyst for agency enforcement action that resulted in the cessation of ... violations."<sup>81</sup> This determination will generally turn on the timing of the citizen suit relative to the agency enforcement action; if the citizen suit is brought before the agency takes an apparent interest, courts are more likely to view the citizen plaintiff as the "catalyst" of enforcement.

Thus, in *Eastman Kodak*, the Second Circuit held that even should the district court dismiss the citizen suit as moot on remand based on the administrative consent order entered into after commencement of the action, the plaintiff could still seek attorneys' fees. The court found, "[w]e believe that when the polluter's settlement with

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<sup>79</sup> The successful use of the diligent prosecution defense, on the other hand, should bar an award of attorneys' fees. The statutes generally provide for awards of attorneys' fees to plaintiffs in actions "brought pursuant to" citizen suit provisions. *See, e.g., CWA*, 33 U.S.C. § 1365(d). As a citizen cannot properly commence an action if a government enforcer is diligently prosecuting the same violations, it thus cannot obtain attorneys' fees when the action is dismissed. *See United States v. Stone Container Corp.*, 196 F.3d 1066 (9th Cir. 1999); *United States v. National Steel Corp.*, 782 F. 2d 62 (6th Cir. 1986).

<sup>80</sup> *See, e.g., CWA*, 33 U.S.C. § 1365(d); *RCRA*, 42 U.S.C. § 6972(e); *TSCA*, 15 U.S.C. § 2619(c)(2); *CERCLA*, 42 U.S.C. § 9659(f); *Endangered Species Act*, 16 U.S.C. § 1540(g)(4). The *CAA* allows discretionary awards to "any party." 42 U.S.C. § 7604(d), providing:

The court, in issuing any final order in any action brought pursuant to subsection (a) of 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. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

<sup>81</sup> *Comfort Lake Ass'n Inc. v. Dresel Contracting, Inc.*, 138 F.3d 351, 357 (8th Cir. 1998)

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 a prevailing party."<sup>82</sup> In *Comfort Lake*, on the other hand, the court upheld the district court's denial of attorneys' fees where the state enforcement action began (though was not concluded) before the plaintiff issued its notice of intent to sue, and where the plaintiff had "actually impeded" the execution of the settlement agreement between the state agency and the violator.<sup>83</sup> Thus, the threat of attorneys' fees creates an additional incentive for the defendant to engage early with government enforcers, where it discovers a violation before a citizen suit is threatened.

If a court does find that a citizen suit, dismissed as superfluous of government enforcement, did act as a catalyst to the ultimate resolution of the violations, it is left with the question of how much of an award is "reasonable in relation to the results obtained."<sup>84</sup> In *Armstrong v. ASARCO, Inc.*, the citizen plaintiffs filed a motion for a preliminary injunction, which was dismissed upon the court's acceptance of a consent decree between EPA and the defendant. The Eighth Circuit held that it was proper to award the litigation costs related to the hearing on the preliminary injunction motion, because the hearing "created a judicial record of ASARCO's history of non-compliance and presumably also assisted the district court's evaluation of the proposed consent decree."<sup>85</sup> However, the court found that costs related to the motion accruing after the hearing should not have

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<sup>82</sup> 933 F.3d at 128. See also *Armstrong v. ASARCO, Inc.*, 138 F.3d 382, 387 (8th Cir. 1998).

<sup>83</sup> 138 F.3d at 357-58.

<sup>84</sup> *Id.* at 388

<sup>85</sup> *Id.*

been awarded.<sup>86</sup> Similarly, the court held that the plaintiff's litigation costs associated with opposing an earlier, less punitive, version of the consent decree were properly awarded, but that costs associated with opposing the version ultimately accepted by the court were properly denied.<sup>87</sup> This case illustrates that the sooner a consent decree is negotiated between the agency and the defendant, the less time the citizen plaintiff has to accumulate litigation costs that a court will find "related to" the ultimate resolution of the case.

### III. Conclusion

There is no question that a citizen suit can be a powerful enforcement weapon. However, courts take the gap filling nature of citizen suits and the admonition by the United States Supreme Court that citizen suits "supplement but not supplant" government enforcement action seriously. Thus, in cases where the fact of the violation is relatively clear, the best defense to a citizen suit will often be to quickly remedy the problem and, in certain circumstances, turn oneself in to the government regulator even before the regulator attempts to take action.

Of course, where the citizen suit provision requires proof of an ongoing violation, a quick remedy -- such as permanent plant closure -- may head off a citizen suit even without the presence of a government regulator. However, in many cases such a quick and permanent remedy may not be possible. In those situations, case law has shown that a consent decree between a government regulator and the defendant -- entered by a court -- can often be successful in preempting a citizen suit challenge.

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 388-89.

