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When Should an Administrative Enforcement Action Preclude a Citizen Suit Under the Clean Water Act?

ABSTRACT

By interpreting the Clean Water Act's administrative penalty provisions as a bar to citizen suits under almost all circumstances, the United States Courts of Appeals for the First and Eighth Circuits have imposed a major restriction on citizen enforcement against water polluters. After analyzing the legislative history, administrative interpretations and case law concerning the relationship between the Clean Water Act's citizen suit and administrative penalty provisions, this article argues that the interpretation adopted by the First and Eighth Circuits should be rejected. To help achieve this goal, this article suggests amendments to the Clean Water Act's administrative penalty provisions and informs federal, state and citizen prosecutors of procedures they can employ to deter water polluters successfully without infringing upon one another's efforts.

I. INTRODUCTION

Since Congress added citizen suit provisions to the Clean Water Act (CWA) in 1972, courts have placed two major restrictions on citizen enforcement against water polluters. First, in 1987, the Supreme Court used the fact that the CWA's citizen suit provisions are written in the present tense to reach the conclusion that citizens cannot sue water polluters for "wholly past violations."¹ This conclusion has been criticized by commentators and members of Congress.² As a result,

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1. *Gwaltney of Smithfield v. Chesapeake Bay Found.*, 484 U.S. 49, 64 (1987).

2. See, e.g., William H. Rodgers, Jr., ENVIRONMENTAL LAW § 4.3, at 289-90 (2d ed. 1994) (calling *Gwaltney* "one of the most destructive in a sorry series of Supreme Court opinions on environmental law"). Congressional debate on the Clean Air Act Amendments of 1990 includes equally damning criticism of *Gwaltney*. See 136 CONG. REC. S3174 (daily ed. Mar. 26, 1990), reprinted in Environmental and Natural Resources Policy Division, Congressional Research Service, A Legislative History of the Clean Air Act Amendments of 1990, at 6355 (1993) [hereinafter 1990 *Legislative History*] (remarks of Sen. Lieberman) ("citizens should have authority to sue for wholly past violations"); *id.* at S3177, 1990 *Legislative History* at 6361 (remarks of Sen. Chafee) (referring to a rejected provision that endorsed *Gwaltney* as "a very,

Congress amended the Clean Air Act to make clear that citizens are entitled to sue for wholly past violations under that statute,³ and efforts are underway to make similar amendments to the CWA.⁴

The second major restriction on citizen suits stems from the administrative penalty provisions that were added to the CWA in 1987.⁵ Under paragraph 309(g)(6) of the CWA, citizen suits may be precluded when the U.S. Environmental Protection Agency (EPA) or a state has commenced and is diligently prosecuting an administrative penalty action under subsection 309(g) of the CWA or a comparable state law.⁶ In 1991, the First Circuit broadly interpreted paragraph 309(g)(6) to reach the conclusion that a citizen suit was precluded by a prior state administrative action which did not assess any civil penalties and was not subject to public notice and comment procedures.⁷ Several courts in other circuits have followed the First Circuit's broad interpretation of the preclusion doctrine expressed in paragraph 309(g)(6).⁸ Indeed, the rapid expansion of this preclusion doctrine threatens to negate any advantage that citizen prosecutors may gain if Congress legislatively overrules the Supreme Court's *Gwaltney* decision.

This article focuses on three aspects of the preclusion doctrine contained in paragraph 309(g)(6) of the CWA. First, this article seeks to aid the courts by proposing an interpretation of paragraph 309(g)(6) that avoids the anomalies created by the First Circuit and its followers. Second, this article aims to advise Congress by suggesting amendments to paragraph 309(g)(6) that will clarify the roles of state, federal, and citizen prosecutors. The third and final goal of this article is to guide

very strange provision"); *id.* at S3183, 1990 *Legislative History* at 6379 (remarks of Sen. Durenberger) ("The Gwaltney problem can be fixed."); *id.* at S3239, 1990 *Legislative History* at 6439 (daily ed. Mar. 27, 1990) (remarks of Sen. Baucus) ("There is no justification for allowing polluters to enjoy the unjust enrichment gained by failing to comply in the past even if they comply in the present."); *id.* at S3239, 1990 *Legislative History* at 6446 (remarks of Sen. Mitchell) (*Gwaltney* "outcome is inappropriate because it provides no penalty to sources that have violated the act in the past").

3. See 42 U.S.C. § 7604(a)(1) (Supp. V 1993) (allowing citizen suits against any person "who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of" certain provisions of the Clean Air Act).

4. See, e.g., S. 2093, 103d Cong., 2d Sess. § 503(a) (1994) (allowing citizen suits for past violations); S. REP. NO. 257, 103d Cong., 2d Sess. 79 (1994) (stating that "the *Gwaltney* rule undermines the [Clean Water] Act's deterrence goals").

5. 33 U.S.C. § 1319 (1988).

6. *Id.* § 1319(g)(6).

7. *North & South Rivers Watershed Ass'n v. Town of Scituate*, 949 F.2d 552 (1st Cir. 1991), *aff'g* 755 F. Supp. 484 (D. Mass. 1991).

8. E.g., *Arkansas Wildlife Fed. v. ICI Americas, Inc.*, 29 F.3d 376 (8th Cir. 1994), *aff'g* 842 F. Supp. 1140 (E.D. Ark. 1993) *cert. denied*, 115 S. Ct. 1094 (1995); *Sierra Club v. Colorado Refining Co.*, 852 F. Supp. 1476 (D. Colo. 1994); *Saboe v. State of Oregon*, 819 F. Supp. 914 (D. Or. 1993).

state, federal, and citizen prosecutors by suggesting procedures they can employ to deter polluters successfully without infringing upon one another's efforts.

The path toward each of these goals begins with a discussion of the legislative history and administrative interpretations of the CWA's provisions regarding citizen suits and administrative penalties. This discussion leads to a brief survey of the case law and proposed legislation interpreting paragraph 309(g)(6) and then turns to an analysis of four issues: (1) What kinds of administrative enforcement actions should have a preclusive effect on CWA citizen suits?; (2) What actions of a governmental prosecutor are sufficient to commence a preclusive administrative enforcement action?; (3) What makes a governmental agency's prosecution diligent enough to warrant preclusion of a citizen suit?; and (4) What remedies should an administrative enforcement action preclude citizens from seeking in subsequent litigation? The analysis of these issues provides a critique of both the methods of statutory interpretation employed by the courts and the policy arguments presented by administrative agencies and members of Congress with respect to paragraph 309(g)(6). This critique in turn provides a basis for the recommendations which form the concluding sections of this article.

II. BACKGROUND

A. The 1972 Amendments and the Creation of the Citizen Suit Provisions

In the 1972 amendments to the Federal Water Pollution Control Act (renamed the Clean Water Act in 1977), Congress set an ambitious national goal of ensuring that "the discharge of pollutants into the navigable waters will be eliminated by 1985."⁹ To accomplish this goal, Congress established a nationwide permit program known as the "national pollutant discharge elimination system" (NPDES).¹⁰ Permits issued under the NPDES program establish technology-based limits on the volume and concentration of pollutants that can be discharged into the nation's waters from "point sources."¹¹ While polluters continue to

9. Pub. L. No. 92-500, § 2, 86 Stat. 816 (codified as amended at 33 U.S.C. § 1251(a)(1)); see 1 FRANK P. GRAD, TREATISE ON ENVIRONMENTAL LAW § 3.03, at 3-102 (1994) (noting that with the advent of the 1972 amendments, "[t]he question is no longer how high must effluent standards be set in order to accomplish ambient water quality standards, but what technology can best be used, and how soon, to reduce water pollution to zero" (citation omitted)).

10. Pub. L. No. 92-500, § 2, 86 Stat. 880-83 (codified as amended at 33 U.S.C. § 1342).

11. Congress defined a "point source" as "any discernible, confined and discrete

befoul the nation's waters long after the expiration of the CWA's 1985 deadline for ceasing such befoulment, the NPDES program that Congress constructed in 1972 still stands as the statute's cornerstone.

To ensure that polluters apply for NPDES permits and comply with the effluent limitations that these permits establish, the 1972 CWA amendments expanded and strengthened the federal government's enforcement authorities,¹² allowed for delegation of such enforcement authorities to states with permit programs that meet EPA guidelines,¹³ and specifically empowered private citizens to sue CWA violators.¹⁴ To facilitate enforcement by federal, state, and citizen prosecutors, Congress made clear in the 1972 amendments that prosecutors can establish liability merely by showing that a defendant discharged pollutants without an NPDES permit or in violation of permit conditions.¹⁵ The CWA prosecutor's job is also made easier by NPDES permit requirements which compel permittees to submit public self-monitoring reports which can be used as *prima facie* evidence of permit violations.¹⁶

The 1972 amendments gave governmental prosecutors two basic enforcement options: (1) issue an administrative compliance order directing the alleged violator to comply with the CWA,¹⁷ or (2) bring a civil action for appropriate relief (including a permanent or temporary injunction and civil penalties of up to \$10,000 per day of violation) in a district court for the district in which the defendant is located.¹⁸

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, for which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

12. Pub. L. No. 92-500, § 2, 86 Stat. 859 (codified as amended at 33 U.S.C. § 1319).

13. *Id.* § 2, 86 Stat. 850, 880 (1972) (codified as amended at 33 U.S.C. §§ 1314(i), 1342(b)). Regulations regarding state program requirements are published at 40 C.F.R. pt. 123 (1994).

14. Pub. L. No. 92-500, § 2, 86 Stat. 888 (1972) (codified as amended at 33 U.S.C. § 1365).

15. *Id.* § 2, 86 Stat. 844 (codified as amended at 33 U.S.C. § 1311(a)). The CWA's liability scheme differs from common law tort theories because CWA liability does not depend on elaborate and potentially subjective proof that a polluter's discharge actually causes harm to the environment. See S. REP. NO. 414, 92d Cong., 1st Sess. 79 (1971), reprinted in 1972 U.S.C.C.A.N. 3668, 3745 (noting that the CWA citizen suit provision "would not substitute a 'common law' or court-developed definition of water quality. An alleged violation of an effluent control limitation or standard, would not require reanalysis of technological [or] other considerations at the enforcement stage [and thus] an objective evidentiary standard will have to be met by any citizen who brings an [enforcement] action under this section.").

16. Subsection 402(a)(2) of the CWA, 33 U.S.C. § 1342(a)(2), authorizes the Administrator of EPA to "prescribe conditions for [NPDES] permits . . . including conditions on data and information collection, reporting, and such other requirements as he deems appropriate." EPA regulations establish periodic self-monitoring as one of the conditions applicable to all NPDES permits. 40 C.F.R. § 122.41 (1994).

17. Pub. L. No. 92-500, § 2, 86 Stat. 859 (codified as amended at 33 U.S.C. § 1319(a)). This provision also requires the EPA Administrator to notify states of such compliance orders.

18. *Id.* § 2, 86 Stat. 859 (codified as amended at 33 U.S.C. §§ 1319(b), 1319(d)). This

Although the administrative compliance orders authorized by the 1972 amendments are not subject to judicial review, do not assess civil penalties, and are not binding absent judicial enforcement, it is unwise to ignore them because failure to comply with an administrative compliance order may subject the violator to additional civil penalties if that violator is sued in court by EPA or a citizen.¹⁹

The citizen suit provisions that Congress added to the CWA in 1972 allow "any citizen" to bring a civil action in a district court for the district in which the unlawful pollution source is located.²⁰ There are two basic categories of potential defendants whom citizens may sue. First, citizen plaintiffs may sue "any person . . . alleged to be in violation of: (A) an effluent standard or limitation under this chapter; or (B) an order issued by the [EPA] administrator or a State with respect to such a standard or limitation" ²¹ The second category of citizen suit defendant is the EPA Administrator herself, whom citizens may sue "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."²² In either case, district courts have jurisdiction under the citizen suit provisions of the CWA "to enforce . . . an effluent standard or limitation, or . . . an order [with respect to such an effluent standard or limitation], or to order the [EPA] Administrator to perform [a nondiscretionary] act or duty . . . and to apply any appropriate civil penalties" ²³ Such civil penalties are paid to the government; they are not recovered by the citizen plaintiff.²⁴ However, under the 1972 amend-

provision also requires the EPA Administrator to notify states when such actions are commenced.

19. See 33 U.S.C. § 1319(d) ("Any person who violates any order issued by the [EPA] Administrator under subsection (a) [of section 309], shall be subject to a civil penalty not to exceed \$25,000 per day for each violation."); *id.* § 1365(a)(1) (allowing citizens to sue persons who violate "an order issued by the Administrator or a State . . ."). The distinction between compliance orders and civil penalty actions is more fully discussed *infra* at Part III.A.1.

20. Pub. L. No. 92-500, § 2, 86 Stat. 888 (codified as amended at 33 U.S.C. §§ 1365(a), 1365(c)). The CWA defines "citizen" as "a person or persons having an interest which is or may be adversely affected." Pub. L. No. 92-500, § 2, 86 Stat. 889 (codified at 33 U.S.C. § 1365(g)). This definition was intended to accord with the standing requirements that the Supreme Court articulated in *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972). See H.R. CONF. REP. NO. 1465, 92d Cong., 2d Sess. 146 (1972), reprinted in 1972 U.S.C.C.A.N. 3776, 3823.

21. 33 U.S.C. § 1365(a)(1).

22. *Id.* § 1365(a)(2).

23. *Id.* § 1365(a).

24. See S. REP. NO. 414, *supra* note 15, at 79, reprinted in 1972 U.S.C.C.A.N. at 3745 (noting that "any penalties imposed would be deposited as miscellaneous receipts and not be recovered by the complainant"); GRAD, *supra* note 9, at 3-330.8 (stressing that "citizen suit authorization allows [a] citizen to vindicate a public right. It is not to be used as a vehicle for private actions to collect damages or to advance the plaintiff's private interests.").

ments, the courts may award "costs of litigation (including reasonable attorney and expert witness fees) to any party" ²⁵

While the possibility of winning attorney's fees under the CWA's citizen suit provisions undoubtedly provides an added incentive for citizen enforcement, the attorney fee provisions also serve as one of several limitations which protect defendants from frivolous litigation by citizen prosecutors. If a citizen-plaintiff's suit is frivolous, then courts may require that plaintiff to pay the defendant's attorney's fees. ²⁶ Courts may also require citizen plaintiffs to file a bond or other equivalent security if they are seeking a temporary restraining order or preliminary injunction. ²⁷

Two other significant limitations that Congress built into the CWA's citizen suit provisions in 1972 are the requirement that citizen plaintiffs notify defendants and the government of their intention to sue at least 60 days before a citizen suit is filed, ²⁸ and a provision which precludes citizens from filing suit "if the [EPA] 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 [effluent] standard, limitation, or [compliance] order" at issue in the case. ²⁹ These two limitations work together to provide federal and state prosecutors with a window of time in which to preclude a citizen suit by filing their own suit against the targeted defendant. The limitation allowing governmental prosecutors to preclude a citizen suit by filing their own action in court is an important precursor of the administrative preclusion doctrine which is the main focus of this article.

The balance between the sources and limits of citizen enforcement authority that Congress struck in the CWA's citizen suit provisions also has important precursors in both common law doctrines and other federal pollution control statutes, particularly the Clean Air Act. In the years immediately preceding the passage of the 1972 CWA amendments, for example, several citizen's groups employed the *qui tam* provisions in the

25. 33 U.S.C. § 1365(d). There has been considerable debate over how successful citizen plaintiffs must be in order to warrant recovery of attorney's fees. See Jeffrey G. Miller, *Private Enforcement of Federal Pollution Control Laws: Part III*, 14 ENVTL. L. REP. (Envtl. L. Inst.) 10407 (1984). In 1987, Congress amended the language of subsection 1365(d) to limit fee recovery to any "prevailing or substantially prevailing" party. Pub. L. No. 100-4, § 505(c), 101 Stat. 76 (codified as amended at 33 U.S.C. § 1365(d)).

26. See S. REP. NO. 414, *supra* note 15, at 81 (1971), reprinted in 1972 U.S.C.C.A.N. at 3747 (noting that courts could "award costs of litigation to defendants where the litigation was obviously frivolous or harassing").

27. 33 U.S.C. § 1365(d).

28. *Id.* § 1365(b)(1)(A).

29. *Id.* § 1365(b)(1)(B).

1899 Refuse Act to prosecute water polluters.³⁰ *Qui tam* refers to an old common law remedy allowing private citizens to prosecute crimes and keep part of the fines paid.³¹ While this common law remedy may sound more lucrative than the citizen suit provisions in the 1972 CWA amendments, most of the *qui tam* litigation under the Refuse Act were unsuccessful, as were the cumbersome enforcement mechanisms available to the federal and state governments under prior water pollution control statutes.³²

With regard to its statutory origins, the citizen suit provisions of the CWA were taken almost verbatim from the 1970 amendments to the Clean Air Act (CAA).³³ The CAA was the first federal environmental statute to expressly empower citizens to "act as real private attorneys general, vindicating the statutory rights of the community at large rather than the plaintiff's own economic losses."³⁴ However, unlike the 1970 amendments to the CAA, the 1972 CWA amendments allow citizens to sue for civil penalties rather than just injunctive or declaratory relief.³⁵ Another difference between the two statutes is the CWA's substitution of the term "citizen" for the CAA term "person."³⁶ Despite these changes, the citizen suit provisions of the CWA remain similar enough to the CAA for one commentator to conclude "[t]here are perhaps no sections of the environmental statutes where precedent under one statute so clearly applies to others."³⁷

The original citizen suit provision in the CAA amendments of 1970 was shaped by extensive congressional deliberation over how to

30. An extensive list of this *qui tam* litigation is provided in an article by Jeffrey G. Miller. See Jeffrey G. Miller, *Private Enforcement of Federal Pollution Control Laws: Part I*, 13 ENVTL. L. REP. (Envtl. L. Inst.) 10,309 n.2 (1983); see also Robert L. Potter, Comment, *Discharging New Wine into Old Wineskins: The Metamorphosis of the Rivers and Harbors Act of 1899*, 33 U. PITT. L. REV. 483 (1972); R. Zener, *The Federal Law of Water Pollution Control*, in FEDERAL ENVIRONMENTAL LAW 785-86 (E. Dolgin & T. Guilbert eds., 1974).

31. "*Qui tam*" is an abbreviation of the Latin phrase, "*qui tam pro domino rege quam pro si ipso in hac parte sequitur*," meaning "who sues on behalf of the King as well as for himself." BLACK'S LAW DICTIONARY 1251 (6th ed. 1990).

32. See Miller, *supra* note 30, at 10309-10 nn. 2, 3; GRAD, *supra* note 9, at 3-71 to 3-99.

33. Pub. L. No. 91-604, § 12(a), 84 Stat. 1706 (1970) (codified as amended at 42 U.S.C. § 7604 (1988 & Supp. V 1993)).

34. Miller, *supra* note 30, at 10309 (footnote omitted).

35. The CAA provisions are contained in Pub. L. No. 91-604, § 12(a), 84 Stat. 1706 (1970) (codified as amended in 42 U.S.C. § 7604). The CWA provisions are contained in Pub. L. No. 92-500, § 2, 86 Stat. 888 (1972) (codified as amended at 33 U.S.C. § 1365(a)).

36. *Id.* The change from "person" to "citizen" reflects the Supreme Court's redefinition of the standing requirements for citizen plaintiffs in *Sierra Club v. Morton*, 405 U.S. at 734-35. This redefinition occurred in between the enactment of the CAA's citizen suit provisions in 1970 and the passage of the CWA citizen suit provisions in 1972.

37. Miller, *supra* note 30, at 10311 (footnote omitted).

strengthen the Act's enforcement mechanisms without "burden[ing] the court system with [a] large number of lawsuits. . . ."³⁸ The clean air bill reported out of the Senate Committee on Public Works in 1970 contained expansive citizen suit provisions which eliminated the 60-day waiting period in some instances,³⁹ left the issue of whether citizen suits should be precluded by governmental enforcement action to the discretion of the trial court,⁴⁰ and allowed citizens to sue the government for failure to enforce the act.⁴¹ The House Committee bill contained no citizen suit provisions, and the Senate Committee bill was extensively modified by the Conference Committee.⁴² The Conference Committee narrowed the exceptions to the 60-day waiting period,⁴³ limited citizen suits against the Administrator to instances where the Administrator fails to perform "mandatory functions,"⁴⁴ and precluded citizen suits "[i]f an abatement action is pending and is being diligently pursued in a United States or State court"⁴⁵

In crafting the citizen suit provisions incorporated in the 1972 amendments to the CWA, the Senate acknowledged that this provision

38. 116 CONG. REC. 32,923 (1970) (remarks of Sen. Hruska), *reprinted in* Environmental Policy Division, Congressional Research Service, A Legislative History of the Clean Air Act Amendments of 1970, at 274 (1974) [hereinafter 1970 *Legislative History*].

39. The Committee bill did not require citizens to wait for 60 days after giving notice of their intent to sue "if the alleged violation is a failure to comply with an administrative enforcement order [or] a violation [either] a standard of performance or a prohibition or emission standard [because it was] the Committee's intent that enforcement of these control provisions be immediate, that citizens should be unconstrained to bring these actions, and that the courts should not hesitate to consider them." S. REP. NO. 1196, 91st Cong., 2d Sess. 36 (1970), *reprinted in* 1970 *Legislative History*, *supra* note 38, at 436.

40. "It should be emphasized that if . . . the citizen believed efforts initiated by the agency to be inadequate, the citizen might choose to file the action. In such case, the courts would be expected to consider the [citizen's] petition against the background of the agency action and could determine that such action would be adequate to justify suspension, dismissal, or consolidation of the citizen petition. On the other hand, if the court viewed the agency action as inadequate, it would have jurisdiction to consider the citizen action notwithstanding any pending agency action." *Id.* at 36, 1970 *Legislative History*, *supra* note 38, at 437.

41. "The Committee bill would provide in the citizen suit provision that actions will lie against the Secretary for failure to exercise [the Secretary's] duties under the Act, including enforcement duties. The Committee expects that many citizen suits would be of this nature, since such suits would reduce the ultimate burden on the citizen of going forward with the entire action." *Id.* at 37-38, 1970 *Legislative History*, *supra* note 38, at 438-39.

42. See H.R. CONF. REP. NO. 1783, 91st Cong., 2d Sess. 54 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5374, 5388.

43. "Prior to commencing any action in the district courts, the plaintiff must have provided the violator, the Administrator, and the State with sixty days notice." *Id.* at 55, 1970 U.S.C.C.A.N. at 5388.

44. *Id.*

45. In such instances, a citizen suit "cannot be commenced but any party in interest may intervene as a matter of right." *Id.*

was "modeled on the provision enacted in the Clean Air Amendments of 1970."⁴⁶ Just like its earlier proposal for the CAA, the Senate Committee on Public Works proposed citizen suit provisions for the CWA that would have eliminated the 60-day waiting period in many instances, left the preclusion issue to the discretion of the trial courts, and allowed citizens to sue the government for its failure to enforce the act.⁴⁷ However, the House amendments to the CWA instead adopted the limitations expressed in the conference report on the CAA,⁴⁸ and these limitations were retained in the conference substitute that was enacted as the Federal Water Pollution Control Act Amendments of 1972.⁴⁹

From the legislative history of both the CWA and the CAA, it is clear that Congress saw the citizen suit provisions as a remedy for "the government's failure to enforce [the nation's environmental laws], whether caused by lack of will or lack of resources."⁵⁰ More generally, Congress enacted the citizen suit provisions "to restore the public's confidence and to open wide the opportunities for the public to participate in a meaningful way in the decisions of government"⁵¹ To accomplish these goals, Congress gave citizens the statutory tools they needed to "motivate governmental agencies . . . to bring enforcement and abatement proceedings," and, where necessary, to bring such enforcement proceedings themselves where governmental enforcement is lacking.⁵²

46. S. REP. NO. 414, 92d Cong., 1st Sess. 79 (1971), *reprinted in* 1972 U.S.C.C.A.N. at 3745; *see also* H.R. REP. NO. 911, 92d Cong., 2d Sess. 133 (1972), *reprinted in* Environmental Policy Division, Congressional Research Service, A Legislative History of the Water Pollution Control Act Amendments of 1972, at 820 (1973) [hereinafter 1972 *Legislative History*] (noting that the citizen suit provisions of the House Committee bill "closely follow the concepts utilized in section 304 of the Clean Air Act").

47. S. REP. NO. 414, *supra* note 46, at 79-81, *reprinted in* 1972 U.S.C.C.A.N. at 3745-47.

48. H.R. REP. NO. 911, *supra* note 46, at 132-34, *reprinted in* 1972 *Legislative History*, *supra* note 46, at 819-21.

49. S. CONF. REP. NO. 1236, 92d Cong., 2d Sess. 145-46 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3776, 3823.

50. Miller, *supra* note 30, at 10310.

51. H.R. REP. NO. 911, *supra* note 46, at 132, *reprinted in* 1972 *Legislative History*, *supra* note 46, at 819.

52. S. REP. NO. 1196, *supra* note 39, at 36, *reprinted in* 1970 *Legislative History*, *supra* note 38, at 436; *see also* Miller, *supra* note 30, at 10314 (citizen suits "were authorized to goad governmental enforcement and only as a last resort, provide for fallback private enforcement"); RODGERS, *supra* note 2, at 271 (noting "the inherent tension between citizen as independent agent and as conscience of the public authorities").

B. The 1977 Amendments—Relinquishment or Mid-Course Correction?

Although Congress did not amend the citizen suit provisions when it reauthorized the CWA in 1977,⁵³ at least one court has misread the 1977 amendments as a rationale for limiting the ability of citizens to sue CWA violators.⁵⁴ This misreading is based on Professor Frank R. Grad's characterization of the 1977 amendments as "both a relinquishment of the zero pollution goal and a shift of enforcement away from the federal government to state agencies."⁵⁵ Professor Grad's characterization might limit citizen suits in two ways. First, by relinquishing the zero-pollution goal, there is less impetus to enforce the Act in the first place. Second, by reading the 1977 amendments as "a progression away from centralized management and enforcement to a state controlled locus,"⁵⁶ the court enhances the authority of state agencies to preclude federally-authorized citizen suits.

The misreading of the 1977 amendments as an implied limitation on citizen suits relies on an erroneous interpretation of Professor Grad's treatise and is contradicted by other commentators. Grad's discussion of the 1977 amendments begins by acknowledging that these amendments "retained the statement of policies and purpose of the 1972 Act, including the 'zero pollution' target."⁵⁷ Grad regards the 1977 amendments as only a "partial relinquishment of that goal [as evidenced by] the substantial postponement of standards mandated earlier"⁵⁸ With regard to the alleged increase in state authority, Grad merely notes how the 1977 amendments to sections 101(b) and 101(g) of the CWA make clear that "states bear responsibility for management and enforcement in the first instance, though leaving ultimate authority to the Administrator of EPA."⁵⁹ When read in the context of Grad's lengthy accounts of how the CWA has expanded federal jurisdiction over water pollution control,⁶⁰ Grad's acknowledgment of the role for states expressed in

53. Pub. L. No. 95-217, 91 Stat. 1567 (1977) (codified as amended at 33 U.S.C. §§ 1251-1387).

54. *Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co.*, 777 F. Supp. 173, 177 (D. Conn. 1991), *aff'd in part, rev'd in part*, 989 F.2d 1305 (2d Cir. 1993) (citing, without reference to a date of publication, FRANK P. GRAD, TREATISE ON ENVIRONMENTAL LAW 3-103).

55. *Remington Arms*, 777 F.Supp. at 177. Frank R. Grad is the author of a leading treatise on environmental law. See GRAD, *supra* note 9.

56. *Remington Arms*, 777 F. Supp. at 178.

57. 1 FRANK P. GRAD, TREATISE ON ENVIRONMENTAL LAW § 3.03, at 3-103 (1994).

58. *Id.*

59. *Id.*

60. See *id.* at 3-100 to 3-102 ("[a]lthough the 1977 revisions made some important changes, the basic pattern and regulatory philosophy of the current law has remained essentially

sections 101(b) and 101(g) hardly amounts to the kind of sweeping generalization expressed by the *Remington Arms* court.

The author of another leading treatise on environmental law, Professor William H. Rodgers, offers an equally plausible characterization of the 1977 amendments as merely "mid-course corrections that can be explained as constituent-group reactions against objectionable policies emerging in the wake of the 1972 amendments. These include successful attempts to correct losses not anticipated in 1972, as by the underscoring of state supremacy in the water allocation business" ⁶¹ Under Rodgers' analysis of the 1977 amendments, there are five provisions which represent "accommodations to the preferences of the states" ⁶² None of these five provisions expresses or implies any intent to allow states to limit the scope of the CWA's citizen suit provisions.

C. The 1987 Amendments and the Preclusion of Citizen Suits by Administrative Penalty Assessments

While Congress made significant changes to the CWA again in 1981,⁶³ the enforcement provisions of the statute remained unchanged until 1987. In February of that year, Congress altered the CWA's enforcement scheme by adding a new administrative procedure for assessing civil penalties.⁶⁴ In drafting this new administrative procedure, Congress noted that governmental CWA prosecutors had two civil enforcement options prior to 1987: either (1) issue quick but non-binding

unchanged") and 3-107 to 3-112 ("[e]fforts to limit federal jurisdiction over 'navigable waters' so as to make the term less inclusive than 'waters of the United States' did not succeed when the law was amended in 1977") (footnote omitted).

61. WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW § 4.1, at 255 (2d ed. 1994) (footnote omitted); see H.R. REP. NO. 189, 99th Cong., 1st Sess. 2 (1985), reprinted in Environmental and Natural Resources Policy Division, Congressional Research Service, A Legislative History of the Water Quality Act of 1987 1073 (1988) [hereinafter 1987 *Legislative History*] (also characterizing the 1977 amendments as "mid-course corrections").

62. RODGERS, *supra* note 61, at 255. These five provisions are: "§ 5(a), adding Section 101(g), 33 U.S.C.A. § 1251(g) (recognizing state authority over water allocation); § 31(b), amending Section 208(f)(2), 33 U.S.C.A. § 1288(f)(2) (extending time for compliance and increasing federal share for [areawide waste treatment management] plans); § 40, adding Section 216, 33 U.S.C.A. § 1296 ([emphasizing] state authority to control priorities for construction of publicly owned treatment works); § 62, amending Section 314(b), 33 U.S.C. § 1324(b) (providing financial assistance for the study of freshwater lakes); [and] § 67, amending Section 404, 33 U.S.C. § 1344" (allowing states to administer permit programs for dredged or fill material). *Id.* at 255 n. 81 (citations omitted).

63. Pub. L. No. 97-117, 95 Stat. 1623 (codified as amended at 33 U.S.C. §§ 1281-1314); see H.R. REP. NO. 189, *supra* note 61, at 2-3, reprinted in 1987 *Legislative History*, *supra* note 61, at 1073-74 (noting that the 1981 amendments "related primarily to the Construction Grants Program").

64. Pub. L. No. 100-4, Title III, § 314(a), 101 Stat. 46 (codified at 33 U.S.C. § 1319(g)).

compliance orders under subsection 309(a); or (2) file slow and costly lawsuits in a state or federal district court under subsection 309(b).⁶⁵ These two options often presented CWA prosecutors with a dilemma: "Many violations simply do not warrant the expenditure of judicial resources. But issuance of an administrative order, without penalties, has not proven powerful enough to motivate violators or deter other similar violators."⁶⁶

To avoid this dilemma, Congress added a third enforcement option: assess administrative penalties under the newly created subsection 309(g). Subsection 309(g) was designed to address instances of noncompliance for which "a remedy stronger than an administrative order is deemed necessary to obtain compliance [but] court injunctive relief or specific performance is [not] believed to be necessary to stop ongoing conduct which violates the Clean Water Act."⁶⁷ Administrator Ruckelshaus testified in 1983 that EPA's "experience to date with assessing similar civil penalties existing under other environmental statutes . . . indicates that this option will give EPA more enforcement flexibility, lead to speedier compliance, and assure due process without the expense and delay of a judicial enforcement action."⁶⁸ The general counsel for a prominent citizens' group engaged in litigation under the CWA agreed that "[t]he authority for EPA to administratively assess penalties against violators in a quick, efficient, and effective manner may

65. S. REP. NO. 50, 99th Cong., 1st Sess. 26 (1985), reprinted in 1987 *Legislative History*, supra note 61, at 1447. Subsections 309(a) and 309(b) are codified at 33 U.S.C. §§ 1319(a), 1319(b).

66. *Amending the Clean Water Act: Hearings on S. 53 and S. 652 before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment and Public Works*, 99th Cong., 1st Sess. 10 (1985) (statement of Jack E. Ravan, EPA Ass't Administrator for Water) [hereinafter *Hearings on S. 53 and S. 652*], reprinted in 1987 *Legislative History*, supra note 61, at 1646; see also *Possible Amendments to the Federal Water Pollution Control Act: Hearings before the Subcomm. on Water Resources of the House Comm. on Public Works and Transportation*, 98th Cong., 1st Sess. 2730 (1983) (statement of William D. Ruckelshaus, EPA Administrator), reprinted in 1987 *Legislative History*, supra note 61, at 2007.

67. *Hearings on S. 53 and S. 652*, supra note 66, at 57 (responses of Jack E. Ravan, EPA Ass't Administrator for Water, to additional questions propounded by Sen. Mitchell), reprinted in 1987 *Legislative History*, supra note 61, at 1695; see also S. REP. NO. 50, supra note 65, at 26, reprinted in 1987 *Legislative History*, supra note 61, at 1447 ("[a]dministrative penalties could provide greater deterrent value than an administrative order for a violation that does not warrant the more resource intensive aspects of judicial enforcement").

68. 1983 *Hearings before the Subcomm. on Water Resources*, supra note 66, at 2730, reprinted in 1987 *Legislative History*, supra note 61, at 2007. The administrative penalty provisions in the "other environmental statutes" that Administrator Ruckelshaus mentioned are: the Clean Air Act (CAA), 42 U.S.C. §§ 7413(d), 7524(c), 7545(d), and 7547(d) (1988 & Supp. V 1993); the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136l (1988); the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6928, 6991(e), and 6992(d) (1988); and the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2615(a) (1988). *Id.*

be the best and simplest method to improve enforcement of the Clean Water Act."⁶⁹

The new administrative penalty provisions at subsection 309(g) were seen by Congress, EPA, and citizen groups as an addition to existing enforcement mechanisms and not as a replacement for any of these mechanisms. Congressional acceptance of the administrative penalty provisions proposed by EPA was predicated on EPA's reassurance that these provisions would be used to "increase the total number of enforcement actions without any corresponding decline in the number of judicial enforcement actions taken by the Administrator."⁷⁰ Congress envisioned that judicial enforcement would remain the norm for "cases involving novel issues of law or contested penalty assessments, cases requiring injunctive relief, serious violations of the Act, or large penalty actions, and cases where remedies are sought requiring significant construction or capital investment."⁷¹ In contrast, Congress "designed [the administrative penalty procedures in subsection 309(g)] to address past, rather than continuing, violations [that] are clearly documented and easily corrected and will likely be uncontested by the violator."⁷² A "major reason" for assessing an administrative civil penalty for such past violations is "to deprive a violator of any economic advantage from non-compliance"⁷³ Hence, subsection 309(g) directs the EPA Administrator to "take into account . . . the economic benefit or savings (if any) resulting from the violation" when determining the amount of an administrative civil penalty.⁷⁴

69. *Possible Amendments to the Federal Water Pollution Control Act: Hearings before the Subcomm. on Water Resources of the House Comm. on Public Works and Transportation*, 99th Cong., 1st Sess. 59 (1985) (statement of Edward Lloyd, General Counsel, New Jersey PIRG) [hereinafter 1985 *Hearings before the Subcomm. on Water Resources*]. Mr. Lloyd conditioned his approval of the proposed administrative penalty authority on the inclusion of a provision to ensure that "neither the existence of a consent order nor the assessment of penalties by the EPA should preclude a citizen's suit based on the inadequacy of an administrative remedy or a penalty assessment or upon more recent violations of a permit." *Id.*

70. S. REP. NO. 50, *supra* note 65, at 26, reprinted in 1987 *Legislative History*, *supra* note 61, at 1447. One of the Senate bill's chief sponsors stated that the new administrative penalty authority "is intended to complement and not to replace a vigorous civil judicial enforcement program." 131 CONG. REC. S8006 (daily ed. June 12, 1985) (statement of Sen. Chafee), reprinted in 1987 *Legislative History*, *supra* note 61, at 1309.

71. S. REP. NO. 50, *supra* note 65, at 26-27, reprinted in 1987 *Legislative History*, *supra* note 61, at 1447.

72. *Id.* at 26-27, reprinted in 1987 *Legislative History*, *supra* note 61, at 1447-48; see also 131 CONG. REC. S8006 (daily ed. June 12, 1985) (statement of Sen. Chafee), reprinted in 1987 *Legislative History*, *supra* note 61, at 1309.

73. *Hearings on S. 53 and S. 652*, *supra* note 66, at 57 (responses of Jack E. Ravan, EPA Ass't Administrator for Water, to additional questions propounded by Sen. Mitchell), reprinted in 1987 *Legislative History*, *supra* note 61, at 1695.

74. CWA § 309(g)(3), 33 U.S.C. § 1319(g)(3) (1988).

The administrative penalty provisions in subsection 309(g) aim to "strike the appropriate balance between streamlined procedures and basic fairness."⁷⁵ To ensure fairness, the EPA Administrator cannot issue an order assessing administrative penalties against an alleged CWA violator until the Administrator has "consulted" with the state in which the violation occurs,⁷⁶ notified both the alleged CWA violator and the public of the proposed order,⁷⁷ and provided a reasonable opportunity for the public to comment and the CWA violator to request a hearing on the proposed order.⁷⁸ Issuance of an administrative penalty order may be delayed further or set aside if either the alleged CWA violator or persons who have commented on the proposed order request a hearing on the matter.⁷⁹ The procedures for requesting a hearing vary according to the type of requester and the class of administrative penalty that EPA proposes.

Paragraph 309(g)(2) establishes two categories of administrative civil penalties. Class I penalties may not exceed \$10,000 per violation or a total of \$25,000.⁸⁰ Class II penalties may not exceed \$10,000 per violation or a total of \$125,000.⁸¹ For either class of penalty, the alleged violator has at least 30 days to request a hearing at which EPA must provide a reasonable opportunity for the violator to be heard and to present evidence.⁸² Members of the public who comment on the proposed penalty assessment are also afforded the opportunity to be heard and to present evidence at such a hearing.⁸³ However, only Class II penalty orders are governed by the Administrative Procedure Act (APA) requirements for a hearing on the record,⁸⁴ and if the alleged violator does not request a hearing regarding either class of penalty, then EPA generally is not required to provide a hearing solely to answer comments submitted by the public.⁸⁵ If no one requests a hearing or petitions for judicial review, then an administrative penalty order issued under subsection 309(g) becomes final 30 days after its issuance.⁸⁶ These

75. S. REP. NO. 50, *supra* note 65, at 27, reprinted in 1987 *Legislative History*, *supra* note 61, at 1448.

76. CWA § 309(g)(1), 33 U.S.C. § 1319(g)(1) (1988).

77. *Id.* §§ 309(g)(2), 309(g)(4), 33 U.S.C. §§ 1319(g)(2), 1319(g)(4).

78. *Id.*

79. *Id.*

80. *Id.* § 309(g)(2)(A), 33 U.S.C. § 1319(g)(2)(A).

81. *Id.* § 309(g)(2)(B), 33 U.S.C. § 1319(g)(2)(B).

82. *Id.* § 309(g)(2), 33 U.S.C. § 1319(g)(2).

83. *Id.* § 309(g)(4)(B), 33 U.S.C. § 1319(g)(4)(B).

84. *Id.* § 309(g)(2)(B), 33 U.S.C. § 1319(g)(2)(B).

85. *Id.* § 309(g)(4)(C), 33 U.S.C. § 1319(g)(4)(C).

86. *Id.* § 309(g)(5), 33 U.S.C. § 1319(g)(5).

provisions help to streamline the procedures for assessing civil penalties under the CWA.

To ensure that due process concerns are not abandoned after EPA has issued an order assessing an administrative penalty, subsection 309(g) provides for both administrative and judicial review of such orders. If no hearing is held at the request of the alleged violator prior to the issuance of the administrative penalty order, any person who commented on the proposed order has 30 days from the date the order was issued to petition the EPA Administrator to set aside the order and provide a hearing on the penalty.⁸⁷ The Administrator must grant such a hearing if the evidence presented in support of the petition is material and was not considered in the issuance of the order.⁸⁸ If the Administrator denies a citizen's petition, then she must notify the petitioner and publish in the *Federal Register* the reasons for the denial.⁸⁹ The Administrator's penalty order becomes final 30 days after such a denial unless a petition for judicial review is filed.⁹⁰

Either the alleged violator or any person who commented on the proposed penalty assessment has 30 days from the date the penalty order was issued to seek judicial review by filing a notice of appeal with the appropriate court.⁹¹ Class I penalty assessments are reviewed by the district courts, while Class II penalty assessments warrant review by appellate courts.⁹² The standard of judicial review in either case is to apply a "substantial evidence" test to the finding of a violation and an "abuse of discretion" test to the assessment of the penalty.⁹³ The courts do not conduct a new trial on the matter.

Potential grounds for finding an abuse of discretion include a failure to take into account any of the required penalty assessment criteria listed in paragraph 309(g)(3). These criteria include: "the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require."⁹⁴ These penalty assessment criteria are among the "safeguards" that Congress included in subsection 309(g) "to prevent abuse of the adminis-

87. *Id.* § 309(g)(4)(C), 33 U.S.C. § 1319(g)(4)(C).

88. *Id.*

89. *Id.*

90. *Id.* § 309(g)(5), 33 U.S.C. § 1319(g)(5).

91. *Id.* § 309(g)(8), 33 U.S.C. § 1319(g)(8).

92. *Id.*

93. *Id.*

94. *Id.* § 309(g)(3), 33 U.S.C. § 1319(g)(3).

trative penalty authority, such as significant violators escaping with nominal penalties."⁹⁵

The substantial evidence test in paragraph 309(g)(8) is less likely to function as such a safeguard. Congress expected the "administrative penalty authority . . . to be exercised where violations are clearly documented"⁹⁶ If this requirement is met, as in the case of NPDES permit violations that are documented on a permittee's discharge monitoring reports, courts are unlikely to set aside an administrative penalty assessment for lack of substantial evidence. However, the substantial evidence test may be harder for prosecutors to meet in cases involving more amorphous violations such as the dredging or filling of an alleged wetland without a permit under CWA sections 402 or 404.⁹⁷

To streamline the process by which the public may attempt to challenge the EPA Administrator's assessment of an administrative civil penalty under subsection 309(g), Congress limited the public to the aforementioned options for administrative and judicial review and thereby created a new and significant limitation on the CWA's citizen suit provisions. With the advent of subsection 309(g), citizens generally could not sue and seek civil penalties for any CWA violation:

- (i) with respect to which the [EPA] Administrator or the Secretary [of the Army] 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 be⁹⁸

This provision can be viewed as an extension of the statutory preclusion doctrine contained in the CWA's original citizen suit provisions of 1972. Under the 1972 provisions, citizen suits were precluded only when "the

95. S. REP. NO. 50, *supra* note 65, at 27, reprinted in 1987 *Legislative History*, *supra* note 61, at 1448.

96. *Id.* at 27, reprinted in 1987 *Legislative History*, *supra* note 61, at 1448.

97. CWA §§ 402, 404, 33 U.S.C. §§ 1342, 1344 (1988); see *Hoffman Homes, Inc. v. EPA*, 999 F.2d 256, 261-62 (7th Cir. 1993) (vacating an EPA administrative penalty assessment alleging unpermitted filling of wetlands because the court found no substantial evidence to support EPA's finding that the filled area was a wetland).

98. *Id.* § 309(g)(6)(A), 33 U.S.C. § 1319(g)(6)(A) (1988); see also Pub. L. No. 100-4, 101 Stat. 73, (codified at 33 U.S.C. § 1365(a)) (amending the citizen suit provision to conform with the new subsection 309(g) preclusion doctrine).

Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or [a] State" prior to the filing of a citizen suit covering the same violations.⁹⁹ The new provision added in 1987 extends this preclusion doctrine to cover administrative civil penalty actions prosecuted out of court. However, unlike the preclusive effect of court actions, administrative penalty actions must be commenced and diligently prosecuted prior to the date on which a citizen has given notice of her intent to sue (rather than the date on which the citizen actually files her suit in court) in order to have a preclusive effect.¹⁰⁰ The only exception to this rule is where the citizen fails to file suit within 120 days of giving notice of her intent to sue. In such cases, the administrative penalty action has a preclusive effect beginning on the 120th day after notice is given.¹⁰¹

Perhaps the most curious feature of the preclusion doctrine contained in paragraph 309(g)(6) is its reference to "action[s] under a State law comparable to this subsection." Such actions have the effect of precluding not only citizen suits but federal enforcement actions as well. Yet there is no language in the statute which defines what an "action under a State law" is or what makes a state law "comparable to this subsection." Indeed, the only reasonably clear definition of these phrases appears in the remarks of the Senate bill's chief sponsor, Senator Chafee, during the final Senate debates in January, 1987. Senator Chafee defines "action under a State law" as an "administrative civil penalty action," and limits the preclusive effect of such actions to "cases where the State in question has been authorized under [CWA] section 402 to implement the relevant permit program."¹⁰² In order to be "comparable" to subsection 309(g), Senator Chafee said "a State law must provide for a right to a hearing and for public notice and participation procedures similar to those set forth in section 309(g); it must include analogous penalty assessment factors and judicial review standards; and it must include provisions that are analogous to the other elements of section 309(g)."¹⁰³

The failure to statutorily define the role of states in precluding citizen suits did not result from a lack of time to consider the matter. On the contrary, the administrative penalty provisions were the subject of extensive deliberation between their initial appearance in a 1983 Senate bill and their final passage in 1987. The 1983 Senate bill included a provision establishing administrative civil penalty procedures but

99. CWA § 505(b)(1)(B), 33 U.S.C. § 1365(b)(1)(B) (1988).

100. *Id.* § 309(g)(6)(B), 33 U.S.C. § 1319(g)(6)(B).

101. *Id.*

102. 133 CONG. REC. S737 (daily ed. Jan. 14, 1987), reprinted in 1987 *Legislative History*, *supra* note 61, at 367.

103. *Id.*

contained no mention of state actions or citizen suits.¹⁰⁴ State enforcement is first mentioned in a 1984 House bill.¹⁰⁵ Preclusion of citizen suits is not mentioned until the 1985 Senate bill, but this bill does not mention anything about the preclusive effect of state enforcement.¹⁰⁶ The House Amendment reported from committee in 1985 considers both state enforcement and citizen suits in the context of the subsection 309(g) preclusion doctrine, and this amendment contains perhaps the clearest and simplest statement of the 309(g) preclusion doctrine.¹⁰⁷ However, the House subsequently considered a committee amendment that would have allowed citizen suits to proceed in the face of state or federal administrative penalty actions "in the case of continuing violations,"¹⁰⁸ and the conference committee then combined the administrative civil penalty provisions of the House amendment with those of the Senate bill, apparently choosing "the language on preclusion of citizen suits" from the Senate bill.¹⁰⁹ The legislation that came out of the conference committee was then vetoed twice by President Reagan before being overridden when Congress reconvened in the next session.¹¹⁰

104. S. 431, 98th Cong., 1st Sess. § 8(c), at 39 (1983), *reprinted in 1987 Legislative History*, *supra* note 61, at 2176. This bill provided that "the discharge of pollutants which is penalized administratively under this subsection shall not be the subject of a civil penalty under section 309(d) or section 311(b) of this Act in a civil action commenced by the [EPA] Administrator." *Id.*

105. H.R. 3282, 98th Cong., 2d Sess. § 23, at 51 (1984), *reprinted in 1987 Legislative History*, *supra* note 61, at 1974. This bill provided that "[w]hen a State has proceeded with an enforcement action relating to a violation with respect to which the [EPA] Administrator or the Secretary [of the Army] is authorized to assess a civil penalty under this subsection, the Administrator and the Secretary are not authorized to take any action under this subsection if the State demonstrates that the State imposed penalty is appropriate." *Id.*

106. S. 1128, 99th Cong., 1st Sess. § 109(d), at 22 (1985), *reprinted in 1987 Legislative History*, *supra* note 61, at 1567. This bill provided that: "any violation with respect to which the [EPA] Administrator has commenced and is diligently prosecuting an action under this subsection, or for which the Administrator has issued a final order not subject to further judicial review and the violator paid a penalty assessed under this subsection, shall not be the subject of a civil penalty action under . . . section 505 [the citizen suit provision] of this Act . . ." *Id.*

107. H.R. 8, 99th Cong., 1st Sess. § 24(b), at 69-70 (1985), *reprinted in 1987 Legislative History*, *supra* note 61, at 1245-46. This bill would have amended the citizen suit provision to preclude citizen suits "if the Administrator or State has commenced and is diligently pursuing the assessment of a civil penalty under section 309(g) of this Act." *Id.*

108. 131 CONG. REC. H5999 (daily ed. July 22, 1985) (remarks of Rep. Edgar); *see also id.* at H6041 (daily ed. July 23, 1985) (remarks of Rep. Gilman). Both Representatives regarded this committee amendment as a "fair compromise."

109. H.R. REP. NO. 1004, 99th Cong., 2d Sess. 138-39 (1986), *reprinted in 1987 Legislative History*, *supra* note 61, at 827-28

110. President Reagan vetoed S. 1128 on November 6, 1986, and then vetoed H.R. 1 on January 30, 1987. *Water Quality Act of 1986, Memorandum Withholding Approval of S. 1128*, WEEKLY COMP. PRES. DOC. 1541 (Nov. 6, 1986), *reprinted in 1987 Legislative History* at 615; *Message from the President of the United States Transmitting His Veto of H.R. 1, A Bill to Amend*

Rather than stemming from a lack of adequate consideration, anomalous aspects of the preclusion doctrine expressed in paragraph 309(g)(6) (such as the reference to "comparable State law") probably resulted from Congress' efforts to reconcile two opposing positions. On the one hand, citizen groups wary of the government's long history of inadequate enforcement conditioned their approval of the proposed administrative penalty authority on a reassurance from Congress that "neither the existence of a consent order nor the assessment of penalties by the EPA should preclude a citizen suit based upon the inadequacy of an administrative remedy or a penalty assessment or upon more recent violations of a permit."¹¹¹ Industry groups, on the other hand, generally opposed giving EPA or states the authority to assess administrative penalties and would only begrudgingly accept this new administrative penalty authority if it could be used to preclude citizen suits.¹¹² In addition, for some Western senators such as Malcolm Wallop, the notion of giving EPA additional enforcement authority only exacerbated a long-standing concern that EPA was duplicating or otherwise infringing upon the legitimate efforts of states to control their water.¹¹³

Congress phrased its effort to reconcile these opposing positions as an attempt to strike "a balance between two competing concerns: The need to avoid placing obstacles in the path of . . . citizen suits and the desire to avoid subjecting violators of the law to dual enforcement actions or penalties for the same violation."¹¹⁴ Congress did not want to place obstacles in the path of citizen suits because "citizen suits are a proven enforcement tool. They operate as Congress intended—to both spur and supplement . . . government enforcement actions. They have deterred violators and achieved significant compliance gains."¹¹⁵ Moreover, citizen groups presented testimony at the hearings on the 1987 Amendments which demonstrated how EPA and the states had failed to

the Federal Water Pollution Control Act to Provide for the Renewal of the Quality of the Nation's Waters, and for Other Purposes, H.R. DOC. NO. 26, 100th Cong., 2d Sess. (1987), reprinted in *1987 Legislative History*, *supra* note 61, at 359. Congress overrode the President's 1987 veto on February 4, 1987. See 133 CONG. REC. S1691-S1708 (daily ed. Feb. 4, 1987).

111. *1985 Hearings before the Subcomm. on Water Resources*, *supra* note 69, at 59 (statement of Edward Lloyd, General Counsel, New Jersey PIRG).

112. See, e.g., *Hearings on S. 53 and S. 652*, *supra* note 66, at 399-400 (statement of Charles D. Malloch on behalf of the Chemical Manufacturers Association).

113. See, e.g., the colloquy between Senator Wallop and Senators Chafee and Mitchell at 131 CONG. REC. S8098-S8102 (daily ed. June 13, 1985), reprinted in *1987 Legislative History*, *supra* note 61, at 1352-60.

114. S. REP. NO. 50, 99th Cong., 1st Sess. 28, reprinted in *1987 Legislative History*, *supra* note 61, at 1449.

115. *Id.*

diligently enforce the CWA in the past.¹¹⁶ Given this testimony, Congress did not want to create an administrative penalty provision that could serve as an additional means of retreating from vigorous enforcement.

On the other hand, Congress had to answer Senator Wallop's concerns that the new administrative penalty provision would "heighten the chances for dual penalties under the act," and thereby "undermine the authority of State officials and make the States shy away from spending any money at all to enforce the provisions of the act."¹¹⁷ Although Senator Wallop admitted that "it [is] true at present that dual enforcement is rare,"¹¹⁸ there was a growing concern during the mid-1980s that the floodgates of citizen litigation had opened wide and would soon overtake governmental prosecution as the dominant mode of CWA enforcement.¹¹⁹ The preclusion doctrine embedded in the new administrative penalty provisions thus serves as an additional check on this surge of citizen suits and provides the government with a means of narrowing the floodgates (if not closing them entirely).

116. See, e.g., 1985 *Hearings before the Subcomm. on Water Resources*, *supra* note 69, at 165-67 (statement of Edward Lloyd, General Counsel, New Jersey PIRG). Mr. Lloyd cited the following General Accounting Office reports in his testimony: *More Effective Action by the Environmental Protection Agency Needed to Enforce Industrial Compliance with Water Pollution Control Discharge Permits*, No. CED-78-182 (1978); *Wastewater Dischargers Are Not Complying with EPA Pollution Control Permits*, No. GAO/RCED-84-53 (1983). Mr. Lloyd also cited the New Jersey PIRG's 1981 report entitled *Enforcement under the Federal Water Pollution Control Act by the U.S. Environmental Protection Agency Region II 1975-1980*, reprinted in *Possible Amendments to the Federal Water Pollution Control Act: Hearings before the Subcomm. on Water Resources of the House Comm. on Public Works and Transportation*, 97th Cong., 2d Sess. 586-601 (1982).

117. 131 CONG. REC. S8099 (daily ed. June 13, 1985) (remarks of Sen. Wallop), reprinted in 1987 *Legislative History*, *supra* note 61, at 1353-54.

118. *Id.*

119. The Senate Committee on Environment and Public Works noted that, "[i]n the past two years, the number of citizen suits to enforce NPDES permits has surged so that such suits now constitute a substantial portion of all enforcement actions filed in Federal court under this Act." S. REP. NO. 50, 99th Cong., 1st Sess. 28 (1985), reprinted in 1987 *Legislative History*, *supra* note 61, at 1449. One commentator, writing in 1983, observed that "citizen suits have become more than an occasionally used safety valve. Under the Clean Water Act, they are now the dominantly used federal judicial enforcement mechanism." Jeffrey G. Miller, *Private Enforcement of Federal Pollution Control Laws: Part I*, 13 ENVTL. L. REP. (Envtl. L. Inst.) 10,314 (1983). A recent casebook explains the rise of citizen suits as follows: "While action-forcing litigation against EPA played a major role in the development of environmental law during the 1970s, citizen suits were rarely filed during this period against private parties who violated environmental regulations. This changed in 1982 due to concern over a dramatic decline in governmental enforcement effort during the early days of the Reagan Administration. The Natural Resources Defense Council initiated a national project to use citizen suits to fill the enforcement void." ROBERT V. PERCIVAL ET AL., *ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY* 996 (1992).

D. EPA Policy Statements and Rulemaking Regarding Administrative Penalty Actions

Congress did not require EPA or any other federal agency to promulgate implementing regulations for subsection 309(g) of the CWA. The only mention of implementing regulations occurs in the subparagraph concerning the Class II civil penalty assessments, which states that "[t]he [EPA] Administrator and the Secretary [of the Army] may issue rules for discovery procedures for hearings under this subparagraph."¹²⁰ Nonetheless, EPA has issued a variety of policy statements and guidance documents regarding implementation of subsection 309(g)'s administrative penalty procedures, and some of these materials have been incorporated into EPA's Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties.

EPA's consolidated rules exist in two forms. The consolidated rules regarding the administrative assessment of Class II civil penalties, which must meet the APA requirements for a hearing on the record, have been published as final rules in the *Code of Federal Regulations*.¹²¹ The consolidated rules regarding Class I civil penalties, which are not governed by the APA, remain in the form of proposed rules.¹²² Both sets of consolidated rules contain general provisions which apply to practically all of the environmental statutes that EPA administers,¹²³ as well as special provisions which apply only to administrative penalty assessments under the CWA or other specific statutes.¹²⁴ As such, EPA's consolidated rules aim to "assure procedural fairness through a

120. CWA § 309(g)(2)(B), 33 U.S.C. § 1319(g)(2)(B).

121. 40 C.F.R. pt. 22 (1994).

122. 56 Fed. Reg. 29,996 (1991) (to be codified at 40 C.F.R. pt. 28); see also EPA, GUIDANCE ON CLASS I CIVIL PENALTY PROCEDURES (July 27, 1987), reprinted in [1 Federal Laws] Env't Rep. (BNA) 31:3031 (1992).

123. The general provisions of the Class II consolidated rules at 40 C.F.R. §§ 22.01-22.32 apply to administrative civil penalty assessments under the CWA, CAA, FIFRA, RCRA, and TSCA, *supra* note 68, and under the Marine Protection, Research, and Sanctuaries Act (MPRSA), 33 U.S.C. § 1415(a), the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9609, the Emergency Planning and Community Right-to-Know Act (EPCRA), 42 U.S.C. § 11,045, and the Safe Drinking Water Act (SDWA), 42 U.S.C. § 300g-3(g)(3)(B). The general provisions of the Class I consolidated rules (to be codified at 40 C.F.R. pt. 28) are proposed to cover non-APA administrative penalties under the CWA, 33 U.S.C. § 1319(g)(6)(2)(A), SDWA, 42 U.S.C. § 300h-2(c), CERCLA, 42 U.S.C. § 9609(a), EPCRA, 42 U.S.C. §§ 11045(b)(1), (c)(1), (c)(2), and (d), and the Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484 (to be codified at 33 U.S.C. §§ 1321(b)(6)(A) and (B)(i)).

124. The Class II consolidated rules contain supplemental rules for the CWA. 40 C.F.R. § 22.38. The special provisions for the CWA are interspersed throughout the Class I consolidated rules. See 56 Fed. Reg. at 30,021-33 (to be codified at 40 C.F.R. pt. 28).

more consistent administration of fundamentally similar statutory provisions," while at the same time recognizing "the need for certain distinctions . . . based upon varying statutory or program requirements."¹²⁵

The most distinctive feature of the CWA's administrative penalty provisions is the requirement that EPA must consult with states and submit its proposed penalty assessment for public notice, comment, and judicial review before the assessment becomes final. This requirement is the source of most of the supplemental rules and special provisions for CWA penalty assessments that EPA added to its rules of practice. These supplemental rules and special provisions serve to underscore the special role that Congress created for state and citizen prosecutors in the CWA's enforcement scheme. Such a role is not always present in other environmental statutes, and hence, it is not usually possible to equate an administrative penalty assessment under another environmental statute with an administrative penalty assessment under the CWA.

In addition to distinguishing the CWA from other federal environmental statutes, EPA's consolidated rules help to distinguish administrative penalty assessments from other types of enforcement actions. For example, EPA's consolidated rules do not apply to compliance orders or other administrative orders issued under section 309(a) of the CWA.¹²⁶ Section 309(a) compliance orders do not purport to assess a civil penalty and consequently do not require EPA to provide the same level of due process protections.¹²⁷ Even if a section 309(a) compliance order threatens to penalize a CWA violator or states that the violations covered by the order may subject the violator to civil penalties, such a compliance order does not institute a proceeding for the assessment of a civil penalty unless it takes the form of an "administrative complaint" as that term is defined in EPA's consolidated rules.¹²⁸

Under the Class II consolidated rules, an administrative complaint must state "the amount of the civil penalty which is proposed to be assessed," and that amount must "be determined in accordance with any criteria set forth in the Act relating to the proper amount of a civil

125. 56 Fed. Reg. at 29,997.

126. When promulgating the final Class II rules, EPA noted that "[s]ubsection 309(g) did not change the procedures for issuing and enforcing administrative compliance orders under other subsections of section 309. See § 309(g)(11) [33 U.S.C. § 1319(g)(11)]. Accordingly, the [Class II civil penalty rule] does not apply to or change the procedures for issuing or enforcing compliance orders issued by EPA under, for example, section 309(a) of the CWA." 55 Fed. Reg. 23,838, 23,839 (1990).

127. See 33 U.S.C. § 1319(a).

128. See 40 C.F.R. §§ 22.13, 22.14 (Class II consolidated rules); 56 Fed. Reg. at 30,021, 30,026 (to be codified at 40 C.F.R. §§ 28.2(a), 28.14) (Class I consolidated rules).

penalty and with any civil penalty guidelines issued under the Act."¹²⁹ Under the Class II supplemental rules governing administrative penalty assessments under the CWA, EPA must also "consult with the state in which the alleged violation occurs" and "provide public notice of the complaint" before issuing a final order.¹³⁰ An administrative complaint filed under the proposed Class I Consolidated Rules must propose "a penalty be assessed upon the respondent as authorized by applicable law."¹³¹ EPA must "provide a copy of the public notice of [the Class I administrative penalty action] to the public by providing notice by first class mail to any person who requests such notice and by providing notice to potentially affected persons in a manner reasonably calculated to provide such notice."¹³² To qualify as a "public notice" under the proposed Class I Consolidated Rules, a document must list the names, addresses, and permit numbers of all the parties, briefly describe both the alleged violations and the relief sought for those violations, state that the public has the opportunity to comment on the administrative complaint, and briefly describe how the public may participate in the action and review the administrative record.¹³³ Once the administrative complaint is filed and served and the public is notified, EPA cannot withdraw the action from public scrutiny by reaching a settlement with the violator. On the contrary, the members of the public who comment on a complaint may still seek administrative and judicial review of a consent order issued under the consolidated rules.¹³⁴

Despite this detailed explication of subsection 309(g)'s public participation requirements, neither the Class I nor the Class II consolidated rules expressly define the moment at which an administrative penalty

129. 40 C.F.R. §§ 22.14(a)(4) and (c). The criteria for determining the amount of an administrative penalty under the CWA are specified in paragraph 309(g)(3). 33 U.S.C. § 1319(g)(3). EPA has also issued several policy guidance documents for calculating civil penalties. E.g., EPA, POLICY ON CIVIL PENALTIES (Feb. 16, 1984), reprinted in 17 ENVTL. L. REP. (Envtl. L. Inst.) 35,083 (1987); EPA, ADDENDUM TO THE CLEAN WATER ACT CIVIL PENALTY POLICY FOR ADMINISTRATIVE PENALTIES (Aug. 28, 1987); see generally, Barnett M. Lawrence, *EPA's Civil Penalty Policies: Making the Penalty Fit the Violation*, 22 ENVTL. L. REP. (Envtl. L. Inst.) 10,529 (1992).

130. 40 C.F.R. §§ 22.38(b) and (c).

131. 56 Fed. Reg. at 30,021 (to be codified at 40 C.F.R. § 28.2(a)(3)).

132. *Id.* at 30,027 (to be codified at 40 C.F.R. § 28.16(d)). As examples of appropriate public notice, the proposed rule includes the use of mailing lists on which members of the public are invited to place their names, and "publishing notices of the commencement of the action in a local newspaper of general circulation or through other media." 56 Fed. Reg. at 30,010.

133. 56 Fed. Reg. at 30,023 (to be codified at 40 C.F.R. § 28.2(q)).

134. See 40 C.F.R. §§ 22.18, 22.38 (Class II rules); 56 Fed. Reg. at 30,014 (Class I proposed rule stating "the effective date of a consent order is subject further to the rights of commenters").

action is "commenced" for the purposes of precluding a citizen suit under paragraph 309(g)(6) of the CWA. Under both Class I and Class II proceedings, there are at least three possible moments at which EPA might deem an administrative penalty action to have been "commenced:" either (1) the date on which service of the administrative complaint upon the respondent is completed; (2) the date on which the complaint is filed with one of EPA's regional hearing clerks; or (3) the date on which public notice of the complaint is published or otherwise completed. EPA's failure to specify which of these dates applies to the paragraph 309(g)(6) preclusion doctrine is a curious omission, especially considering EPA's close attention to this preclusion doctrine in the proposed revisions to its rules governing prior notice of citizen suits.¹³⁵

Another issue that EPA omitted from its rules is the question of what makes a state law "comparable" to an EPA administrative penalty action for the purposes of precluding a citizen suit under subsection 309(g). However, EPA has issued two policy guidance documents to clarify the comparability issue.¹³⁶ These guidance documents essentially echo Senator Chafee's remarks in the Senate debates on the 1987 amendments to the effect that state laws must contain public participation procedures similar to those in subsection 309(g) in order to be "comparable."¹³⁷ The 1987 guidance document predicts that:

federal judicial penalty actions are not likely to be preempted by State administrative penalty actions unless States begin to implement legislation specifically patterned on Section 309(g). Until that time, which EPA welcomes, the individual State/EPA Enforcement Agreements might be the appropriate forum for establishing some voluntary ground rules for preventing unnecessary duplication of efforts between EPA and approved NPDES states.¹³⁸

135. The proposed citizen suit rules note that "citizen compliance with the statutory and regulatory requirements concerning service of notices of violation may have consequences as to whether or not a citizen penalty suit is barred by a government administrative penalty action. [T]he timely filing of citizen complaints . . . takes on an added importance in light of the new administrative penalty provisions, and prompt service upon the federal government of such complaints is needed." 54 Fed. Reg. 36,020 (1987) (to be codified at 40 C.F.R. pt. 135).

136. EPA, GUIDANCE ON STATE ACTION PREEMPTION OF CIVIL PENALTIES ACTIONS UNDER THE FEDERAL CLEAN WATER ACT, (Aug. 28, 1987) [hereinafter EPA, GUIDANCE ON STATE ACTION]; EPA, SUPPLEMENTAL GUIDANCE ON SECTION 309(G)(6)(A) OF THE CLEAN WATER ACT (Mar. 5, 1993) [hereinafter EPA, SUPPLEMENTAL GUIDANCE ON SECTION 309(G)(6)(A)].

137. Senator Chafee's remarks are quoted above. See *supra* text accompanying notes 102, 103.

138. EPA, GUIDANCE ON STATE ACTION, *supra* note 136, at 7.

In accordance with this "voluntary ground rules" approach, EPA's state NPDES program requirements for enforcement authority (which States must fulfill in order to receive EPA approval under sections 318, 402 and 405 of the CWA) highly recommend—but do not require—that States include "procedures for the administrative assessment of civil penalties" among their enforcement options under State law.¹³⁹ The number of adverse judicial decisions cited in EPA's 1993 supplemental guidance document suggest that this voluntary approach has not lived up to EPA's initial expectations.¹⁴⁰

E. A Brief History of the Case Law Interpreting Paragraph 309(g)(6)

Courts and commentators addressed the question of whether administrative actions could preclude citizen suits under the CWA even before the 1987 amendments specifically provided administrative penalty actions with such preclusive effects.¹⁴¹ The courts reached this issue by interpreting the provision of the 1972 CWA amendments which precluded citizen suits when "the [EPA] Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or State . . ."¹⁴² Responding to the claim that an action before an administrative board constituted an action "in a court," the Second Circuit reasoned that the plain meaning of the word "court" does not include administrative proceedings, and therefore such claims should be dismissed.¹⁴³ However, the Third Circuit looked beyond the language of the statute to the underlying policy question of whether an administrative board "possesses the power to impose fines and/or injunctions substantially equivalent to those which the EPA could seek in federal court, and . . . employs procedural safeguards similar to those of a federal court."¹⁴⁴ If the answer to this question is yes, then the Third Circuit would give preclusive effect to the enforcement actions of such an administrative board.

When it enacted the 1987 CWA amendments, Congress answered this question for the courts. Consequently, after 1987, one court held that the Third Circuit's broad view of administrative preclusion did not

139. 40 C.F.R. §§ 123.1, 123.27 nt.

140. See EPA, SUPPLEMENTAL GUIDANCE ON SECTION 309(G)(6)(A), *supra* note 136, at 2.

141. See Randall S. Schipper, Note, *Administrative Preclusion of Environmental Citizen Suits*, 1987 U. ILL. L. REV. 163.

142. 33 U.S.C. § 1365(b)(1)(B).

143. *Friends of the Earth v. Consolidated Rail Corp.*, 768 F.2d 57, 63 (2d Cir. 1985).

144. Schipper, *supra* note 141, at 171 (citing *SPIRG v. Fritzsche, Dodge & Olcott, Inc.*, 759 F.2d 1131, 1139 (3d Cir. 1985); *Baughman v. Bradford Coal Co.*, 592 F.2d 215, 219 (3d Cir. 1979), *cert. denied*, 441 U.S. 961(1979)).

survive the 1987 amendments because this broad view would make the new language in paragraph 309(g)(6) into surplusage,¹⁴⁵ and another court held that the Second Circuit's plain meaning analysis supporting the non-preclusiveness of administrative actions also lost its relevance after the 1987 amendments.¹⁴⁶ While these courts had to face litigants who tried to bring the pre-1987 analysis of the Second and Third Circuits to bear on post-1987 administrative actions, other courts were confronted with the opposite situation: litigants claiming that the 1987 amendments should apply retroactively to pre-1987 administrative actions. The claims of these litigants also failed when two federal courts in the Eastern District of Pennsylvania determined that the administrative penalty provisions of the 1987 amendments did not retroactively preclude citizen suits.¹⁴⁷

After consistently resolving these transitional questions, courts quickly diverged on the issue of whether and to what extent the 1987 amendments gave preclusive effect to post-1987 administrative actions. In *Atlantic States Legal Foundation v. Tyson Foods*, a federal district court in Alabama began the line of cases that give a very broad preclusive effect to administrative actions.¹⁴⁸ The *Tyson Foods* court found that Alabama's water quality statute was comparable to CWA subsection 309(g) because the state statute "provides for the imposition of civil penalties by the Alabama Department of Environmental Management."¹⁴⁹ Although the preclusive administrative order issued by this agency did not impose any civil penalties, the court found that this administrative order amounted to "diligent prosecution" because it set a compliance schedule and stated that failure to comply with this schedule would subject the violator to the imposition of "civil penalties, criminal fines, or other appropriate relief."¹⁵⁰ Thus, the *Tyson Foods* court reached the conclusion that an administrative order assessing no civil penalties precluded a subsequently filed citizen suit.

To bolster its broad reading of subsection 309(g)'s preclusiveness, the *Tyson Foods* court cited the Supreme Court's 1987 *Gwaltney* opinion.¹⁵¹ Although *Gwaltney* was limited to the issue of whether citizens

145. *PIRG of New Jersey v. Witco Chem. Corp.*, No. 89-3146, 31 Env't Rep. Cas. (BNA) 1571, 1575-76 (D.N.J. 1990).

146. *Atlantic States Legal Found. v. Tyson Foods*, 682 F. Supp. 1186, 1188 (N.D. Ala. 1988).

147. *Proffitt v. Municipal Authority of the Borough of Morrisville*, 716 F. Supp. 837 (E.D. Pa. June 22, 1989) (holding that paragraph 309(g)(6) did not retroactively preclude citizen suits); *United States v. BP Oil, Inc.*, No. 86-0792, 1989 WL 83623 (E.D. Pa. 1989) (holding that subsection 309(g)(6) did not retroactively preclude federal enforcement).

148. 682 F. Supp. 1186 (N.D. Ala. 1988).

149. *Id.* at 1187.

150. *Id.*

151. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49 (1987). The

could maintain a suit for wholly past violations, and the citizen suit at issue in *Gwaltney* predated the enactment of subsection 309(g), the *Tyson Foods* court nonetheless reasoned that a narrower reading of subsection 309(g)'s preclusive effect would "change the nature of the citizen's role from interstitial to potentially intrusive."¹⁵² Under this reasoning, to limit the preclusiveness of subsection 309(g) would be contrary to the *Gwaltney* Court's view of the restricted, supplementary role of citizens in CWA enforcement.

Only five days after the *Tyson Foods* court rendered its decision, a federal district court in Minnesota suggested the opposite conclusion: *Gwaltney* did not support the assertion that courts should give a broad reading of subsection 309(g)'s preclusive effect.¹⁵³ On the contrary, the Minnesota court underscored the *Gwaltney* Court's reliance on the canon of construction according to which "the starting point for interpreting a statute is the language of the statute itself."¹⁵⁴ Although the policy arguments employed by the *Tyson Foods* court also enjoy several followers,¹⁵⁵ many courts have looked to the language of the statute itself to reach the conclusion that subsection 309(g)'s preclusive effect is narrow in scope and therefore does not apply to administrative proceedings which do not assess civil penalties or provide the level of public participation contemplated in subsection 309(g).¹⁵⁶

Gwaltney decision is discussed *supra* part I.

152. 682 F. Supp. at 1189 (quoting *Gwaltney*, 484 U.S. at 61).

153. *Atlantic States Legal Found. v. Koch Refining Co.*, 681 F. Supp. 609 (D. Minn. 1988).

154. *Id.* at 613 (quoting *Gwaltney*, 484 U.S. at 56).

155. See *Arkansas Wildlife Fed. v. ICI Americas, Inc.*, 29 F.3d 376 (8th Cir. 1994) *cert. denied*, 115 S. Ct. 1094 (1995); *North & South Rivers Watershed Ass'n v. Town of Scituate*, 949 F.2d 552 (1st Cir. 1991); *Sierra Club v. Colorado Refining Co.*, 852 F. Supp. 1476 (D.Colo. 1994); *Pape v. Menominee Paper Co.*, No. 2:93-CV-236, 1994 U.S. Dist. LEXIS 10277 (W.D. Mich. 1994); *Saboe v. State of Oregon*, 819 F. Supp. 914 (D. Or. 1993); *Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co.*, 777 F. Supp. 173 (D. Conn. 1991), *aff'd in part, rev'd in part*, 989 F.2d 1305 (2nd Cir. 1993).

156. See *Washington PIRG v. Pendleton Woolen Mills*, 11 F.3d 883 (9th Cir. 1993); *Friends of Santa Fe County v. Lac Minerals, Inc.*, No. CIV. 94-0569JB/LH/DJS, 1995 WL 428414, at *10 (D.N.M. July 12, 1995); *Molokai Chamber of Commerce v. Kukui (Molokai), Inc.*, No. CIV94-00530-DAE, 1995 WL 368712, at *16 (D. Haw. May 23, 1995); *Citizens for a Better Environment v. Union Oil Co. of Cal.*, 861 F. Supp. 889 (N.D. Cal. 1994); *Murray v. Bath Iron Works*, 867 F. Supp. 33 (D. Me. 1994); *PIRG of New Jersey v. ELF Atochem North America*, 817 F. Supp. 1164 (D.N.J. 1993); *PIRG of New Jersey v. New Jersey Expressway Authority*, 822 F. Supp. 174 (D.N.J. 1992); *NRDC v. Fina Oil & Chem. Co.*, 806 F. Supp. 145 (E.D. Tex. 1992); *NRDC v. Vygen Corp.*, 803 F. Supp. 97 (N.D. Ohio 1992); *Arkansas Wildlife Fed. v. Bekaert Corp.*, 791 F. Supp. 769 (W.D. Ark. 1992); *New York Coastal Fishermen's Ass'n v. New York Dep't of Sanitation*, 772 F. Supp. 162 (S.D.N.Y. 1991); *PIRG of New Jersey v. GAF Corp.*, 770 F. Supp. 943 (D.N.J. 1991); *PIRG of New Jersey v. Yates Industries*, 757 F. Supp. 438 (D.N.J. 1991); *Atlantic States Legal Found. v. Universal Tool & Stamping Co.*, 735 F. Supp. 1404 (N.D. Ind. 1990); *PIRG of New Jersey v. Witco Chem. Corp.*, No. 89-3146, 31

Currently, the circuits are in conflict regarding the nature and scope of subsection 309(g)'s preclusiveness. The First and Eighth Circuits give a broad preclusive effect to all administrative actions by looking to the overall scheme of the statute at issue and relying on the policy considerations expressed in *Gwaltney*.¹⁵⁷ The Ninth Circuit, on the other hand, looks more closely at the exact wording of the statutory provisions at issue, their legislative history, and EPA's own interpretation of subsection 309(g) to arrive at the conclusion that the preclusiveness of this subsection is limited to a narrow class of administrative penalty actions.¹⁵⁸ The Supreme Court is not expected to resolve these contrary approaches in the foreseeable future.

F. Proposed Amendments to Subsection 309(g) in the 103d Congress

Before a case interpreting subsection 309(g) of the CWA reaches the Supreme Court, Congress is likely to amend this subsection during the pending CWA reauthorization. Upon revisiting subsection 309(g) in 1993, the Senate Committee on Environment and Public Works found that EPA's use of the administrative penalty provisions enacted in 1987 "has resulted in streamlined enforcement and lower litigation costs."¹⁵⁹ The same committee also agreed with an EPA Assistant Administrator's testimony that:

citizen suits complement and enhance [the Federal government's] own program and . . . are an essential part of the program. [G]iven the diminishing nature of our resources and the great extent of area to be covered in terms of inspections and enforcement . . . neither [EPA] nor the States are fully capable of handling the entire load. In fact, if you review the docket of citizen suits, my own view is that they have made an extremely salutary and constructive contribution to the development of the Clean Water Act.¹⁶⁰

Env't Rep. Cas. (BNA) 1571 (D.N.J. 1990); *Tobyhanna Conservation Ass'n v. Country Place Waste Treatment Co.*, 734 F. Supp. 667 (M.D. Pa. 1989).

157. *Arkansas Wildlife Fed. v. ICI Americas*, 29 F.3d at 379-83; *Scituate*, 949 F.2d at 555-58.

158. *Pendleton Woolen Mills*, 11 F.3d at 885-87.

159. S. REP. NO. 257, 103d Cong., 2d Sess. 84-85 (1994). The Senate Report notes that "in 1986, the Federal Government brought 119 civil judicial enforcement actions under the Clean Water Act; in 1992, it brought only 77 civil judicial enforcement actions, but 238 administrative penalty actions." *Id.* at 85.

160. *Id.* at 79 (quoting *Reauthorization of the Clean Water Act: Hearings on S. 1114 and S. 1302 before the Subcomm. on Clean Water, Fisheries, and Wildlife of the Senate Comm. on Environment and Public Works*, 103d Cong., 1st Sess. 754 (1993) (statement of Steve Herman, EPA Ass't Administrator for Enforcement)).

In response to these findings, the Senate committee proposed two major changes to the CWA's administrative penalty provisions. First, the bill reported out of the Senate committee in 1993 essentially requires states to adopt administrative penalty provisions similar to subsection 309(g) by providing that "the [EPA] Administrator may withhold up to 25 percent of a State's . . . program management funds unless the State has . . . the authority to recover an administrative civil penalty . . . of not less than \$10,000 per day for each violation."¹⁶¹ Second, the 1993 Senate committee bill removes the preclusive effect of state administrative penalty actions on citizen suits by striking the provisions in paragraph 309(g)(6) relating to actions under comparable state law.¹⁶² This change is intended to prevent courts from expanding the preclusive effects of state administrative actions as the First and Eighth Circuits did. According to the Senate Committee, such an expansive reading of subsection 309(g) "undermines vigorous enforcement."¹⁶³

Just as the First and Eighth Circuit's reading of the subsection 309(g) preclusion doctrine contradicts that of the Ninth Circuit, the two changes to this doctrine proposed in the 1993 Senate bill also contradict one another. On the one hand, this bill in effect would require states to adopt administrative penalty procedures, but on the other hand, the bill would diminish the authority of such state administrative procedures by not allowing them to preclude citizen suits. The remainder of this article attempts to resolve the contradiction between the need to maintain the beneficial effects of citizen suits and the need to continue the trend toward streamlined administrative enforcement procedures.

III. ANALYSIS

Four major questions arise from the case law interpreting paragraph 309(g)(6) of the CWA: (1) What kinds of administrative enforcement action should have a preclusive effect on citizen suits?; (2) What actions of a governmental prosecutor are sufficient to commence a preclusive administrative enforcement action?; (3) What makes a governmental agency's prosecution diligent enough to warrant preclusion of a citizen suit?; and (4) What remedies should an administrative enforcement action preclude citizens from seeking in subsequent litigation? To answer each of these questions, this article looks to the language of CWA subsection 309(g), the CWA's enforcement scheme as a whole, the legislative history and administrative interpretations of CWA subsection 309(g), and the underlying policy arguments regarding the

161. *Id.* at 85.

162. *Id.* at 90.

163. *Id.*

respective roles of federal, state, and citizen prosecutors in CWA enforcement.

A. What kinds of administrative enforcement action should have a preclusive effect on citizen suits?

1. Compliance Orders versus Penalty Assessments

There are three basic categories of enforcement action under the CWA: administrative compliance orders, administrative penalty assessments, and civil and criminal judicial actions.¹⁶⁴ Although there is little dispute that citizen suits are precluded by prior judicial actions, some courts have great difficulty distinguishing administrative penalty assessments from administrative compliance orders for the purposes of determining whether a citizen suit is precluded by administrative enforcement action.¹⁶⁵ Distinguishing these two categories of administrative enforcement actions becomes even more difficult for the courts when the orders or assessments at issue result from a settlement between the government and a CWA violator,¹⁶⁶ or when such orders or assessments arise under other environmental statutes that also contain administrative penalty provisions.¹⁶⁷ Nonetheless, this article argues that

164. 33 U.S.C. § 1319(a) (1988) (compliance orders); *id.* §§ 1319(b) and (c) (civil and criminal court actions); *id.* § 1319(g) (administrative penalty assessments). For a discussion of the legislative history of these three categories of enforcement actions, see discussion *supra* part II.C.

165. *E.g.*, *North & South Rivers Watershed Ass'n v. Town of Scituate*, 949 F.2d 551, 556 (1st Cir. 1991) (giving preclusive effect to a State administrative order that did not assess any civil penalties); *Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co.*, 777 F. Supp. 173, 176, 186 (D. Conn. 1991) (same), *aff'd in part; rev'd in part*, 989 F.2d 1305 (2nd Cir. 1993); *Atlantic States Legal Found. v. Tyson Foods*, 682 F. Supp. 1186, 1189 (N.D. Ala. 1988) (same).

166. *See* *Arkansas Wildlife Fed. v. ICI Americas, Inc.*, 29 F.3d 376, 380 (8th Cir. 1994) (giving preclusive effect to an administrative order that bypassed usual notice and service requirements because the order was issued with the consent of the violator), *cert. denied*, 115 S. Ct. 1094 (1995); *Atlantic States Legal Found. v. Eastman Kodak*, 933 F.2d 124, 127 (2d Cir. 1991) (dismissing properly commenced citizen suit where defendant had subsequently reached a settlement agreement with a State). *But see* *Citizens for a Better Environment v. Union Oil Co. of Cal.*, 861 F. Supp. 889, 911 (N.D. Cal. 1994) (holding that citizen suit was not precluded by settlement agreement between defendant and State and payment generated by settlement agreement was not a "penalty" for the purposes of CWA subsection 309(g)); *PIRG of New Jersey v. New Jersey Expressway Auth.*, 822 F. Supp. 174, 184 (D.N.J. 1992) (holding that citizen suit was not precluded by memorandum of understanding (MOU) between defendant and State and MOU did not formally commence a preclusive administrative enforcement action against defendant).

167. *See* *Sierra Club v. Colo. Refining Co.*, 852 F. Supp. 1476, 1483 (D. Colo. 1994) (holding that CWA citizen suit is precluded by consent order issued pursuant to section 3008(h) of

there is a clear distinction in the statutory scheme between compliance orders and penalty assessments, and the language of the statute plainly states that the only category of administrative enforcement action that may preclude a CWA citizen suit is the administrative penalty assessment under subsection 309(g) of the CWA or a state law comparable to subsection 309(g).¹⁶⁸

Under the CWA's enforcement scheme, administrative penalty assessments occupy an intermediate position between administrative compliance orders and civil judicial actions.¹⁶⁹ As the weakest of the CWA's enforcement tools, administrative compliance orders do not impose civil penalties or other sanctions and are not enforceable without

the federal Resource Conservation and Recovery Act (RCRA) and its State equivalent). *But see* Washington PIRG v. Pendleton Woolen Mills, 11 F.3d 883, 886 (9th Cir. Dec. 1, 1993) (distinguishing the CWA's paragraph 309(g)(6) preclusion doctrine from the broader preclusion doctrines in paragraph 7002(b)(2)(B)(iv) of RCRA and paragraph 310(d)(2) of CERCLA); *Murray v. Bath Iron Works Corp.*, 867 F. Supp. 33, 44 (D. Me. 1994) (holding that CWA citizen suit is not precluded by administrative actions relating to general management of hazardous substances pursuant to State equivalent of RCRA); *cf.* *Orange Environment, Inc. v. County of Orange*, 860 F. Supp. 1003 (S.D.N.Y. 1994) (holding that CWA citizen suit was precluded by a consent order that primarily regulated defendant's solid waste management activities but also alleged violation of State statute comparable to the CWA).

168. *See Pendleton Woolen Mills*, 11 F.3d at 886-87; *Union Oil*, 861 F. Supp. at 907-09; *NRDC v. Fina Oil & Chem. Co.*, 806 F. Supp. 145, 146 (E.D. Tex. 1992); *Arkansas Wildlife Federation v. Bekaert Corp.*, 791 F. Supp. 769, 774-75 (W.D. Ark. 1992). In addition to ignoring the plain meaning of paragraph 309(g)(6), 33 U.S.C. § 1319(g)(6), giving preclusive effect to administrative compliance orders would be contrary to CWA paragraph 309(g)(11), which states that "nothing in this subsection [309(g)] shall change the procedures existing on the day before February 4, 1987, under other subsections of this section [309] for issuance and enforcement of orders by the [EPA] Administrator." 33 U.S.C. § 1319(g)(11). The prohibition on changing procedures under other subsections applies to the administrative compliance order provisions at subsection 309(a). Thus, to change procedures for enforcing compliance orders issued under subsection 309(a) by giving them the preclusive effect of subsection 309(g) penalty assessments would violate this prohibition.

169. *Amending the Clean Water Act: Hearings on S. 53 and S. 652 before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment and Public Works*, 99th Cong., 1st Sess. 57 (1985), reprinted in *1987 Legislative History*, *supra* note 61, at 1695 (responses of Jack E. Ravan, EPA Ass't Administrator for Water, to additional questions propounded by Sen. Mitchell); *see also* S. REP. NO. 50, 99th Cong., 1st Sess. 26 (1985), reprinted in *1987 Legislative History*, *supra* note 61, at 1447 ("[a]dministrative penalties could provide greater deterrent value than an administrative order for a violation that does not warrant the more resource intensive aspects of judicial enforcement"). The addition of administrative penalty provisions to the CWA in 1987 was not intended to replace existing enforcement mechanisms such as compliance orders or civil judicial actions. *Id.* at 26, reprinted in *1987 Legislative History*, *supra* note 61, at 1695; 55 Fed. Reg. at 23,839 (EPA rulemaking citing CWA paragraph 309(g)(11), 33 U.S.C. § 1319(g)(11), for the proposition that subsection 309(g) "did not change the procedures for issuing and enforcing administrative compliance orders under other subsections of section 309"). The legislative history and administrative interpretation of the CWA administrative penalty provisions are discussed *supra* parts II.C, II.D.

a court order.¹⁷⁰ As such, they are not subject to judicial review or public participation requirements.¹⁷¹ The function of administrative compliance orders is merely to motivate a CWA violator to achieve future compliance by setting certain deadlines which, if violated, can become the subject of a future court action.¹⁷²

In contrast to the equitable, future focus of administrative compliance orders, administrative penalty assessments under CWA subsection 309(g) or comparable state laws are aimed at collecting civil penalties for past violations.¹⁷³ The reason for recovering civil penalties for past violations is to ensure that CWA violators do not benefit economically from delays in achieving compliance.¹⁷⁴ Hence, administrative penalty assessments are not a mechanism for ordering injunctive relief,¹⁷⁵ and unlike civil judicial actions (including citizen suits),

170. See *Southern Ohio Coal Co. v. Office of Surface Min., Reclamation & Enforcement*, 20 F.3d 1418, 1426-27 (6th Cir. 1994); *Southern Pines Assoc. v. United States*, 912 F.2d 713, 715-16 (4th Cir. 1990). In *Hoffman Group, Inc. v. EPA*, the Seventh Circuit initially declined to review an EPA compliance order and held that such orders were not enforcement proceedings. 902 F.2d 567, 569 (7th Cir. 1990). However, after EPA's Chief Judicial Officer decided to assess a fine against the Hoffman defendants, the court exercised jurisdiction pursuant to paragraph 309(g)(8) of the CWA administrative penalty provisions, 33 U.S.C. § 1319(g)(8), and held that substantial evidence to support EPA's decision to assess the fine was lacking. *Hoffman Homes, Inc. v. EPA*, 999 F.2d 256, 262 (7th Cir. 1993).

171. *Laguna Gatuna, Inc. v. Browner*, 58 F.3d 564, 565 (10th Cir. 1995); *Southern Ohio Coal Co.*, 20 F.3d at 1426; *Southern Pines*, 912 F.2d at 715-16; *Hoffman Group*, 902 F.2d at 569.

172. See S. REP. NO. 50, 99th Cong., 1st Sess. 26 (1985), reprinted in 1987 *Legislative History*, supra note 61, at 1695; *Hearings on S. 53 and S. 652*, supra note 169, at 10, reprinted in 1987 *Legislative History*, supra note 61, at 1646 (statement of Jack E. Ravan, EPA Ass't Administrator for Water) (noting that "issuance of an administrative order, without penalties, has not proven powerful enough to motivate violators or deter other similar violators").

173. The administrative penalty provisions are written in the past tense, applying to any person who "has violated" the CWA. 33 U.S.C. § 1319(g)(1); see *Gwaltney*, 484 U.S. at 57-58 n.2. The legislative history and administrative penalty provisions are also clear on this point. See S. REP. NO. 50, supra note 172, at 26, reprinted in 1987 *Legislative History*, supra note 61, at 1447 (noting that subsection 309(g) was designed "to address past, rather than continuing, violations . . ."); Rules of Practice Governing the Administrative Assessment of Class II Civil Penalties Under the Clean Water Act, 55 Fed. Reg. 23,838 (1990) (codified at 40 C.F.R. § 22.38) (noting that "administrative penalties are for past violations").

174. See S. REP. NO. 50, supra note 172, at 26-27, reprinted in 1987 *Legislative History*, supra note 61, at 1447-48; *Hearings on S. 53 and S. 652*, supra note 169, at 57, reprinted in 1987 *Legislative History*, supra note 61, at 1695 (responses of Jack E. Ravan, EPA Ass't Administrator for Water, to additional questions propounded by Sen. Mitchell).

175. Two Supreme Court cases have recognized that "section 1319 [§ 309] does not intertwine equitable relief with the imposition of civil penalties. Instead each kind of relief is separately authorized in a separate and distinct statutory provision." *Gwaltney*, 484 U.S. at 58 (quoting *Tull v. United States*, 481 U.S. 412, 425 (1987)). Injunctive relief for continuing violations is handled administratively under section 309(a), 33 U.S.C. § 1319(a), or judicially under section 309(b), 33 U.S.C. § 1319(b). Civil penalties for past violations are addressed administratively under section 309(g), 33 U.S.C. § 1319(g), or judicially under section 309(d),

administrative penalty assessments cannot be used to collect penalties for violating an administrative compliance order.¹⁷⁶ Moreover, since subsection 309(g) empowers the government to deprive CWA violators of their property interest in the economic benefits gained from past noncompliance, Congress and EPA intended such penalty assessments to include procedural due process safeguards for the violator.¹⁷⁷ And since administrative penalty assessments may preclude citizens from exercising their statutory right to sue the violator for the same past violations, such assessments must comply with subsection 309(g)'s public participation requirements.¹⁷⁸

If they do not succeed in avoiding these public participation requirements by erasing the distinction between compliance orders and penalty assessments altogether, CWA defendants may obfuscate matters by arguing that the statutory term "penalty" includes all the costs incurred voluntarily by a CWA violator in its efforts to achieve compliance and any payments made by the violator in order to settle enforcement actions brought under provisions of the CWA other than subsection 309(g), state law provisions that are not comparable to subsection 309(g), and other federal environmental statutes. However, this argument is problematic—even for defendants—because the payment of damages in the form of an administrative penalty is logically prefaced by an admission or finding of liability. Thus, by expanding the definition of the penalty they claim to be paying, defendants may also be expanding their own admissions of liability—a result that is contrary to the customary *quid pro quo* wherein a defendant pays a settlement in order to avoid any findings of liability.

33 U.S.C. § 1319(d). Congress specifically stated that administrative penalties under subsection 309(g) apply to "past, rather than continuing, violations," and that civil judicial enforcement was to remain the norm for "cases requiring injunctive relief." S. REP. NO. 50, *supra* note 172, at 26, reprinted in 1987 *Legislative History*, *supra* note 61, at 1447.

176. Unlike subsection 505(a) of the CWA citizen suit provisions, 33 U.S.C. § 1365(a), the CWA administrative penalty provisions at paragraph 309(g)(1), 33 U.S.C. § 1319(g)(1), do not cover violations of compliance orders issued by EPA or a state with respect to an effluent standard or limitation. See *Hearings on S. 1114 and S. 1302 before the Subcomm. on Clean Water, Fisheries and Wildlife of the Senate Comm. on Environment and Public Works*, 103d Cong., 1st Sess. 803 (1993) (statement of Steven A. Herman, EPA Ass't Administrator for Enforcement).

177. Congress intended the CWA administrative penalty provisions to "strike the appropriate balance between streamlined procedures and basic fairness." S. REP. NO. 50, *supra* note 172, at 27, reprinted in 1987 *Legislative History*, *supra* note 61, at 1448. The need for procedural fairness is also noted in EPA rulemaking regarding administrative penalty assessments. See 56 Fed. Reg. 29,997 (1991).

178. The public participation requirements for CWA administrative penalty assessments are spelled out in paragraph 309(g)(4), 33 U.S.C. § 1319(g)(4), and in EPA rulemaking at 40 C.F.R. § 22.38 and 56 Fed. Reg. at 30,021-33 (to be codified at 40 C.F.R. pt. 28).

The better argument reads "administrative penalty" as a term of art that refers only to payments collected in response to an agency's exercise of the authority granted to it under subsection 309(g) or a state law comparable to subsection 309(g).¹⁷⁹ This reading is necessary to maintain the distinction in the CWA's enforcement scheme between penalty assessments and compliance orders, and to give meaning to the specific provisions in subsection 309(g) under which payment of an administrative penalty must be accompanied by certain procedural safeguards that protect both the defendant's due process rights and the public's right to participate in the proceedings.¹⁸⁰ To allow CWA defendants unilaterally to decide which of their environmental compliance costs count as administrative penalties under subsection 309(g) is to subvert both the procedural framework for assessing penalties that Congress carefully crafted in subsection 309(g) and the underlying policy goals of due process and public participation that this framework was designed to advance.

In addition to defeating the purposes of the administrative penalty provisions in subsection 309(g), giving preclusive effect to mere compliance orders that do not assess penalties may render a portion of the citizen suit provisions in CWA section 505 self-contradictory or superfluous. The CWA citizen suit provisions allow citizens to sue "any person . . . who is alleged to be in violation of . . . an order issued by the [EPA] Administrator or a State with respect to [an effluent] standard or limitation" except as provided in paragraph 309(g)(6) of the statute.¹⁸¹ For the most part, orders issued by EPA or a State with respect to an effluent standard or limitation take the form of administrative compliance orders. Thus, if paragraph 309(g)(6) is broadly interpreted to preclude citizens from bringing suit for violations which are the subject of a preexisting administrative compliance order, then the provision in paragraph 505(b) which allows citizens to sue persons alleged to be in violation of an administrative compliance order is superfluous because such orders effectively preclude citizen suits in the first place.

This contradiction may be mitigated by applying the preclusive language of subsection 309(g) only to the violations of effluent limits alleged in the compliance order and not to the violation of the compli-

179. The *Union Oil* court took this view and consequently refused to give preclusive effect to a settlement agreement in which defendant had made a payment to avoid a finding of liability. 861 F. Supp. at 909. The court noted that defendant was trying to "have it both ways" by arguing that the payment was not a "penalty" for the purposes of admitting liability in the settlement but then arguing that the same payment was a penalty for the purpose of precluding a CWA citizen suit. *Id.* at 910-11.

180. The specific provisions which form the procedural framework for assessing administrative penalties under subsection 309(g) are outlined *supra* part II.C.

181. 33 U.S.C. § 1365(a).

ance order itself. However, to the extent that the violation of a compliance order presupposes the existence of effluent limit violations alleged in that order, the two categories of violation are difficult to separate. Moreover, if citizens can avoid the preclusive effect of an administrative compliance order merely by alleging a violation of that order itself, then the extension of paragraph 309(g)(6)'s preclusiveness to administrative compliance orders is itself rather superfluous. Thus, the proponents of extending the paragraph 309(g)(6) preclusion doctrine to administrative compliance orders are faced with a self-defeating dilemma: either misread the statute such that paragraph 309(g)(6) renders a portion of the statute's citizen suit provisions superfluous, or accommodate the citizen suit provisions by allowing an exception that effectively swallows the preclusion rule for administrative compliance orders.

To avoid this dilemma, courts sympathetic to CWA defendants have dismissed the statutory language limiting subsection 309(g)'s preclusiveness as irrational or leading to an absurd result.¹⁸² Instead of applying the statutory language in a straightforward manner, these courts turn to general policy arguments which disfavor citizen suits and afford great deference to state and federal CWA prosecutors. The primary policy argument that courts use to quash citizen suits is derived from the Supreme Court's *Gwaltney* decision.¹⁸³ In *Gwaltney*, the Court noted in dicta that "[t]he bar on citizen suits when governmental enforcement action is underway suggests that the citizen suit is meant to supplement rather than to supplant governmental action."¹⁸⁴ According to the First Circuit, a narrow reading of CWA paragraph 309(g)(6) that fails to extend a preclusive effect to all forms of governmental enforcement action would "undermine the supplemental role envisioned for section 505 citizen suits" and, in the words of the *Gwaltney* Court, would "chang[e] the nature of the citizen's role from interstitial to potentially intrusive."¹⁸⁵ While the First Circuit would allow citizen suits to proceed if "Federal and State authorities appear unwilling to act,"¹⁸⁶ other courts have taken the restrictive view of citizen suits envisioned in *Gwaltney* to its extreme by advocating the position that citizen suits are precluded even when a governmental prosecutor has failed to act: citizens may not "seek to

182. See, e.g., *North and South Rivers Watershed Assoc. v. Town of Scituate*, 949 F.2d 552, 555-56 (1st Cir. 1991); *Sierra Club v. Colorado Refining Co.*, 852 F. Supp. 1476, 1483 (D. Colo. 1994).

183. *Gwaltney of Smithfield v. Chesapeake Bay Found.*, 484 U.S. 49 (1987).

184. *Id.* at 60.

185. *Scituate*, 949 F.2d at 556 (quoting *Gwaltney*, 484 U.S. at 61).

186. *Id.* at 555.

recover fines and penalties that the government has elected to forego."¹⁸⁷

Using *Gwaltney* to extend the preclusive effect of subsection 309(g) to administrative enforcement actions that forego or simply do not assess penalties is problematic for two reasons. First, rather than encouraging courts to ignore the statutory language in favor of general policy arguments that they find more appealing, the *Gwaltney* Court reached its holding by relying on the premises that "the starting point for interpreting a statute is the language of the statute itself[.]" and the statutory language at issue should be understood "as a statutory term of art rather than a mere stylistic infelicity" ¹⁸⁸ The statutory language of CWA subsection 309(g) plainly limits the preclusion of citizen suits to administrative penalty assessments, and the term "administrative penalty" is a statutory term of art rather than a stylistic infelicity.¹⁸⁹

Second, the statutory provision at issue in *Gwaltney* was a product of the 1972 CWA amendments, and thus the *Gwaltney* Court relied almost entirely on the legislative history of the 1972 amendments to support its suggestion regarding the supplementary role of citizen suits in the CWA enforcement scheme.¹⁹⁰ The statutory provisions which allow administrative penalty assessments to preclude citizen suits, on the other hand, are a product of the 1987 CWA amendments, and hence the legislative history of the 1987 amendments is more germane to the interpretation of these provisions than the general precautionary statements regarding the role of citizen suits expressed in the legislative history of the 1972 amendments.

187. E.g., *Atlantic States Legal Found. v. Eastman Kodak*, 933 F.2d 124, 127 (2d Cir. 1991) (citing *Gwaltney*, 484 U.S. at 60-61); *Orange Environment, Inc. v. County of Orange*, 860 F. Supp. 1003, 1016 (S.D.N.Y. 1994) (quoting *Eastman Kodak*, 933 F.2d at 127; *New York Coastal Fishermen's Ass'n v. New York Dep't of Sanitation*, 772 F. Supp. 162, 165 (S.D.N.Y. 1991)).

188. *Gwaltney*, 484 U.S. at 56, 62. The Ninth Circuit quoted this portion of the *Gwaltney* opinion to support its conclusion that the language of the CWA administrative penalty provisions itself is more persuasive evidence of congressional intent than "a court's sense of the general role of citizen suits in the enforcement of the [CWA]." *Washington PIRG v. Pendleton Woolen Mills*, 11 F.3d 883, 886 (9th Cir. 1993).

189. See 33 U.S.C. § 1319(g)(6).

190. See *Gwaltney*, 484 U.S. at 60-61. The 1987 amendments are addressed only in a footnote which largely dismisses them on the grounds that "the conclusions of the 99th Congress . . . are hardly probative of the intent of the 92d Congress." *Id.* at 63 n.4 (citation omitted). This footnote does not mention the issue of whether and to what extent the 1987 amendments expanded the preclusive effect of administrative enforcement actions. Indeed, to the extent that this issue turns on a statutory provision enacted by the 99th Congress, the footnote in *Gwaltney* could support the proposition that the earlier conclusions of the 92d Congress regarding the supplementary role of citizen suits are not probative of the intent of the 99th Congress.

A closer look at the intentions of the 99th Congress reveals that the legislative intent behind the administrative penalty provisions enacted in 1987 differs significantly from that envisioned by the *Gwaltney* court. After reviewing almost fifteen years of citizen suit activity that had transpired since the citizen suit provisions were first added to the CWA in 1972, the 99th Congress came to the conclusion that "citizen suits are a proven enforcement tool. They operate as Congress intended—both to spur and supplement . . . government enforcement actions. They have deterred violators and achieved significant compliance gains."¹⁹¹ The *Gwaltney* Court deviated from this view by seizing upon the supplementary role of citizen suits and ignoring the role of citizen suits as a spur to governmental enforcement action. The role of the citizen prosecutor as a spur—or even a thorn in the side of the government—is particularly relevant to administrative proceedings wherein lax governmental prosecutors may rely on unenforceable compliance orders or small administrative fines when more serious enforcement mechanisms are needed to deprive the violator of the economic benefit gleaned from its noncompliance and deter future violations. Indeed, the history of the CWA reveals a pattern of such lax enforcement,¹⁹² and one of the reasons for adding citizen suit provisions to the CWA was to alter this pattern.¹⁹³

Given the CWA's history of lax enforcement and the success of citizen suits in combating this problem,¹⁹⁴ the 99th Congress recognized "[t]he need to avoid placing obstacles in the path of . . . citizen suits."¹⁹⁵ The 99th Congress attempted to "strike a balance" between this need and "the desire to avoid subjecting violators of the law to dual enforcement

191. S. REP. NO. 50, *supra* note 172, at 28, reprinted in 1987 *Legislative History*, *supra* note 61, at 1449. The 103d Congress also praised citizen suits as "an important component of the Clean Water Act's enforcement system." S. REP. NO. 257, 103d Cong., 2d Sess. 79 (1994).

192. See *Management Deficiencies in Environmental Enforcement: "Forceless Enforcement": Hearings before the Senate Comm. on Governmental Affairs*, 102d Cong., 1st Sess. 4-6, 107-34, 151-52, 158-61, 163-64 (1991) (statements of Richard Hembra, Director, Environmental Protection Issues, Resources, Community and Economic Development Div., General Accounting Office; David S. Bailey, Senior Scientist and Director, Virginia Office, Environmental Defense Fund).

193. See discussion *supra* part II.A.

194. The Environmental Law Institute (ELI) commissioned a study of environmental citizen suits which correlated an increase in citizen enforcement in the early 1980s with a decrease in EPA enforcement during this period. The ELI study concluded that citizen suits were functioning as Congress intended. Jeffrey G. Miller, *Private Enforcement of Federal Pollution Control Laws: Part III*, 14 ENVTL. L. REP. (Envtl. L. Inst.) 10,407, 10,424-25 (1984) (citing ELI, *Citizen Suits: An Analysis of Citizen Enforcement Action Under EPA-Administered Statutes* (1984)).

195. S. REP. NO. 50, *supra* note 172, at 28, reprinted in 1987 *Legislative History*, *supra* note 61, at 1448.

actions or penalties for the same violation" when it enacted the new administrative penalty provisions in subsection 309(g).¹⁹⁶ The result of this congressional balancing is a statutory provision which—in contrast to the blanket preclusion and absolute deference suggested by the *Gwaltney* Court—gives preclusive effect to some, but not all, administrative enforcement actions and affords citizens the right to participate meaningfully in such administrative actions even when a citizen suit is precluded.

Citizens do not supplant the primary role of governmental CWA prosecutors when they spur the government to take actions more vigorous than issuing administrative compliance orders. On the contrary, Congress designed the CWA's enforcement scheme in a manner that effectively prevents private citizens from supplanting the government's enforcement efforts. In particular, Congress required citizen prosecutors to provide both state and federal prosecutors with sixty days notice before filing a citizen suit, and during this notice period, governmental prosecutors have the option of precluding a citizen suit under CWA subsection 505(b) by filing their own lawsuit.¹⁹⁷ While administrative penalty assessments do not have this preclusive effect on citizen suits unless they are commenced before the citizen's 60-day notice of intent to sue has been served,¹⁹⁸ EPA still retains the absolute right to intervene in any citizen suit,¹⁹⁹ and there is nothing in the CWA to suggest that governmental prosecutors cannot file their own, separate administrative or judicial action after a citizen suit has been filed. These safeguards effectively prevent citizens from usurping the government's primary role in CWA enforcement.

Even in the legislative history of the 1972 CWA amendments, there is evidence that Congress attributed more important policy goals to the citizen suit provisions than the *Gwaltney* Court's goal of vesting absolute control of CWA enforcement in the government. In particular, Congress enacted the CWA citizen suit provisions in order to "restore the public's confidence and to open wide the opportunities for the public to participate in a meaningful way in the decisions of government."²⁰⁰ This statement suggests that democracy—and not statism—provides the theoretical and jurisprudential basis for the CWA's citizen suit provisions. Thus, while the CWA undoubtedly precludes citizen suits in some instances in order to advance procedural goals of fairness and efficiency,

196. *Id.* at 28, 1987 *Legislative History*, *supra* note 61, at 1448.

197. 33 U.S.C. § 1365(b).

198. *Id.* § 1319(g)(6).

199. *See id.* §§ 1365(c)(2), (3).

200. H.R. REP. NO. 911, 92d Cong., 2d Sess. 132 (1972), *reprinted in* 1972 *Legislative History*, *supra* note 46, at 819.

expanding the CWA's preclusion doctrine beyond the statute's carefully crafted language is entirely contrary to the democratic ideals upon which the CWA is premised.

2. Comparability of State Laws

If we accept the distinction between the preclusiveness of administrative penalty assessments and the non-preclusiveness of administrative compliance orders, a question remains regarding which state enforcement actions are comparable to an administrative penalty assessment under CWA subsection 309(g) for the purposes of precluding a citizen suit. Subsection 309(g) requires state water quality laws to be "comparable to *this subsection*" in order to provide a basis for precluding CWA citizen suits.²⁰¹ However, the statute does not further define what makes a provision of state law "comparable" to a provision in subsection 309(g). While it seems clear that "comparable" does not mean "identical,"²⁰² it is not as easy to discern whether "comparable" means "functionally equivalent," "analogous," or merely "similar." Courts also have difficulty determining what elements of state and federal law are to be compared. With respect to the state law at issue, courts differ on whether the unit of comparison is the specific provision in the state law which provides for administrative penalties,²⁰³ or merely the enforcement scheme of the state law taken as a whole.²⁰⁴ With respect to the federal CWA, courts do not always agree on whether the relevant unit of state law must be "comparable" with respect to each element of subsection 309(g)²⁰⁵ or only some key elements of this subsection.²⁰⁶

201. 33 U.S.C. § 1319(g)(6)(A)(ii); see *Friends of Santa Fe County v. Lac Minerals, Inc.*, No. CIV. 94-0569JB/LH/DJS, 1995 WL 428414 at *10 (D.N.M. July 12, 1995).

202. See *Sierra Club v. Colorado Refining Co.*, 838 F. Supp. 1428, 1435 (D. Colo. 1993) (citing *Saboe v. Oregon*, 819 F. Supp. 914, 917 (D. Or. 1993); *Sierra Club v. Port Townsend Paper Corp.*, 19 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,532 (W.D. Wash. 1988)).

203. See *Citizens for a Better Environment v. Union Oil Co. of Cal.*, 861 F. Supp. 889, 905-07 (N.D. Cal. 1994) (citing *Washington PIRG v. Pendleton Woolen Mills*, 11 F.3d 883, 885-86 (9th Cir. 1993)); *Molokai Chamber of Commerce v. Kukui (Molokai), Inc.*, No. CIV. 94-00530 DAE, 1995 WL 368712, at *15 (D. Haw. May 23, 1995).

204. *Arkansas Wildlife Fed. v. ICI Americas, Inc.*, 29 F.3d 376, 381 (8th Cir. 1994) (citing *North & South Rivers Watershed Ass'n v. Town of Scituate*, 949 F.2d 552, 556 (1st Cir. 1991) *cert. denied*, 115 S. Ct. 1094 (1995); *Saboe*, 819 F. Supp. at 918; *Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co.*, 777 F. Supp. 173, 182-83 (D. Conn. 1991), *aff'd in part, rev'd in part*, 989 F.2d 1305 (2d Cir. 1993)).

205. See, e.g., *PIRG of New Jersey v. New Jersey Expressway Auth.*, 822 F. Supp. 174, 184 n.14 (D.N.J. 1993); *NRDC v. Vygen Corp.*, 803 F. Supp. 97, 102 (N.D. Ohio 1992); *PIRG of New Jersey v. GAF Corp.*, 770 F. Supp. 943, 951 (D.N.J. 1991); *Atlantic States Legal Found. v. Universal Tool & Stamping Co.*, 735 F. Supp. 1404, 1415-16 (N.D. Ind. 1990).

206. See, e.g., *Arkansas Wildlife Fed. v. ICI Americas*, 29 F.3d at 381 (holding that "the

This article argues that in order to have a preclusive effect on citizen suits under the CWA, the specific provisions of state law on which the administrative penalty action is premised must be functionally equivalent to the provisions of CWA subsection 309(g) with respect to public notice, penalty assessment criteria, opportunity for citizen participation and judicial review. This conclusion is a reasonable inference from the statutory language, its legislative history, and a balancing of the need for citizen participation with the policy of cooperative federalism.

With respect to the statutory language at issue, the question is "whether the language 'comparable state law' should be interpreted to mean 'comparable state enforcement scheme' or 'comparable state enforcement provision.'"²⁰⁷ If "comparable state law" means "comparable state enforcement scheme," then any state enforcement action—regardless of whether it purports to assess penalties—may preclude a citizen suit so long as somewhere in the state's water quality statute there is an administrative penalty provision comparable to subsection 309(g) of the federal CWA. However, if "comparable state law" means "comparable state enforcement provision," then a citizen suit only can be precluded by a state administrative penalty assessment that invokes specific provisions of a state statute which are comparable to subsection 309(g).

While courts may allow a looser comparison between the specific provisions of the federal CWA regarding administrative penalty assessments and the state's enforcement scheme in order to make way for overriding policy concerns,²⁰⁸ the more natural reading is to compare the specific provisions of federal law with the specific enforcement provisions of state law.²⁰⁹ Otherwise, state enforcement actions would assume a greater preclusive effect on citizen suits than federal enforcement actions, and the crucial distinction between penalty assessments and mere compliance orders would be lost with respect to state enforcement actions.²¹⁰

The legislative history of the 1987 amendments, as incorporated in an EPA guidance document, answers the question of which provisions of state law must be "comparable" to those of subsection 309(g). During the Senate debate on the 1987 CWA amendments, the amendments' chief

comparability requirement may be satisfied so long as the state law contains comparable penalty provisions which the state is authorized to enforce" and citing *Scituate*, 949 F.2d at 556 n.7).

207. *Union Oil*, 861 F. Supp. at 906.

208. See, e.g., *Scituate*, 949 F.2d at 555-56 (quoting the policy concerns expressed in *Gwaltney of Smithfield v. Chesapeake Bay Foundation*, 484 U.S. 49, 60 (1987)).

209. *Union Oil*, 861 F. Supp. at 906-07.

210. This crucial distinction is discussed *supra* part III.A.1.

sponsor and current chair of the Senate Environment and Public Works Committee, Senator Chafee, stated that:

in order to be comparable, a State law must provide for a right to a hearing and for public notice and participation procedures similar to those set forth in section 309(g); it must include analogous penalty assessment factors and judicial review standards; and it must include provisions that are analogous to the other elements of section 309(g).²¹¹

In its *Guidance on State Action Preempting Civil Penalty Actions under the Federal Clean Water Act*, EPA adopts this definition of the comparability requirement and uses the words "analogous," "equivalent," and "similar" as interchangeable synonyms for the statutory term "comparable."²¹² Case law on the subject suggests that these synonyms are not interchangeable. For example, the Eighth Circuit concluded that an Arkansas law satisfied the comparability requirement because "copies of permits, permit applications, and related documentation . . . are publicly available," and such public availability is "sufficiently similar" to the public notice provisions in subsection 309(g) of the federal CWA.²¹³ Other courts have interpreted the comparability requirement to reach the exact opposite conclusion—that "public availability" is *not* comparable to "public notice."²¹⁴ To avoid the inconsistencies that result from the use of imprecise synonyms such as "similar" or "analogous," Congress and the courts should adopt a narrower definition of what it means for a state law to be comparable to subsection 309(g).

In choosing a definitional standard by which to measure the comparability of state laws, courts and Congress should strike a balance between the need for state law to conform to the specific purposes behind each paragraph of CWA subsection 309(g) and the need to avoid the absurdities that could result from allowing the comparability issue to turn on mere grammar or clerical considerations.²¹⁵ Apart from such gram-

211. 133 CONG. REC. S. 737 (daily ed. Jan. 14, 1987), reprinted in 1987 *Legislative History*, *supra* note 61, at 367.

212. EPA, GUIDANCE ON STATE ACTION PREEMPTION OF CIVIL PENALTIES UNDER THE FEDERAL CLEAN WATER ACT (Aug. 28, 1987) [hereinafter EPA, GUIDANCE ON STATE ACTION PREEMPTION OF CIVIL PENALTY ACTIONS]; see also EPA, SUPPLEMENTAL GUIDANCE ON SECTION 309(G)(6)(A) OF THE CLEAN WATER ACT (Mar. 5, 1993).

213. *Arkansas Wildlife Fed. v. ICI Americas*, 29 F.3d at 381.

214. See *PIRG of New Jersey v. New Jersey Expressway Auth.*, 822 F. Supp. at 184 n.14; *NRDC v. Vygen Corp.*, 803 F. Supp. at 102; *PIRG of New Jersey v. GAF Corp.*, 770 F. Supp. at 951; *Atlantic States Legal Found. v. Universal Tool & Stamping Co.*, 735 F. Supp. at 1415-16.

215. The concurring opinion in *Scituate* stressed the need to avoid letting the comparability issue turn on mere "vagaries of draftsmanship[,] clerical considerations[, or] ritualistic

mational or clerical considerations, the legislative history of the 1987 CWA amendments shows that Congress intended each provision in subsection 309(g) to serve a particular function. For example, the penalty assessment criteria in paragraph 309(g)(3) is a "safeguard" that serves "to prevent abuse of the administrative penalty authority, such as significant violators escaping with nominal penalties."²¹⁶ The provisions regarding public notice, opportunity for citizen participation and judicial review serve a dual function.²¹⁷ On the one hand, these provisions help to ensure that citizens are given an alternative, administrative remedy when paragraph 309(g)(6) deprives them of their power to bring citizen suits.²¹⁸ On the other hand, these provisions help to ensure that due process is given to CWA violators before they are deprived of their property interest in the economic gains they garnered from past noncompliance.²¹⁹ Surely, it is absurd to suggest that persons charged with violating the CWA need not be notified of an enforcement action against them because such action is recorded in publicly available documents which they can search on their own initiative. In order to maintain the balance between the rights of CWA violators and the rights of citizen prosecutors that Congress struck when it enacted subsection 309(g), it should be regarded as equally absurd to suggest that public notice of proposed administrative penalty assessments is unnecessary because members of the public may obtain such information by searching through agency records on their own initiative.²²⁰

The requirements of subsection 309(g) are spelled out in greater detail in EPA's proposed and final rules or practice governing the administrative assessment of civil penalties.²²¹ For example, EPA

incantation" 949 F.2d at 559 (Selya, J., concurring).

216. S. REP. NO. 50, *supra* note 172, at 27, reprinted in 1987 *Legislative History*, *supra* note 61, at 1448.

217. Subsection 309(g) "strikes a balance between two competing concerns: the need to avoid placing obstacles in the path of citizen suits and the desire to avoid subjecting violators of the law to dual enforcement actions or penalties for the same violation." *Id.* at 28, 1987 *Legislative History*, *supra* note 61, at 1449.

218. Congress saw citizen suits as "an important component of the Clean Water Act's enforcement system" and did not want the paragraph 309(g)(6) preclusion doctrine to undermine the goal of "vigorous enforcement." See S. REP. NO. 257, 103d Cong. 2d Sess. 79, 90 (1994). The public notice and comment requirement and judicial review provisions help to ensure that vigorous enforcement will not be undermined. See discussion *supra* part II.C.

219. See discussion *supra* part II.C. Due process concerns are also addressed in the preamble to EPA's Rules of Practice Governing the Administrative Assessment of Class II Civil Penalties, 55 Fed. Reg. 23,838, 23,839 (1990), and in the preamble to EPA's proposed Non-APA, Consolidated Rules of Practice for Administrative Assessment of Civil Penalties, 56 Fed. Reg. 29,996, 29,997-98 (1991).

220. Cf. *NRDC v. Vygen*, 803 F. Supp. at 102 (noting that "[p]ublic notice is fundamental to protecting citizen participation in agency decisions").

221. EPA, Rules of Practice Governing the Administrative Assessment of Civil Penalties

proposes eleven elements that must be contained in a public notice, including the names and addresses of all parties, permit numbers, and brief descriptions of the alleged violations, the business activity involved and the procedure by which a member of the public may become a participant in the action.²²² However, while EPA's rules of practice provide a useful model for assessing the comparability of the public notice provisions in a state statute, it would be overly formalistic to expect a state law or regulation regarding public notice to mirror EPA's interpretation exactly in order to be considered comparable. Minor differences between state and federal law can be accommodated by defining comparability under paragraph 309(g)(6) in terms of functional equivalence, and looking to the legislative history and administrative interpretations of subsection 309(g) to ascertain the function that each specific provision in this subsection is intended to serve.

The procedure by which EPA delegates CWA enforcement authority to states provides an appropriate mechanism for ensuring that state laws carry out the same functions that Congress intended each paragraph of subsection 309(g) to serve. Indeed, in his remarks on the 1987 CWA amendments, Senator Chafee stated that "the limitation on Federal civil penalty actions [contained in paragraph 309(g)(6)] clearly applies only in cases where the State in question has been authorized under section 402 to implement the relevant permit program."²²³ Without such authorization, a violation of state law remains separate and distinct from a violation of federal law, and a state enforcement action cannot address a violation of federal law. Because enforcement actions by an unauthorized state cannot address violations of federal law, such actions cannot preclude citizen suits from addressing these violations under the federal CWA.²²⁴

Despite this requirement that states must operate duly authorized NPDES programs in order for administrative penalty assessments under state law to preclude citizen suits, EPA's regulations for delegating CWA enforcement authority to states merely recommends—but does not require—that states "include procedures for the administrative assessment

Under the Clean Water Act, 55 Fed. Reg. 23,838 (1990) (codified at 40 C.F.R. pt. 22); EPA, Proposed Non-APA, Consolidated Rules of Practice for Administrative Assessment of Civil Penalties, 56 Fed. Reg. 29,996 (1991) [hereinafter EPA, Proposed Non-APA Consolidated Rules].

222. EPA, Proposed Non-APA Consolidated Rules, *supra* note 221, at 30,023.

223. 133 CONG. REC. S.737 (daily ed. Jan. 14, 1987), reprinted in 1987 *Legislative History*, *supra* note 61, at 367.

224. *Id.*; see EPA, GUIDANCE ON STATE ACTION PREEMPTION OF CIVIL PENALTY ACTIONS, *supra* note 212, at 3. But see *Scituate*, 949 F.2d at 556 (declining to reach the issue of whether the State of Massachusetts' lack of authorization prevented it from precluding a citizen suit because this issue was not raised by the parties below).

of civil penalties" among their enforcement options.²²⁵ Hence, it is entirely possible for a state program to receive authorization from EPA yet lack an administrative penalty assessment provision under state law that is comparable to subsection 309(g) of the federal CWA. The 103d Congress attempted to correct this anomaly by requiring state programs to contain appropriate authority for assessing administrative civil penalties.²²⁶ However, the same Congress would have created an equally anomalous situation by eliminating the preclusiveness of state administrative penalty actions altogether—and thus providing citizens with an easy way to circumvent the states' newly required administrative penalty authority.²²⁷ A more logical approach would be to reward states that enact laws which are functionally equivalent to subsection 309(g) by giving these states the ability to preclude citizen suits in appropriate circumstances, while withholding this preclusive power from states that do not have a functional equivalent of subsection 309(g).

Underlying the debate about whether states must have delegated authority from EPA in order to preclude citizen suits is a basic issue of federalism: to what extent does, or should, the federal government have the power to dictate the elements of a state water quality program? Some courts answer this question by emphasizing language in the 1977 CWA amendments which purports to give states the primary role in protecting the quality of the nation's waters.²²⁸ Indeed, these courts seem to find it necessary to diminish the role of citizens in CWA enforcement in order to add more primacy to the role of the states. Courts carry out this diminishment of citizen suits by liberally interpreting the comparability language in CWA paragraph 309(g)(6) to allow almost any state action to preclude a citizen suit.²²⁹

This article argues that it is not necessary to resort to such an expansive interpretation of paragraph 309(g)(6) in order to make state law the primary authority under which to enforce the CWA's mandates. Such a goal would be accomplished sooner if more states added citizen suit provisions to their own clean water statutes, so that citizen prosecutors would not have to rely exclusively upon federal law and would not be forced to choose sides in the power struggle between state and federal agencies. Until citizen prosecutors have the option of proceeding under

225. 40 C.F.R. § 123.27 (1994).

226. See S. REP. NO. 257, 103d Cong., 2d Sess. 85 (1994). This new requirement is unlikely to survive the "adequately funded mandates" provisions under consideration in the 104th Congress. See H.R. 961, 104th Cong., 1st Sess. 505 (1995).

227. See S. 2093, 103d Cong., 2d Sess. 503(e)(2) (1994) (proposing to eliminate subparagraphs 309(g)(6)(A)(ii) and (iii) from the CWA).

228. See, e.g., *Scituate*, 949 F.2d at 555; *Remington Arms*, 777 F. Supp. at 177-78 (discussed *supra* part II.B).

229. See *Scituate*, 949 F.2d at 556; *Remington Arms*, 777 F. Supp. at 182.

state law, they must rely on the opportunities for public participation guaranteed by the federal CWA. The purpose of requiring provisions of state law to be functionally equivalent to each paragraph of subsection 309(g) is not to give more power to the federal government, but to protect the rights of individual citizens.

3. Comparability of other federal environmental statutes

Subsection 309(g) does not mention anything about giving preclusive effect to administrative penalty actions taken pursuant to other federal or state environmental statutes such as the Resource Conservation and Recovery Act (RCRA)²³⁰ or the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).²³¹ Nonetheless, some courts have allowed such non-CWA enforcement actions to preclude CWA citizen suits.²³² In *Orange Environment v. County of Orange*, a citizen suit was precluded because the government pursued a multi-media enforcement action against a landfill that was regulated as both a solid waste management facility and a facility that discharges pollutants to waterbodies.²³³ In *Sierra Club v. Colorado Refining Co.*, the court simply supplied its own reasons for precluding the citizen suit where the preclusive government enforcement action did not arise under the CWA and the governmental prosecutor expressly reserved the right to pursue CWA enforcement separately in the future.²³⁴ As a reason for granting a CWA defendant's summary judgment motion despite these facts, the *Colorado Refining* court cited the need to avoid "balkanizing" the enforcement of federal and state environmental statutes where an integrated, multimedia approach seemed more appropriate.²³⁵

Congress is considering the policy arguments in favor of multimedia enforcement as it moves toward reauthorizing the CWA,²³⁶

230. 42 U.S.C. §§ 6901-6992k (1988).

231. 42 U.S.C. §§ 9601-9675 (1988).

232. See *Sierra Club v. Colorado Refining Co.*, 852 F. Supp. 1476, 1481-83 (D. Colo. 1994) (giving preclusive effect to a consent order issued under section 3008(h) of RCRA, 42 U.S.C. § 6928(h), and Colorado's solid waste management statute); *Orange Environment v. County of Orange*, 860 F. Supp. 1003, 1014-15 (S.D.N.Y. 1994) (giving preclusive effect to a series of consent orders that focused on regulating a landfill as a solid waste management facility but also included allegations under the State's water quality statute). But see *Murray v. Bath Iron Works*, 867 F. Supp. 33, 44 (1994) (declining to give preclusive effect to administrative actions relating to the management of a landfill as a hazardous substance site where no action had been undertaken by the State under its clean water legislation).

233. 860 F. Supp. at 1014-15.

234. 852 F. Supp. at 1483.

235. *Id.* The *Colorado Refining* court may have borrowed its argument against "balkanizing" the CWA from the concurring opinion in *Scituate*. See 949 F.2d at 559 (Selya, J., concurring).

236. In its testimony before the 103d Congress, EPA established "multimedia ecosystem

and EPA already has cited some of these policy arguments as a basis for proposing and issuing consolidated rules of practice governing the administrative assessment of civil penalties under several environmental statutes.²³⁷ Nonetheless, the policy arguments in favor of multimedia enforcement cannot erase the significant differences between the CWA and other environmental statutes as they exist now. EPA has acknowledged these significant differences by supplementing its consolidated rules of practice with special rules that only apply to administrative penalty assessments under the CWA.²³⁸

The Ninth Circuit also recognized the differences between the CWA, RCRA, and CERCLA when it concluded that "if Congress had intended to preclude [CWA] 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."²³⁹ Following the Ninth Circuit's reasoning, courts should not allow enforcement actions under RCRA and CERCLA to preclude citizen suits under the CWA because equating these statutes with one another has the effect of erasing the crucial distinction between compliance orders and penalty assessments around which the CWA's enforcement scheme is organized. Such an equation of RCRA and CERCLA enforcement with CWA enforcement is also contrary to the clear language of CWA subsection 309(g), which contains no provision

and geographic enforcement targeting" as one of its three major talking points. *Hearings on S. 1114 and S. 1302 before the Subcomm. on Clean Water, Fisheries and Wildlife of the Senate Comm. on Environment and Public Works*, 103d Cong., 1st Sess. 806 (1993) (statement of Steven A. Herman, EPA Ass't. Administrator for Enforcement). EPA specifically mentioned making the CWA consistent with RCRA with respect to federal facilities enforcement and emergency powers provisions.

237. "Because of [their] similarity to other administrative penalty proceedings subject to the Administrative Procedure Act," EPA's rules of practice for administrative assessment of Class II civil penalties under the CWA share the same basic procedural framework that governs administrative penalty assessments under other environmental statutes. 55 Fed. Reg. 23,838 (codified as amended at 40 C.F.R. pt. 22 (1994)). In its proposed rules for non-APA, Class I administrative civil penalty assessments, EPA "recognizes the advantages, both to the regulated community and to itself, of appropriately consolidating and harmonizing . . . its procedural rules for non-APA enforcement proceedings." 56 Fed. Reg. 29,996, 29,997 (1991).

238. See 40 C.F.R. § 22.38 (1994) (stating the supplemental rules of practice for Class I administrative penalties under the CWA); 56 Fed. Reg. at 29,997 (recognizing "the need for certain distinctions in [the rules of practice for Class II administrative penalties] based upon varying statutory or program requirements"). Specifically, EPA's supplemental rules for administrative penalties under the CWA reflect this statute's unique requirements with respect to consultation with states, public notice, comment by a person who is not a party, judicial review, and petitions to set aside an order and to provide a hearing. 40 C.F.R. § 22.38 (1994).

239. *Washington PIRG v. Pendleton Woolen Mills*, 11 F.3d 883, 886 (9th Cir. 1993) (citing RCRA, 42 U.S.C. § 6972(b)(2)(B)(iv) (1988); CERCLA, 42 U.S.C. § 9659(d)(2) (1988)).

allowing actions under RCRA or CERCLA to preclude citizen suits.²⁴⁰ Hence, with the possible exception of multimedia enforcement actions that assess penalties for CWA violations along with penalties for violations of other environmental statutes, there is no valid basis for concluding that an administrative penalty assessment under a statute other than the CWA (or a comparable state water quality law) can preclude a CWA citizen suit.

B. What actions of a governmental prosecutor are sufficient to commence a preclusive administrative enforcement action?

There usually are several steps that precede a government agency's decision to assess administrative penalties against a CWA violator. For example, such decisions may be preceded by sending a threatening letter to the violator, issuing a non-binding compliance order that does not assess penalties, or calling for a meeting with the violator to discuss the possibility of negotiating a settlement agreement or administrative consent decree. Courts differ on whether any of these pre-enforcement actions can be treated as the commencement of an administrative penalty assessment for the purposes of precluding citizen suits under the CWA.²⁴¹

240. See *id.* at 886 (noting that the most persuasive evidence of congressional intent is the words selected by Congress, "not a court's sense of the general role of citizen suits in enforcement of the [CWA]").

241. Compare *Sierra Club v. Colorado Refining Co.*, 852 F. Supp. 1476, 1485 (D. Colo. 1994) (holding that a form letter sent by a State agency to a CWA violator commenced an administrative penalty assessment) with *Molokai Chamber of Commerce v. Kukui (Molokai), Inc.*, No. CIV 94-00530 DAE, 1995 WL 368712, at *16 (D. Haw. May 23, 1995) ("Commencement of an action for penalties is not signalled by a letter stating that penalties may be sought under a separate statutory section, particularly where [the agency] has taken no further steps toward the imposition of penalties") and *Tobyhanna Conservation Ass'n v. Country Place Waste Treatment Co.*, 734 F. Supp. 667, 669-70 (M.D. Pa. 1989) (holding that an administrative penalty action was not commenced by "an unsigned letter from [a State agency] setting an Administrative Conference out of which no order issued assessing a civil penalty, and in which no hearing was held subject to the terms of [CWA] § 1319(g)(3), and for which no public notice was provided to interested persons . . ."); see also *PIRG of New Jersey v. ELF Atochem*, 817 F. Supp. 1164, 1172-73 (D.N.J. 1993) (one in a series of periodic inspection reports did not commence an administrative penalty assessment); *PIRG of New Jersey v. New Jersey Expressway Auth.*, 822 F. Supp. 174, 184 n.13 (D.N.J. 1993) (a proposed memorandum of understanding and cover letter did not commence an administrative penalty action); *Connecticut Fund for the Environment v. Acme Electro-Plating*, 822 F. Supp. 57, 61 (D. Conn. 1993) (an appeal of a permit application was not an enforcement proceeding and therefore did not bar a citizen suit); *Friends of Santa Fe County v. Lac Minerals, Inc.*, No. CIV 94-0569JB/LH/DJS, 1995 WL 428414, at *10 (D.N.M. July 12, 1995) (refusing to "pigeonhole" the permit renewal and application process into the paragraph 309(g)(6) bar on citizen suits).

While the statute does not explicitly define what it means to "commence" an administrative penalty assessment, EPA's rules of practice effectively fill this important gap in the statute by offering a relatively clear definition of when an administrative penalty assessment is "initiated."²⁴² According to EPA procedures, an action to assess administrative penalties under the CWA is initiated by filing an administrative complaint with a regional hearing clerk, serving the complaint on a respondent, and providing public notice of its service.²⁴³ An administrative complaint for the assessment of a civil penalty is a document that includes:

- (1) A statement reciting the section(s) of the Act authorizing the issuance of the complaint;
- (2) Specific reference to each provision of the Act and implementing regulations which respondent is alleged to have violated;
- (3) A concise statement of the factual basis for alleging the violation;
- (4) The amount of the civil penalty which is proposed to be assessed;
- (5) A statement explaining the reasoning behind the proposed penalty;
- (6) Notice of respondent's right to request a hearing on any material fact contained in the complaint, or on the appropriateness of the amount of the proposed penalty.²⁴⁴

This definition of an administrative complaint—and the procedures by which such complaints are filed, served and public noticed—do not contemplate that an administrative penalty assessment will be commenced by informal activities such as sending a threatening letter that lists some permit violations or requesting a meeting with a violator to discuss settlement. Rather, EPA's rules of practice set up a procedural framework that is analogous in many respects to the Federal Rules of Civil Procedure.²⁴⁵ Just like a judicial enforcement action, an administrative penalty assessment is commenced by filing a specific type of pleading with a clerk and formally serving this pleading on the respondent. The major difference between an administrative complaint and a

242. EPA, Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation and Suspension of Permits, 40 C.F.R. §§ 22.13, 22.14 (1994); EPA, Proposed Non-APA, Consolidated Rules of Practice for Administrative Assessment of Civil Penalties, 56 Fed. Reg. 29,996, 30,008-10 (1991) (to be codified at 40 C.F.R. § 28.16) (proposed July 1, 1991).

243. 40 C.F.R. §§ 22.05, 22.13; 56 Fed. Reg. at 30,008.

244. 40 C.F.R. § 22.14; cf. 56 Fed. Reg. at 30,021 (to be codified at 40 C.F.R. § 28.2(a)).

245. In its proposed, non-APA rules of practice, EPA acknowledges that it "treats the administrative complaint as analogous to a judicial complaint filed in United States district court." 56 Fed. Reg. at 30,008.

judicial complaint is that the former must be public noticed to comply with subparagraph 309(g)(4)(A) of the CWA.²⁴⁶

This article argues that an administrative penalty action has not been commenced until an administrative complaint has been filed and served and the public notified. While there is room for debate about whether the timing of an administrative penalty action should be calculated from the date of filing, service, or publication, an administrative penalty assessment unquestionably cannot commence prior to the date on which a document fitting the definition of an administrative complaint is filed with an official responsible for keeping a publicly available administrative record, and this filing date may be rendered invalid if the agency fails to complete the service of process and public notice requirements in a timely manner. Under this standard—and the EPA rules of practice on which it is premised—pre-enforcement activities such as threatening letters, administrative compliance orders, and meetings with the violator do not commence administrative penalty assessments under the CWA. Hence, these activities cannot preclude citizen suits.

EPA's interpretation of when an administrative penalty assessment is commenced under the CWA is "a reasonable choice within a gap left open by Congress."²⁴⁷ As such, courts should defer to this interpretation rather than simply imposing their own construction on the statute.²⁴⁸ However, if courts are forced to impose their own construction—as they might be in a case calling for an interpretation of a state law that purports to be functionally equivalent to CWA subsection 309(g) with respect to the commencement of an administrative penalty action—then such constructions should not conflict with the language of subsection 309(g) and the structure of the CWA's enforcement scheme.

The "single ongoing action" theory advanced by the Eighth Circuit in *Arkansas Wildlife Fed. v. ICI Americas, Inc.*, is an example of a judicial construction that squarely conflicts with language of subsection 309(g) and the structure of the CWA's enforcement scheme.²⁴⁹ According to this theory, two or more state enforcement actions against a particular polluter may merge into the same, ongoing action. This merger

246. See 33 U.S.C. § 1319(g)(4)(A); 40 C.F.R. § 22.38(c); 56 Fed. Reg. at 30,010 (to be codified at 40 C.F.R. § 28.16(d)).

247. See *Chevron v. NRDC*, 467 U.S. 837, 843 (1984) (deferring to EPA's interpretation of section 172(b)(6) of the Clean Air Act, 42 U.S.C. § 7502(b)(6)).

248. *Id.*; see also *Citizens for a Better Environment v. Union Oil Co. of Cal.*, 861 F. Supp. 889, 907 n.12 (N.D. Cal. 1994) (treating EPA's interpretation of CWA subsection 309(g) as persuasive authority and noting that it was unnecessary to reach the *Chevron* issue because legislative intent was evident in the statute's text and structure).

249. 29 F.3d 376, 378 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1094 (1995).

enables courts to treat later state enforcement actions as if they were commenced on the same date as earlier state enforcement actions. As a result, the state's later enforcement actions may respond to and preclude earlier citizen suits by merging with agency actions that preceded notice of the citizen suit.²⁵⁰

The single ongoing action theory defeats the public notice requirements of CWA subsection 309(g) because it allows administrative agencies to add new violations or withdraw penalties from an existing, administrative enforcement action without notifying the public of these changes. To the extent that the single ongoing action theory allows courts to merge administrative compliance orders with subsequent penalty assessments, it also destroys a central distinction in the CWA's enforcement scheme. Congress intended compliance orders and penalty assessments to serve two different functions.²⁵¹ Because of their different functions, the power to preclude citizen suits was extended only to penalty assessments. Courts that treat compliance orders as if they commenced penalty assessments are in direct conflict with the statutory scheme that Congress designed.

To help courts resolve this conflict, Congress should amend subsection 309(g) to clarify that the preclusive effect of an administrative penalty assessment under the CWA extends only to the violations which are included in the public notice that accompanies the filing and service of the administrative complaint. EPA should also change its rules of practice to prevent pleading amendments from defeating the public notice provisions of subparagraph 309(g)(4)(A). In fairness to defendants, however, the same rules should also apply to citizen suits.²⁵² If a citizen

250. In *Arkansas Wildlife Fed. v. ICI Americas*, 29 F.3d at 378, a state agency precluded a citizen suit by subsequently issuing a "corrected" administrative order that purported to cover violations which were not alleged in an earlier administrative order predating the citizen suit. The "single ongoing action" theory was extended to pre-enforcement actions in *Sierra Club v. Colorado Refining Co.*, 852 F. Supp. at 1485, in which the court precluded a citizen suit by merging an agency's cease and desist order with a threatening letter issued prior to the date on which notice of the citizen suit was given. However, at least one court has declined to follow the "single ongoing action" theory, holding that a prior enforcement proceeding was concluded upon entry of a stipulated judgment and therefore did not preclude a subsequent citizen suit alleging violations not covered by the prior judgment. See *Connecticut Fund v. Acme Electro-Plating*, 822 F. Supp. 57, 60 (D. Conn. 1993).

251. See discussion *supra* part III.A.1.

252. In some respects, EPA's rules regarding commencement of citizen suits are already stricter than the rules of practice governing administrative penalty actions. For example, citizens are required to serve their notices of intent to sue on both state and federal agencies as well as defendants. 40 C.F.R. § 135.2 (1994). EPA fashioned this requirement in response to the concern that "service of notices of [intent to sue] may have consequences as to whether or not a citizen penalty suit is barred by a government administrative penalty action." 54 Fed. Reg. 36,020 (1989) (to be codified at 40 C.F.R. pt. 135). However, the effect

gives notice of her intent to sue for a certain set of CWA violations and an agency subsequently commences an administrative penalty action for a separate set of violations, then the citizen should not be permitted to amend her notice to cover the violations alleged in the agency's administrative penalty action and thereby escape the preclusive effect of paragraph 309(g)(6) with respect to those allegations.

Even under this approach, courts still may be confronted with parallel administrative and judicial proceedings in some instances. In these instances, courts should not consider parallel proceedings so unacceptable that a citizen suit must be precluded at all costs.²⁵³ Rather, courts should look for less drastic methods of mitigating the potential risks and inefficiencies of parallel proceedings. For example, courts might invoke the doctrine of primary jurisdiction²⁵⁴ and stay the judicial proceedings pending the agency's review of the violations to which the citizen suit does not apply.²⁵⁵

C. What makes a governmental agency's prosecution diligent enough to warrant preclusion of a citizen suit?

Although an administrative penalty action must be "diligently prosecuted" in order to preclude a citizen suit under paragraph 309(g)(6),²⁵⁶ the CWA does not define what it means to diligently prosecute an administrative penalty action. Despite the lack of a statutory definition, courts generally agree that agency prosecution of administra-

on citizen suits of agency compliance with EPA's rules of practice regarding public notice of administrative penalty actions has not received a similar degree of attention.

253. See *Arkansas Wildlife Fed. v. Bekaert Corp.*, 791 F. Supp. 769, 775 (W.D. Ark. 1992) ("Congress has not provided that citizen suits are barred . . . simply because there may be some duplication with a government proceeding."); *New Jersey PIRG v. Yates Industries*, 757 F. Supp. 438, 444-45 (D.N.J. 1991) ("Congress was presumably aware of the risks and inefficiencies of parallel actions when it drafted § 1319(g)(6)(B) and determined that some duplication is acceptable.").

254. For a general discussion of this doctrine, see 2 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 14 (3d ed. 1994).

255. Cf. *Coalition for a Livable Westside v. New York City Dep't of Env'tl. Protection*, 830 F. Supp. 194, 197 (S.D.N.Y. 1993) (noting that a stay may be appropriate to give the agency the opportunity to demonstrate that it is diligently prosecuting its administrative action). But cf. *PIRG of New Jersey v. Witco Chem. Corp.*, No. 89-3146, 31 Env't Rep. Cas. (BNA) 1571, 1578 (D.N.J. 1990) (denying defendant's motion for a stay "in light of the serious charges of ongoing violations and because the [CWA] anticipates duplicate proceedings by permitting simultaneous litigation and penalty assessments").

256. 33 U.S.C. §§ 1319(g)(6)(A)(i), (ii). The only exception to the diligent prosecution requirement applies to violations "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 [a] comparable State law . . ." *Id.* § 1319(g)(6)(A)-(iii).

tive penalty actions should enjoy a presumption of diligence.²⁵⁷ Differences arise, however, when courts must consider the issue of what an agency must do to invoke the presumption of diligence,²⁵⁸ or what a citizen prosecutor must do to rebut this presumption.²⁵⁹

This article argues there can be no presumption that an agency is "diligently prosecuting" until the agency properly has commenced an administrative penalty action under subsection 309(g) or a comparable state law. This conclusion follows from the plain language of the statute.²⁶⁰ Paragraph 309(g)(6) only precludes citizens from suing over violations "with respect to which the Administrator [or a State] has commenced and is diligently prosecuting an action under this subsection [or] under a State law comparable to this subsection . . .".²⁶¹ Because the word "commenced" is in the past tense while the word "prosecuting" is in the present tense, the question of whether an administrative penalty action has been commenced is both logically and temporally prior to the issue of diligent prosecution.²⁶² Hence, before reaching the issue of

257. See, e.g., *Arkansas Wildlife Fed. v. ICI Americas*, 29 F.3d 376, 380 (8th Cir. 1994) (citing *North & South Rivers Watershed Ass'n v. Town of Scituate*, 949 F.2d 552, 557 (1st Cir. 1991)) *cert. denied*, 115 S. Ct. 1094 (1995); *Orange Environment v. County of Orange*, 860 F. Supp. 1003, 1017 (S.D.N.Y. 1994); *Connecticut Coastal Fishermen's Ass'n v. Remington Arms Inc.*, 777 F. Supp. 173, 183-86 (D. Conn. 1991), *aff'd in part, rev'd in part*, 989 F.2d 1305 (2nd Cir. 1993).

258. Compare *Scituate*, 949 F.2d at 557 (allowing prosecution of a state administrative order to enjoy a presumption of diligence even though it did not purport to assess penalties) with *Washington PIRG v. Pendleton Woolen Mills*, 11 F.3d 883, 886-87 (9th Cir. 1993) (holding that the CWA does not "bar citizen suits when EPA is pursuing an administrative compliance order" rather than an administrative penalty assessment).

259. Compare *Arkansas Wildlife Fed. v. ICI Americas*, 29 F.3d at 380 (holding that a state's prosecution was diligent despite plaintiff's arguments that the state "abandoned nearly all of its enforcement powers, failed to address ICI's violations, gave ICI repeated extensions for compliance, and assessed insignificant amounts of civil penalties in comparison to the amounts of ICI's economic benefit") and *Orange Environment*, 860 F. Supp. at 1017 (noting that "the standard for evaluating the diligence of the state in enforcing its action is a low one") with *New York Coastal Fishermen's Ass'n v. New York Dep't of Sanitation*, 772 F. Supp. 162, 168 (S.D.N.Y. 1991) (holding that state's prosecution was not diligent because of repeated delays extending over a twelve year period) and *Atlantic States Legal Found. v. Universal Tool & Stamping Co.*, 735 F. Supp. 1404, 1416-17 (N.D. Ind. 1990) (holding that state's prosecution was not diligent because the Defendant admitted that the state's administrative proceeding had little effect upon compliance, the state approved Defendant's proposal for an interlocutory consent decree in one day, Defendant continued to violate its permit long after the administrative proceeding was commenced, and the penalty assessed by the state was too lenient).

260. See *Pendleton Woolen Mills*, 11 F.3d at 886-87.

261. 33 U.S.C. §§ 1319(g)(6)(A)(i), (ii) (emphasis added).

262. Cf. *New Jersey PIRG v. GAF Corp.*, 770 F. Supp. 943, 949 (D.N.J. 1991) (noting the distinction between the present tense in § 309(g)(6)(A)(ii) and the past tense in § 309(g)(6)(A)(iii)).

diligent prosecution, courts should complete their inquiries concerning whether the agency action at issue is an administrative penalty action under subsection 309(g) or a comparable state law, and if so, whether that action has been commenced properly under EPA's rules of practice or comparable state rules.

Failure to complete these threshold inquiries may result in a premature, confusing and often unnecessary analysis of the diligent prosecution issue. Such an analysis is especially confusing and unnecessary when an agency is diligently prosecuting some kind of administrative action, but that action is not an administrative penalty action under subsection 309(g) or a comparable state law. For example, an agency may issue one or more administrative compliance orders and not assess a penalty. In this situation, the mere fact that an agency chooses to forego the assessment of a penalty does not necessarily rebut the presumption that the administrative compliance order is being diligently prosecuted.²⁶³ Thus, a court may find that an agency is diligently prosecuting an administrative compliance order even though a penalty never has been assessed.²⁶⁴

For two reasons, however, courts err as a matter of law when they preclude citizen suits on the basis of such findings. First, administrative compliance orders under subsection 309(a) of the CWA are not reviewable by the courts,²⁶⁵ so courts have no role in determining whether such orders are being diligently prosecuted. Second, and more importantly, the preclusion doctrine in CWA paragraph 309(g)(6) does not apply to administrative compliance orders in the first place.²⁶⁶ Hence, it is irrelevant whether an administrative compliance order is being diligently prosecuted. Only the diligent prosecution of an administrative penalty assessment under subsection 309(g) or a comparable state law has the potential to preclude a citizen suit.

If an agency properly has commenced an administrative penalty action under subsection 309(g) or a comparable state law, then courts should presume that such action is being diligently prosecuted. However, since one of the main purposes of the CWA's citizen suit provisions is to curb the abuses caused by an over-reliance on traditional notions of

263. See, e.g., *Sierra Club v. Colorado Refining Co.*, 852 F. Supp. 1476, 1484 (D. Colo. 1994).

264. E.g., *Scituate*, 949 F.2d at 557; *Colorado Refining*, 852 F. Supp. at 1484.

265. *Laguna Gatuna, Inc. v. Browner*, 58 F.3d 564, 565 (10th Cir. 1995); *Southern Ohio Coal Co. v. Office of Surface Min., Reclamation & Enforcement*, 20 F.3d 1418, 1426-27 (6th Cir. 1994); *Southern Pines Associates v. United States*, 912 F.2d 713, 715-16 (4th Cir. 1990); *Hoffman Group, Inc. v. EPA*, 902 F.2d 567, 569 (7th Cir. 1990).

266. The distinction between compliance orders and penalty assessments is discussed *supra* part III.A.1.

prosecutorial discretion,²⁶⁷ a presumption of diligent prosecution cannot arise from these notions alone. Instead, this presumption should arise from a different but related doctrine of administrative law—the exhaustion of administrative remedies.

Unlike the case of administrative compliance orders—which are essentially unreviewable—subsection 309(g) provides citizens with a potential administrative remedy for an agency's lack of diligent prosecution. Citizens may comment on a proposed penalty assessment,²⁶⁸ petition for a hearing,²⁶⁹ and seek judicial review of a final penalty assessment on the grounds that it fails to meet the penalty assessment criteria listed in paragraph 309(g)(3).²⁷⁰ These public participation mechanisms allow citizens to challenge an agency's lax handling of a penalty assessment directly, instead of mounting a collateral attack in the form of a citizen suit. In accordance with the traditional doctrine that plaintiffs must exhaust administrative remedies before filing suit,²⁷¹ courts usually should expect citizens to utilize the public participation mechanisms provided in subsection 309(g) before raising the diligent prosecution issue in court. If citizens fail to attack an agency's lax enforcement through the public participation mechanisms in subsection 309(g), then courts should presume that the agency's prosecution of an administrative penalty action is diligent.

EPA has issued a policy statement which provides useful guidance on how to rebut the presumption of diligent prosecution. According to this policy statement, prosecution is diligent when it "effectively cause[s] the violator to comply with the federal or state clean water statute," and when "the penalty assessed in the [administrative penalty] action [is] sufficient"²⁷² Under these criteria, citizens may rebut a presumption of diligence by showing that violations continued long after an agency commenced its prosecution under subsection 309(g) or a comparable state law,²⁷³ or by showing that the penalty assessed is "wholly inadequate to redress the number and severity of violations"²⁷⁴

267. See the discussion of the legislative history of the citizen suit provisions *supra* part II.A.

268. 33 U.S.C. § 1319(g)(4)(A).

269. *Id.* § 1319(g)(4)(C).

270. *Id.* § 1319(g)(8).

271. For a general discussion of this doctrine, see 2 DAVIS & PIERCE, *supra* note 254, § 15.

272. EPA, SUPPLEMENTAL GUIDANCE ON SECTION 309(G)(6)(A) OF THE CLEAN WATER ACT 3-4 (Mar. 5, 1993).

273. *Id.* at 3 (citing *Universal Tool*, 735 F. Supp. at 1416-17; *New York Dep't of Sanitation*, 772 F. Supp. at 168).

274. *Id.* at 4 (citing *Universal Tool*, 735 F. Supp. at 1417). Cf. *Friends of the Earth v. Laidlaw Envtl. Services*, No. C/A 3:92-1697-17, 1995 WL 311983, at *24-25 (D.S.C. Apr. 7,

Both of EPA's diligence criteria accord with the legislative history of the 1987 CWA amendments. Congress intended administrative penalty assessments "to address past, rather than continuing violations [that] are clearly documented and easily corrected and will likely be uncontested by the violator."²⁷⁵ Court-ordered injunctive relief is a more appropriate remedy for addressing continuing violations, and Congress did not intend to preclude citizens from suing for injunctive relief when an administrative penalty action fails to bring the violator into compliance.²⁷⁶ Moreover, since the "major reason" for assessing administrative penalties under the CWA is "to deprive a violator of any economic advantage from non-compliance[.]"²⁷⁷ an administrative penalty that is wholly inadequate to address the number and severity of violations cannot be regarded as an instance of diligent prosecution. Such a penalty is unlikely to conform to the penalty assessment criteria²⁷⁸ that Congress included in subsection 309(g) "to prevent abuse of the administrative penalty authority, such as significant violators escaping with nominal penalties."²⁷⁹

Traditional exceptions to the exhaustion of administrative remedies doctrine also provide useful guideposts for measuring whether the presumption of diligent prosecution has been rebutted.²⁸⁰ For example, citizens should be able to rebut a presumption of diligence by showing an unreasonable delay in prosecution, an immediate threat to public health which outweighs the harm to the administrative process caused by judicial intervention, or a major procedural flaw in the agency's prosecution, such as a failure to provide public notice of a proposed penalty assessment. If citizens successfully make such showings, then they should not be precluded from litigating a citizen suit under the CWA.

1995) (State's failure to calculate economic benefit of noncompliance is evidence of non-diligent prosecution).

275. S. REP. NO. 50, 99th Cong., 1st Sess. 26-27 (1985), reprinted in 1987 *Legislative History*, *supra* note 61, at 1447-48.

276. Paragraph 309(g)(6) only precludes citizens from bringing "civil penalty actions" in court. 33 U.S.C. § 1319(g)(6)(A). Citizen suits for injunctive relief are not precluded by paragraph 309(g)(6). See discussion *infra* part III.D.

277. *Amending the Clean Water Act: Hearings on S. 53 and S. 652 before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment and Public Works*, 99th Cong., 1st Sess. 57 (1985), reprinted in 1987 *Legislative History*, *supra* note 61, at 1695 (responses of Jack E. Ravan, EPA Ass't Administrator for Water, to additional questions propounded by Sen. Mitchell).

278. See 33 U.S.C. § 1319(g)(3).

279. S. REP. NO. 50, 99th Cong., 1st Sess. 27 (1985), reprinted in 1987 *Legislative History*, *supra* note 61, at 1448.

280. For a general discussion of these exceptions, see 2 DAVIS & PIERCE, *supra* note 254, § 15.

Finally, the fact that an agency enters into a settlement or consent decree with a violator should not in and of itself rebut the presumption of diligent prosecution.²⁸¹ If an administrative penalty action properly is commenced under subsection 309(g) or a comparable state law, then EPA's (or a state agency's) rules of practice should provide mechanisms for ensuring that the public may scrutinize a proposed settlement before it is finalized and seek judicial review of the settlement if it is incorporated in a final order.²⁸² These mechanisms should render the settlement no different than any other administrative penalty assessment with respect to public participation and opportunity for judicial review. However, if agency regulations do not provide adequate public participation mechanisms, or if an out-of-court settlement is finalized prior to the commencement of an administrative penalty action, then the settlement agreement cannot qualify as an action under subsection 309(g) or a comparable state law.²⁸³ Consequently, such a settlement agreement can have no preclusive effect on citizen suits, and it is irrelevant whether the settlement was the result of diligent prosecution.

281. See *Arkansas Wildlife Fed. v. ICI Americas*, 29 F.3d at 380 (noting that "[i]t would be unreasonable and inappropriate to find failure to diligently prosecute simply because . . . a compromise was reached"); *Remington Arms*, 777 F. Supp. at 183 (presuming diligence unless prosecution is shown to be "dilatatory, collusive or otherwise in bad faith").

282. EPA's rules of practice governing Class II penalties prevent the agency from settling an administrative penalty action without a consent order from the Regional Administrator. 40 C.F.R. § 22.18(c) (1994). The Administrator is required to give notice of the final consent order to any person who comments on the administrative complaint. *Id.* § 22.38(c). Commenters may then seek judicial review of this final order under CWA subsection 309(g)(8). 33 U.S.C. § 1319(g)(8). EPA's proposed rules for assessing Class I penalties contain additional requirements. See 56 Fed. Reg. 29,996, 30,013-14, 30,028-29 (1991) (to be codified at 40 C.F.R. § 28.22). For example, the Regional Administrator cannot issue a consent order approving a proposed settlement until the thirty-day public comment period has elapsed, the Regional Administrator must consider all public comments before issuing the consent order, and the signatories to the proposed settlement must serve each public commenter with a copy of their proposed settlement. *Id.*

283. Cf. *Citizens for a Better Environment v. Union Oil Co. of Cal.*, 861 F. Supp. 889, 904-05 (N.D. Cal. 1994) (holding that a settlement agreement did not constitute an exercise of a state agency's authority under a provision of state law providing for imposition of administrative penalties); *New Jersey PIRG v. New Jersey Expressway Auth.*, 822 F. Supp. 174, 184 (D.N.J. 1992) (holding that no state administrative enforcement action was ever formally commenced despite a pre-existing memorandum of understanding between the State and the violator); *New Jersey PIRG v. Witco Chemical Corp.*, No. 89-3146, 31 Env't Rep. Cas. (BNA) 1571, 1575 (D.N.J. 1990) (holding that continued monitoring of a pre-existing consent decree did not constitute diligent prosecution of an administrative penalty action).

D. What remedies should an administrative enforcement action preclude citizens from seeking in subsequent litigation?

Even if an administrative penalty action has been commenced and is being diligently prosecuted, courts still should address the issue of whether such action bars a citizen suit in its entirety. The citizen suit provisions in subsection 505(a) of the CWA allow citizens to seek injunctive relief as well as civil penalties.²⁸⁴ Paragraph 309(g)(6), however, only purports to preclude citizens from filing "civil penalty actions" after an agency has commenced and is diligently prosecuting an administrative penalty action.²⁸⁵ Injunctive relief is not mentioned in paragraph 309(g)(6).

Courts disagree about whether the reference to "civil penalty actions" in paragraph 309(g)(6) means that administrative penalty actions do not preclude citizens suits for injunctive relief.²⁸⁶ At the level of statutory interpretation, the disagreement arises from differences between the CWA's governmental enforcement provisions in section 309 and the citizen suit provisions in section 505. At the level of public policy, the disagreement arises from different assumptions about the role that citizen prosecutors should play in enforcing the CWA. Both as a matter of statutory interpretation and as a matter of public policy, this article argues that administrative penalty actions should not preclude citizens from filing suit for injunctive relief, provided, of course, that citizens can allege in good faith that there are continuing or intermittent violations for a court to enjoin.

As the Supreme Court has noted, the governmental enforcement provisions in section 309 of the CWA and the citizen suit provisions in section 505 are structured differently.²⁸⁷ In section 309, civil penalties

284. 33 U.S.C. § 1365(a).

285. 33 U.S.C. § 1319(g)(6)(A).

286. In *Scituate*, the First Circuit reasoned that the plain language of the statute would lead to an absurd result and consequently held that an administrative order precluded a citizen suit for injunctive relief. 949 F.2d 552, 558 (1st Cir. 1991). A district court in New York subsequently found "no basis for the First Circuit's redrafting of the statute" and held that an administrative order did not preclude a citizen's group from seeking injunctive relief. *Coalition for a Livable West Side v. New York City Dep't of Env'tl. Protection*, 830 F. Supp. 194, 197 (S.D.N.Y. 1993). The Eighth Circuit took note of the debate between the First Circuit and the New York court, but still held that an administrative order precluded a citizen's suit for injunctive relief in spite of the plain statutory language to the contrary. *Arkansas Wildlife Fed. v. ICI Americas, Inc.*, 29 F.3d 376, 382-83 (8th Cir. 1994) *cert. denied*, 115 S. Ct. 1094 (1995). A subsequent decision of the New York court maintained that an administrative order did not bar a citizen suit for injunctive relief because of the plain language of the statute and the "equities of the situation." *Orange Environment v. County of Orange*, 860 F. Supp. 1003, 1018 (S.D.N.Y. 1994).

287. See *Gwaltney of Smithfield v. Chesapeake Bay Found.*, 484 U.S. 49, 58 (1987) (quoting

and injunctive relief each are authorized in distinct, independent subsections.²⁸⁸ Hence, any limitations which apply to the subsections authorizing civil penalties do not necessarily apply to the subsections authorizing injunctive relief. The citizen suit provisions, on the other hand, refer to both civil penalties and injunctive relief in the same sentence of the same subsection.²⁸⁹ Consequently, some courts argue that injunctive relief and civil penalties are so closely connected in the citizen suit provisions that any limitations which apply to one form of relief must also apply to the other.²⁹⁰ If there is such a close connection, then a provision precluding citizens from seeking civil penalties may also preclude citizens from seeking injunctive relief.

While this structural argument may seem plausible, it conflicts sharply with the plain language of the statute and its legislative history. Paragraph 309(g)(6) refers to the citizen suit provisions in section 505, but it also limits the preclusiveness of administrative penalty assessments to "civil penalty actions" under section 505.²⁹¹ If Congress had intended administrative penalty assessments under subsection 309(g) to preclude all actions which arise under the CWA's citizen suit provisions, including those seeking injunctive relief, then it would not have placed the words "civil penalty" before the word "actions." Congressional intent to limit the preclusiveness of subsection 309(g) to civil penalty actions is also evident in the conference committee report on the 1987 CWA amendments, which reads:

No one may bring an action to recover civil penalties under section . . . 505 of this Act for any violation with respect to which the Administrator has commenced and is diligently prosecuting an administrative civil penalty action, or for which the Administrator has issued a final order not subject to further judicial review (and for which the violator has paid the penalty). This limitation applies only to an action for civil penalties for the same violations which are the subject of the administrative civil penalties proceeding. *[T]his limitation would*

Tull v. United States, 481 U.S. 412, 425 (1987)).

288. Civil penalties are authorized in subsections 309(d) and 309(g). 33 U.S.C. §§ 1319(b), (g). Injunctive relief is authorized in subsections 309(a) and 309(b). 33 U.S.C. §§ 1319(a), (b).

289. Subsection 505(a) authorizes citizens to sue "to enforce . . . an effluent standard or limitation, or . . . an [administrative] order, or to order the Administrator to perform [a nondiscretionary] act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title." 33 U.S.C. § 1365(a).

290. See, e.g., *Scituate*, 949 F.2d at 557-58 (citing *Gwaltney*, 484 U.S. at 58).

291. Paragraph 309(g)(6)(A) states that the violations covered by an administrative penalty action that has been commenced and is being diligently prosecuted "shall not be the subject of a civil penalty action under . . . section 1365 of this title." 33 U.S.C. § 1319(g)(6)(A). Section 1365 contains the CWA's citizen suit provisions. See *id.* § 1365.

not apply to: 1) an action seeking relief other than civil penalties (e.g., an injunction or declaratory judgment)²⁹²

In order to find that an administrative proceeding precludes a citizen suit for injunctive relief, courts must ignore this clear expression of congressional intent and, in effect, redraft the statutory language so that it conforms to their findings.²⁹³

To justify such a redrafting of the statute, courts dismiss the language that Congress chose as irrational or leading to an absurd result.²⁹⁴ In particular, courts do not like the result that Congress intended because they feel it fails to give sufficient deference to governmental prosecutors. In *Scituate*, for example, the First Circuit noted that the CWA accorded "a high degree of deference [to] analogous and diligently enforced governmental action[.]" and, on this basis, found it "inconceivable . . . that the [sub]section 309(g) ban is only meant to extend to civil penalty actions."²⁹⁵ In *Arkansas Wildlife Fed. v. ICI Americas*, the Eighth Circuit likewise found it "unreasonable" to allow citizen suits for injunctive and declaratory relief to proceed "despite a state's diligent efforts at administrative enforcement"²⁹⁶ The Eighth Circuit based this conclusion on the concern that a citizen suit for declaratory and injunctive relief "could result in undue interference with, or unnecessary duplication of, the legitimate efforts of the state agency [and] would undermine, rather than promote, the goals of the CWA. . . ."²⁹⁷

This article argues that both the First and Eighth Circuit's deference to governmental prosecutors is misplaced. While courts should leave some room for prosecutorial discretion in their analysis of whether an agency is diligently prosecuting an administrative penalty action, such deference need not extend to the issue of remedies. In *Orange Environment v. County of Orange*, for example, the court accorded a high degree of

292. H.R. CONF. REP. NO. 1004, 99th Cong., 2d Sess. 133 (1986), reprinted in 1987 *Legislative History*, supra note 61, at 822 (emphasis added); see also S. REP. NO. 50, 99th Cong., 1st Sess. 26 (1985), reprinted in 1987 *Legislative History*, supra note 61, at 1447 ("Civil judicial enforcement is . . . necessary for . . . cases requiring injunctive relief.").

293. The accusation that the First Circuit redrafted the statute to reach its holding in *Scituate* was raised in *Coalition for a Livable West Side*, 830 F. Supp. at 197.

294. See *Arkansas Wildlife Fed. v. ICI Americas*, 29 F.3d at 382-83; *Scituate*, 949 F.2d at 557-58.

295. 949 F.2d at 558. The *Scituate* court based its reasoning on the language in *Gwaltney* which gave citizens only a narrow, supplementary role in CWA enforcement. *Id.* (citing *Gwaltney*, 484 U.S. at 60). The role of citizens in CWA enforcement is discussed supra part III.A.1.

296. 29 F.3d at 383.

297. *Id.*

deference to governmental prosecutors in its analysis of the diligent prosecution issue,²⁹⁸ but held that a citizen suit for injunctive relief was not precluded.²⁹⁹ In reaching this conclusion, the *Orange Environment* court looked to both the plain language of the statute—which is more explicit on the issue of remedies than it is with regard to diligent prosecution—and the "equities of the situation."³⁰⁰ The equities favored the citizen plaintiffs because, despite its diligent prosecution of an administrative penalty action to address past violations, the State failed to stop the defendant from continuing to violate the CWA. This failure "spurred the [citizen] plaintiffs' suit for declaratory and injunctive relief[,] and "arguably a good deal of progress that ha[d] been made . . . may have resulted from the plaintiffs' suit."³⁰¹

The approach taken by the *Orange Environment* court does not unduly interfere with, or unnecessarily duplicate, an agency's diligent prosecution of an administrative penalty action for one simple reason: administrative penalty actions only address past violations,³⁰² while citizen suits for injunctive relief seek to enjoin a defendant from violating the CWA again in the future.³⁰³ Hence, administrative penalty actions and citizen suits for injunctive relief do not address the same set of violations. To the extent that a citizen suit addresses a different set of violations than an administrative penalty action, a citizen suit does not duplicate or encroach upon such an administrative action.

In order for a citizen suit for injunctive relief to duplicate or unduly interfere with an agency's enforcement efforts, the agency must be involved in an enforcement action that goes beyond the scope of an administrative penalty action under subsection 309(g) or a comparable state law. For example, the agency may commence an administrative penalty assessment under subsection 309(g) to recover penalties for past violations and, at the same time, issue an administrative compliance order under subsection 309(a) to prompt the violator to install the equipment necessary to eliminate future violations by a specified date. In such a situation, the preclusive effect of paragraph 309(g)(6) extends only as far as the civil penalties recovered for past violations.³⁰⁴ Paragraph

298. The court noted that "the standard for evaluating the diligence of the state in enforcing its action is a low one which requires due deference to the state's plan of attack" 860 F. Supp. at 1017.

299. *Id.* at 1018.

300. *Id.*

301. *Id.* at 1018-19.

302. Subsection 309(g) only authorizes administrative penalty actions against a person who "has violated" the CWA. 33 U.S.C. § 1319(g)(1). For a more detailed explication of this point, see the discussion *supra* part III.A.1.

303. See 33 U.S.C. § 1365(a).

304. For a discussion of the distinction between administrative compliance orders and

309(g)(6) does not apply to the prospective remedies that typically are requested in administrative compliance orders, since such prospective remedies and the costs incurred in meeting them are not "administrative penalties" under subsection 309(g).³⁰⁵ Hence, defendants must look for other grounds on which to base their claim that citizens suits for injunctive relief should be dismissed under such circumstances.

While courts may look to common law doctrines such as mootness³⁰⁶ or primary jurisdiction³⁰⁷ in order to prevent citizens from unduly interfering with compliance orders or other prospective relief fashioned by an administrative agency, the CWA itself provides little support for limiting citizen participation in abatement actions. Indeed, Congress plainly contemplated that there would be some duplication between administrative enforcement and citizen suits when it drafted the CWA.³⁰⁸ The CWA only precludes citizen suits in their entirety when an agency "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 statute's requirements.³⁰⁹

The limited extent to which the CWA allows administrative enforcement actions to preclude citizen suits contrasts sharply with other federal environmental statutes such as RCRA and CERCLA, which do permit administrative compliance orders to preclude citizen suits in their entirety.³¹⁰ Contrary to the First Circuit's ruling in *Scituate*,³¹¹ it is

administrative penalty assessments, see the discussion *supra* part III.A.1.

305. See *Citizens for a Better Environment v. Union Oil Co. of Cal.*, 861 F. Supp. 889, 909 (N.D. Cal. 1994).

306. In *Gwaltney*, the Supreme Court noted that "[l]ongstanding principles of mootness . . . prevent the maintenance of a suit when there is no reasonable expectation that the wrong will be repeated." 484 U.S. at 66 (citations and internal quotation marks omitted). However, the *Gwaltney* Court also recognized the burden a defendant must carry in order to have a suit dismissed as moot is a heavy one. *Id.*

307. For a general discussion of the doctrine of primary jurisdiction, see 2 DAVIS & PIERCE, *supra* note 254, § 14.

308. For example, citizens may sue for violations of an administrative order. See 33 U.S.C. § 1319(a)(1). Such a citizen suit may request injunctive relief that duplicates the prospective relief initially requested by the agency in the administrative order which the defendant violated. Moreover, since paragraph 309(g)(6) only precludes citizen suits when an administrative penalty action is commenced prior to the date on which the citizens serve their notice of intent to sue, it is entirely possible for a citizen suit to duplicate an administrative penalty action. See, e.g., *PIRG of New Jersey v. Yates Indus.*, 757 F. Supp. 438, 444-45 (D.N.J. 1991) (denying defendant's motion to dismiss allegations in a citizen suit which duplicate violations raised in an administrative penalty action on the grounds that the citizens gave notice of their intent to sue prior to the date on which the administrative action was commenced).

309. 33 U.S.C. § 1365(b)(1)(B) (emphasis added).

310. See 42 U.S.C. § 6972(b)(2)(B)(iv) (RCRA); *id.* § 9659(d)(2) (CERCLA).

311. 949 F.2d at 558.

these statutes—and not the CWA—which accord a high degree of deference to an agency's prosecution of administrative compliance orders. Moreover, statutes such as RCRA and CERCLA show that Congress knows how to preclude citizen suits in their entirety when it intends to do so. Because Congress did not extend the preclusive language of RCRA or CERCLA to the CWA, courts should hold that administrative compliance orders under the CWA do not preclude citizen suits for injunctive relief.³¹²

Finally, allowing citizen suits for injunctive relief to proceed in the face of administrative enforcement actions supports, rather than undermines, the goals of the CWA. In 1972, Congress set an ambitious national goal of eliminating the discharge of pollutants into navigable waters by 1985.³¹³ To advance this goal, Congress authorized CWA prosecutors to combat future violations with administrative compliance orders as well as citizen suits.³¹⁴ The main remedy contemplated by the citizen suit provisions was abatement of pollution through court-ordered injunctive relief.³¹⁵ Upon revisiting the CWA in 1985, Congress found that "[c]itizen suits are a proven enforcement tool; they have deterred violators and achieved significant compliance gains."³¹⁶ Administrative compliance orders, on the other hand, "ha[d] not proven powerful enough to motivate violators or deter other similar violators"³¹⁷ and were regarded by EPA as "ineffective."³¹⁸ Given the success of citizen suits and the failure of administrative compliance orders in achieving compliance with the CWA's abatement goals, Congress had good reason to decline to give any preclusive effect to administrative compliance orders when it amended the CWA in 1987. The 103d Congress reinforced this conclusion by criticizing the First Circuit's judicial grant of preclusive effect to an administrative compliance order on the grounds that it

312. See *Washington PIRG v. Pendleton Woolen Mills*, 11 F.3d 883, 886 (9th Cir. 1993).

313. Pub. L. No. 92-500, § 2, 86 Stat. 816 (codified as amended at 33 U.S.C. § 1251(a)(1)).

314. *Id.* § 2, 86 Stat. 888 (codified as amended at 33 U.S.C. § 1365).

315. See *Gwaltney*, 484 U.S. at 59, 61 (inferring from legislative history and the statute's use of the present tense that "the interest of the citizen-plaintiff is primarily forward-looking").

316. S. REP. NO. 50, 99th Cong., 1st Sess. 28 (1985), reprinted in 1987 *Legislative History*, *supra* note 61, at 1449.

317. *Amending the Clean Water Act: Hearings on S. 53 and S. 652 Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment and Public Works*, 99th Cong., 1st Sess. 10 (1985), reprinted in 1987 *Legislative History*, *supra* note 61, at 1695 (statement of Jack E. Ravan, EPA Ass't Administrator for Water).

318. See *Possible Amendments to the Federal Water Pollution Control Act: Hearings Before the Subcomm. on Water Resources of the House Comm. on Public Works and Transportation*, 98th Cong., 1st Sess. 2730 (1983), reprinted in 1987 *Legislative History*, *supra* note 61, at 2007 (statement of William D. Ruckelshaus, EPA Administrator).

undermined the CWA's goal of "vigorous enforcement."³¹⁹ The 104th Congress should continue this trend by legislatively overruling the First Circuit's holding in *Scituate* and the Eighth Circuit's holding in *Arkansas Wildlife Fed. v. ICI Americas*.

IV. RECOMMENDATIONS

A. *How Courts Should Interpret Paragraph 309(g)(6)*

To address the claim that a citizen suit under the CWA is precluded by an administrative enforcement action, courts should conduct a four-part inquiry. First, courts should determine whether the administrative enforcement action alleged to have preclusive effect is an administrative penalty action under subsection 309(g)³²⁰ of the CWA or a comparable state water quality statute. If the administrative action at issue is merely an administrative compliance order under subsection 309(a)³²¹ of the CWA or another statute, then courts may end their inquiry because administrative compliance orders have no preclusive effect under the CWA and are not reviewable by the courts.³²² If the administrative action arises under a specific provision of state law, then courts should not treat that provision of state law as comparable to subsection 309(g) unless it is functionally equivalent to subsection 309(g) with respect to public notice, penalty assessment criteria, opportunity for citizen participation and judicial review. A provision of state law that does not fulfill each of these essential functions should have no preclusive effect on citizen suits under the CWA.

If a court determines that the administrative action at issue is an administrative penalty action under subsection 309(g) of the CWA or a comparable state law, then it should conduct a second inquiry to ascertain whether that administrative penalty action properly was commenced prior to the date on which the citizen-plaintiffs gave notice of their intent to sue. While the time of commencement may be calculated from the date on which a formal administrative complaint is filed with a hearing clerk or served on a respondent, such commencement is not valid unless all the necessary elements of filing, service and public notice are met.³²³ If the administrative penalty action was not filed or served

319. See S. REP. NO. 257, 103d Cong., 2d Sess. 90 (1994).

320. 33 U.S.C. § 1319(g).

321. *Id.* § 1319(a).

322. See discussion *supra* part III.A.1.

323. These elements are laid out in EPA's rules of practice. See 40 C.F.R. §§ 22.05, 22.13, 22.14, 22.38 (1994) (final rules for Class II penalties); 56 Fed. Reg. 29,996, 30,008-11 (1991) (proposed rules for Class I penalties to be codified at 40 C.F.R. pt. 28).

prior to the date on which citizens gave notice of their intent to sue (and the citizen suit is filed within 120 days after such notice),³²⁴ or if the commencement lacks an essential element of filing, service, or public notice, then courts should end their inquiry and hold that the administrative action has no preclusive effect.

If an administrative penalty action properly is commenced, however, courts should turn to a third inquiry to determine whether the administrative penalty action is being diligently prosecuted. To the extent that citizens have an administrative remedy for an agency's lack of diligent prosecution,³²⁵ courts may presume that a properly commenced administrative penalty action is being diligently prosecuted. However, if such a presumption is granted, courts should also grant citizens an ample opportunity to rebut the presumption of diligent prosecution. In analyzing the issue of diligence, courts should be careful not to confuse the prosecution of an administrative penalty action, which may preclude a citizen suit, with the prosecution of other forms of administrative action, which have no preclusive effect on citizen suits.

If an administrative penalty action properly has been commenced and is being diligently prosecuted, then courts should conduct a fourth and final inquiry to determine whether the citizen suit at issue requests declaratory or injunctive relief rather than, or in addition to, civil penalties. Because administrative penalty actions under the CWA only preclude citizens from seeking judicially-imposed civil penalties,³²⁶ courts generally should allow citizens to proceed with their claims for declaratory and/or injunctive relief despite an agency's diligent prosecution of an administrative penalty action. In the rare instance where a citizen suit for declaratory or injunctive relief will unduly interfere with an agency's prosecution of an administrative action, courts may combat this undue interference by staying the court proceedings pending the outcome of the administrative action. Mere duplication of an administrative enforcement action is not grounds for dismissal of a citizen suit under subsection 309(g) of the CWA.³²⁷

Finally, in conducting each of these inquiries, courts should limit their task to applying the plain language of the statute and filling occasional gaps in the statutory language with reasonable inferences from

324. This date and the 120-day period in which citizens may file suit is specified in subparagraph 309(g)(6)(B) of the CWA. 33 U.S.C. § 1319(g)(6)(B).

325. Citizens may be able to challenge an agency's lack of diligent prosecution by commenting or requesting a hearing on the proposed penalty assessment under paragraph 309(g)(4), 33 U.S.C. § 1319(g)(4), and if necessary, seeking judicial review of the penalty assessment under paragraph 309(g)(8). 33 U.S.C. § 1319(g)(8).

326. Paragraph 309(g)(6) only precludes "civil penalty actions." See 33 U.S.C. § 1319(g)(6)-(A).

327. See discussion *supra* part III.D.

the legislative history and administrative interpretations. Adjudicating a preclusion claim under paragraph 309(g)(6) of the CWA does not require courts to enter the public policy debate concerning the proper role of citizens in enforcing federal environmental statutes. In leaving this debate to other branches of government, courts should remember that judicial activism is at its worst when it has the effect of stifling citizen activism. Extending the bar on citizen suits beyond the limit specified in subsection 309(g) of the CWA has precisely this effect.

B. How Congress Should Amend Subsection 309(g)

To the extent that the First and Eighth Circuits reached their conclusions in *Scituate*³²⁸ and *Arkansas Wildlife Fed v. ICI Americas*³²⁹ by consciously disregarding the plain language of the statute, it is not clear that changes to the statutory language alone will reverse the trend created by these decisions. Nonetheless, Congress should amend subsection 309(g)³³⁰ of the CWA to remove any doubt that these First and Eighth Circuit decisions are completely contrary to the plain language of the statute and the purposes for which it was enacted. In particular, Congress should clarify five points which have generated the most conflict and confusion among the courts.

First, Congress should sharpen the distinction between administrative compliance orders under subsection 309(a)³³¹ and administrative penalty assessments under 309(g)³³² so that courts do not confuse these two forms of administrative enforcement. This distinction could be clarified by replacing the generic term "action" as it appears in subsection 309(g) with the specific term "administrative penalty action" or "administrative penalty assessment." Additional clarity could be achieved by amending the generic language regarding "protection of existing procedures" contained in paragraph 309(g)(11)³³³ so that it explicitly states that nothing in subsection 309(g)—including the limitation on citizen suits contained in paragraph 309(g)(6)³³⁴—applies to administrative compliance orders issued under subsection 309(a) or similar state statutes.

Second, Congress should provide further definitional guidance regarding what laws are "comparable" to subsection 309(g). In particular,

328. 949 F.2d 552 (1st Cir. 1991).

329. 29 F.3d 376 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1094 (1995).

330. 33 U.S.C. § 1319(g).

331. *Id.* § 1319(a).

332. *Id.* § 1319(g).

333. *Id.* § 1319(g)(11).

334. *Id.* § 1319(g)(6).

Congress should consider replacing the ambiguous word "comparable" with a more precise phrase such as "functionally equivalent with respect to public notice, penalty assessment criteria, opportunity for citizen participation and judicial review." Also, Congress should clarify that only the clean water statutes of states with EPA-approved water quality programs—and not other state or federal environmental statutes—have the power to preclude citizen suits under the CWA in virtue of their functional equivalence to the essential elements of subsection 309(g). The opportunity to acquire this added, preclusive power should provide an incentive for states to adopt functionally equivalent administrative penalty provisions in their clean water statutes. The lack of this preclusive power—and not the threat of federal funding cuts—should serve as a disincentive for states that choose not to adopt functionally equivalent administrative penalty provisions.

Third, Congress should provide additional guidance on what it means to "commence" an administrative penalty action. Although EPA already has promulgated rules of practice which define when and how an administrative penalty action under the CWA is commenced,³³⁵ Congress could give added weight to these rules and require closer conformity with subsection 309(g) by making its delegation of this definitional task more explicit. Congress should also require states to adopt rules which are functionally equivalent to EPA's rules governing the commencement of administrative penalty actions if they wish to obtain the power to preclude citizen suits under paragraph 309(g)(6).

Fourth, Congress should state how citizens may rebut the presumption that a government agency's prosecution of an administrative penalty action is diligent. As with the commencement issue, this task could be delegated to EPA, provided that there is a mechanism for ensuring that state rules conform to EPA's standards. In addition to the criteria for diligent prosecution contained in existing EPA policy statements,³³⁶ the standards for rebutting the presumption of diligent prosecution should include traditional exceptions to the exhaustion of administrative remedies doctrine such as unreasonable delay, an immediate public health threat that outweighs the harm to the administrative process caused by judicial intervention, or a major procedural flaw in the process such as a failure to give adequate public notice of agency actions.

Fifth, and finally, Congress should clarify that administrative penalty actions do not bar citizen suits for declaratory or injunctive relief,

335. See 40 C.F.R. pt. 22 (1994) (final rules for Class II penalties); 56 Fed. Reg. 29,996 (1991) (proposed rules for Class I penalties to be codified at 40 C.F.R. pt. 28).

336. See, e.g., EPA, SUPPLEMENTAL GUIDANCE ON SECTION 309(G)(6)(A) OF THE CLEAN WATER ACT 3-4 (Mar. 5, 1993).

provided, of course, citizens can allege in good faith that there are continuing or intermittent violations for a court to enjoin. While the statutory language already is quite clear on this point,³³⁷ Congress could make it even more obvious by amending paragraph 309(g)(6) to state that administrative penalty actions may preclude only civil penalty actions for past violations. In addition to clarifying the distinction between the backward-looking nature of administrative penalty actions and the forward-looking focus of citizen suits for injunctive relief, such an amendment would provide a workable compromise among proponents and opponents of the Supreme Court's *Gwaltney* decision.³³⁸ On the one hand, such an amendment would make clear that agencies may preclude citizen suits for past violations by commencing and diligently prosecuting administrative penalty actions to address these violations. On the other hand, if the government failed to exercise its administrative penalty authority under subsection 309(g) or functionally equivalent state laws, paragraph 309(g)(6) would not bar citizens from filing suit to recover penalties for these past violations. Of course, an amendment to the CWA's citizen suit provisions would also be needed to clarify that citizens may sue for past violations in the absence of an administrative penalty action covering the same violations.

C. How Governmental and Citizen Prosecutors Can Work Together to Enforce the Clean Water Act

Motions to dismiss a citizen suit on the grounds that it is precluded by paragraph 309(g)(6) of the CWA invariably are brought by defendants, not by the government agency responsible for prosecuting the administrative enforcement action which is alleged to have preclusive effect.³³⁹ Indeed, EPA has filed amicus briefs supporting the citizen-plaintiffs' claims in several cases involving the interpretation of paragraph 309(g)(6),³⁴⁰ and both federal and state agencies have testified before

337. Paragraph 309(g)(6) expressly precludes only "civil penalty actions." See 33 U.S.C. § 1319(g)(6)(A).

338. This decision held that citizens could not sue for "wholly past violations" of the CWA. *Gwaltney of Smithfield v. Chesapeake Bay Found.*, 484 U.S. 49, 64 (1987).

339. It was defendants who raised paragraph 309(g)(6) as grounds for dismissal in all thirty reported cases on this issue. Search of WESTLAW, Allfeds database (Mar. 24, 1995).

340. See, e.g., *Arkansas Wildlife Fed. v. ICI Americas*, 29 F.3d at 379 n.4; *Washington PIRG v. Pendleton Woolen Mills*, 11 F.3d 883 (9th Cir. 1993); *Scituate*, 949 F.2d at 556 n.8; Brief for the United States as Amicus Curiae in Support of Plaintiff-Appellant, *Sierra Club v. Colorado Refining Co.*, 852 F. Supp. 1476 (D. Colo. 1994) (Nos. 94-1248 and 94-1265). The United States Solicitor General and several state attorneys general filed amicus briefs in support of the citizen-plaintiffs in the *Gwaltney* case. 484 U.S. 49 (1987).

Congress in support of the CWA's citizen suit provisions.³⁴¹ As these facts suggest, it is defendants and the courts sympathetic to them which engender the most resistance to citizen suits under the CWA, not federal or state prosecutors. Nonetheless, both federal and state prosecutors can do more to ensure that their administrative actions do not unintentionally or unnecessarily preclude citizen prosecutors from enforcing the CWA.

First, federal and state prosecutors should lend their support to legislation at both the state and federal level which aims to limit and clarify the preclusive effects that administrative enforcement actions may have on citizen suits. At the federal level, EPA and state water quality agencies should support the proposed changes to subsection 309(g) outlined in Part IV.B of this article. Congressional testimony by governmental prosecutors would be particularly helpful in pointing out that the benefits of citizen suits (such as additional resources for enforcement) far outweigh the burdens that such suits create for the government (such as undue interference with administrative actions). At the state level, EPA and state water quality agencies should support efforts to amend state water quality statutes to ensure that state administrative penalty provisions are functionally equivalent to subsection 309(g) of the federal CWA. These agencies should also support efforts to add citizen suit provisions to state laws. To the extent that state courts and agencies provide a forum that is just as favorable to citizen prosecutors as the federal courts, citizen prosecutors have less reason to side with federal agencies in disputes over federalism, and the whole issue of citizen participation in CWA enforcement can be more neutral with respect to ongoing power struggles between federal and state governments.

Second, federal and state prosecutors should ensure that their rulemaking does not unintentionally or unnecessarily impair the ability to bring citizen suits under the CWA. At the federal level, EPA should review its rules of practice to ensure that they do not provide any mechanisms for circumventing the procedural safeguards in subsection 309(g) of the CWA. For example, EPA should amend its rules of practice to ensure that the agency cannot retroactively preclude citizen suits through the use of pleading amendments, as the Arkansas Department of Pollution Control and Ecology did in *Arkansas Wildlife Fed. v. ICI Americas*.³⁴² At the state level, agencies responsible for enforcing state water quality statutes should ensure that their regulations carefully define

341. See, e.g., *Reauthorization of the Clean Water Act: Hearings on S. 1114 and S. 1302 Before the Subcomm. on Clean Water, Fisheries, and Wildlife of the Senate Comm. on Environment and Public Works*, 103d Cong., 1st Sess. 746, 749, 751, 756 (1993) (statements of Marlen Dooley, Ass't Commissioner for Enforcement, New Jersey Dep't of Env'tl. Protection & Energy, and Steve Herman, EPA Ass't Administrator for Enforcement).

342. See 29 F.3d at 378, 382.

what an administrative penalty action is and provide adequate public notice, opportunity to comment, and judicial review of such actions. While the due process clauses of some state constitutions may go further than the United States Constitution in limiting the amount of a penalty that a state agency can assess without a full, trial-type hearing, no one has claimed that a state constitution provides a basis for reducing citizen participation in administrative actions below the level called for in subsection 309(g) of the federal CWA.

Third, at the practical level of carrying out their enforcement responsibilities, federal and state prosecutors should communicate more carefully with citizens groups and the regulated community about their intent to comply with subsection 309(g) and functionally equivalent state laws. In particular, governmental prosecutors should include language disclaiming any authority or intent to preclude citizen suits in all compliance orders, compliance schedules, settlement agreements and other enforcement documents which do not fall within the ambit of subsection 309(g) or functionally equivalent state laws. If governmental prosecutors do have the authority and intent to preclude citizen suits through the prosecution of an administrative penalty action, they should broadcast this authority and intent from the beginning and actively seek citizen participation in their administrative proceedings.

In return for the cooperation of federal and state prosecutors, citizen prosecutors should be willing to give the administrative procedures in subsection 309(g) a chance to work before attempting to bypass these procedures through the filing of a citizen suit. Citizens should make more effort to comment on proposed administrative penalty assessments and seek judicial review of these assessments under subsection 309(g)-(8)³⁴³ as an alternative to filing separate citizen suits covering the same violations. If a citizen suit is necessary despite these procedures, citizens should limit duplication or interference by disclaiming any authority or intent to recover civil penalties for past violations which are the subject of a previously commenced and diligently prosecuted administrative penalty action.

Finally, prior to initiating a citizen suit, citizens should review previous or ongoing administrative enforcement actions to see if the prospective defendant is in violation of any of the administrative compliance orders which typically accompany such actions. The CWA authorizes citizens to sue "any person . . . who is alleged to be in violation of . . . an order issued by the Administrator or a State with respect to [an effluent] standard or limitation."³⁴⁴ However, subsection

343. 33 U.S.C. § 1319(g)(8).

344. *Id.* § 1365(a)(1).

309(g) grants the government no authority to address such violations through administrative penalty actions.³⁴⁵ Hence, an administrative penalty action cannot preclude citizens from suing over an alleged violation of an administrative compliance order. Citizen-plaintiffs should include such allegations in their complaint whenever possible in order to avoid the preclusive effects of paragraph 309(g)(6).

V. CONCLUSION

When it added administrative penalty provisions to the Clean Water Act in 1987, Congress struck an appropriate balance between the need to avoid placing obstacles in the path of citizen suits and the need to avoid subjecting violators of the Act to duplicative enforcement actions or penalties for the same violations. The First and Eighth Circuits have upset this carefully crafted balance by expanding the limitation on citizen suits contained in paragraph 309(g)(6) far beyond what Congress intended. The First and Eighth Circuit's expansion of the preclusion doctrine in paragraph 309(g)(6) has done nothing to make enforcement of the CWA fairer or more efficient, and instead has virtually guaranteed that defendants will move to dismiss every citizen suit on the grounds that it is precluded by administrative action regardless of whether such administrative action conforms to the requirements of subsection 309(g). For these reasons, Congress, the courts, and CWA prosecutors should reject the First and Eighth Circuit decisions expanding the preclusive effect of administrative enforcement actions under the CWA. In so doing, Congress, the courts, and CWA prosecutors should work to restore the balance that Congress struck when it originally enacted the administrative penalty provisions in 1987.

345. See *id.* § 1319(g)(1) (authorizing administrative penalty actions against "any person [who] has violated section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or has violated any permit condition or limitation implementing any of such sections in a permit issued under section[s] 1342 [or 1344] of this title . . ."). Administrative compliance orders are issued under section 1319(a), which is not among the sections enumerated in section 1319(g)(1). Nor are administrative compliance orders considered permit conditions or limitations. See *Citizens for a Better Environment v. Union Oil Co. of Cal.*, 861 F. Supp. 889, 899-903 (N.D. Cal. 1994).