

# CITIZEN SUIT DEFENSE STRATEGIES AFTER THE REBIRTH OF CITIZEN ENFORCEMENT IN LAIDLAW

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## INTRODUCTION

In the aftermath of the United States Supreme Court's decision in *Steel Company v. Citizens for a Better Environment*<sup>2</sup> many commentators pronounced private attorney general citizen suits all but dead as a tool for the enforcement of environmental laws. The Court's recent decision in *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*,<sup>3</sup> however, has breathed new life into an enforcement tool with a 30-year history. Constitutional standing now appears to be much less of a barrier to the prosecution of environmental enforcement actions by aggrieved citizens than it appeared to be after the *Steel Company* case. In light of *Laidlaw*, this article surveys the latest citizen suit case law and discusses some of the key procedural defensive strategies for appropriately disposing of citizen suits.

## OVERVIEW OF ENVIRONMENTAL CITIZEN SUITS

Before plunging into a discussion of citizen suit case law, a brief recap of citizen suit enforcement mechanisms is warranted. Almost all major federal environmental statutes and many of their state analogues contain citizen suit enforcement mechanisms which supplement environmental enforcement by federal and state environmental protection agencies.<sup>4</sup>

### Basic Elements

There are two basic types of environmental citizen suits. The first involves a person or aggrieved citizen (hereinafter "citizen plaintiff")

filing a civil action to compel an environmental agency to perform a mandatory statutory duty after serving the appropriate pre-suit notice.<sup>5</sup> The second type involves a citizen plaintiff's filing suit after proper notice to seek to compel a regulated person or government to comply with a standard, limitation, permit or order effective under the particular environmental statute at issue.<sup>6</sup> In addition, other non-traditional causes of action, such as qui tam claims, are increasingly being used to enforce environmental regulations.

Relief sought in a citizen suit typically includes one or more of: (1) a declaratory judgment that a violation has occurred, (2) an injunction enjoining the violation or (3) an award of civil penalties. Though civil penalties must be paid to the U.S. Treasury, some environmental statutes permit settlements to encompass monetary payments to fund a pertinent environmental mitigation project, subject to federal review of the settlement. Litigation costs and fees may be awarded to the substantially prevailing party whenever the court determines such to be in the public interest.

A qui tam civil action involves a claim under the False Claims Act by a person acting in the name of the federal government against any person who knowingly presents to the federal government a false or fraudulent claim for payment. Qui tam claims have been brought by plaintiffs in the environmental arena for such things as profiting from the federal government under a site remediation contract by failing to follow environmental cleanup laws or misusing federal grants under particular environmental programs.

Recent U.S. Supreme Court rulings have continued to shape these remedies. In *Vermont Agency of Natural Resources v. United States*,<sup>7</sup> the Court ruled that qui tam claims do not lie against state agencies. The Court's rulings in *Steel*

*Company* and *Laidlaw* have had a profound impact upon how constitutional standing principles are applied in the context of citizen enforcement of environmental laws.

## THE STEEL COMPANY AND LAIDLAW STANDING DECISIONS

*Steel Company v. Citizens for a Better Environment*,<sup>8</sup> decided in 1998, dealt with the constitutional standing issue of “redressability” – specifically whether a citizen plaintiff had standing to sue for civil penalties for a violation existing at the time the citizen gave the required notice of violation to the regulated person but which had been cured by the time the citizen could legally file the lawsuit. *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*,<sup>9</sup> decided in 2000, addressed environmental citizen suit standing generally, along with the related issue of when a claim becomes moot. As relates to *Steel Company*, *Laidlaw* dealt with the issue of the extent to which a citizen plaintiff could pursue a civil penalty claim based upon violations continuing at the time the citizen filed the lawsuit but which were voluntarily cured prior to trial. The *Laidlaw* ruling lessens citizen plaintiff standing burdens and clearly cuts off any expansion of the ruling in *Steel Company* to further undermine citizen suits for civil penalties. To understand the importance of these rulings, it is necessary to recap the elements of standing law.

### The Elements of Constitutional And Prudential Standing

*Steel Company* and *Laidlaw* reaffirm the importance of constitutional standing limitations on environmental citizen suits. Simple proof that an environmental law has been violated is an insufficient basis for a citizen suit. Citizen plaintiffs must also demonstrate standing. Indeed, *Steel Company* went so far as to mandate that specific constitutional standing requirements must be satisfied before a court may pass on the merits of a claim.<sup>10</sup>

Constitutional standing consists of a three-part test. Passing this test is “an irreducible constitutional minimum”<sup>11</sup> that cannot be modified by statute. Prudential standing requirements, on the other hand, are “judge-made” limitations on when a lawsuit can be brought and can be modified by Congress.<sup>12</sup> Prudential limitations are grounded in the concern appropriately to limit the role of the courts in a democratic society. Because prudential limitations must often give way in the face of a conflicting statute, defensive strategy often involves characterizing a standing requirement as part of the irreducible constitutional minimum required showing.

For constitutional standing, each element of the following test must be proved in respect of each cause of action asserted:<sup>13</sup>

- (1) Has the plaintiff suffered an injury in fact consisting of an invasion of a legally protected interest which is concrete and particularized and actual or imminent, not conjectural or hypothetical (“injury-in-fact”)?
- (2) Is there a causal connection between the injury and the conduct serving the basis of the lawsuit, in the sense of the injury being fairly traceable to the challenged action rather than some other action (“traceability”)?
- (3) Is it likely, rather than speculative, that the injury will be redressed by a favorable decision of the court (“redressability”)?<sup>14</sup>

The additional prudential standing limitations embrace such principles as avoiding one litigant’s pursuing another’s rights (so-called *jus tertii*), avoiding adjudicating generalized grievances that should more appropriately be handled in the legislature, and requiring the litigant’s claim fall within the zone of interest protected by the law at issue.

## Steel Company Narrows the Concept of Redressability

Addressing the “redressability” component of constitutional standing – that is, can the court provide legal redress for plaintiff’s injury – *Steel Company* held that plaintiff environmental groups lacked standing to file an action against a steel manufacturer for cured violations of Emergency Planning and Community Right-to-know Act (EPCRA) chemical management reporting requirements. The environmental groups had issued appropriate notices to the target company and pertinent governmental agencies. Within the 60-day notice period, the steel manufacturer had filed the necessary forms and the environmental agencies had decided not to sue. There remained no uncured violations. The environmental groups filed suit seeking six types of relief: (1) a declaration that the facility violated EPCRA, (2) authorization to inspect the facility, (3) an order to produce all reports submitted to U.S. EPA, (4) civil penalties for each EPCRA violation, (5) an award of litigation fees and costs, and (6) such further relief as the court determined appropriate.

The Court upheld dismissal of the action on the grounds that, given the facts existing at the time the environmental groups filed the action, none of the requested forms of relief could redress their injuries. The violation was viewed as wholly past because it had been cured by the time the action could be filed. The complaint made no allegations of ongoing or imminent injury. The Court reasoned that while an award of civil penalties payable to the US Treasury would uphold the rule of law, it would not remedy the environmental groups’ injury stemming from belated EPCRA reporting. The possibility that a penalty would deter future possible violations of EPCRA by the manufacturing facility was too speculative a basis for standing when there was no allegation of possible future recurrence. The pre-suit incurrence and potential subsequent award under the statutory fee-shifting mechanism of litigation expenses alone was not a redressable injury.<sup>15</sup>

*Steel Company* represents an extension of the principle underpinning *Gwaltney v. Chesapeake*

*Bay Foundation, Inc.*<sup>16</sup> that citizen suits cannot be brought in respect of wholly past violations. Upon receipt of a citizen suit notice, a targeted entity has an opportunity to implement measures to correct the alleged violation within the statutory period that must elapse before an action may be filed. So long as the alleged violation does not recur at the point an action may be filed, or threaten to recur thereafter, *Steel Company* holds that if the citizen plaintiff nonetheless proceeds to file its action the targeted entity has a basis for obtaining a prompt dismissal.

## Laidlaw Redefines and Liberalizes the Ground Rules of Standing

The *Laidlaw* case involved a targeted entity’s attempt to further extend *Gwaltney* and *Steel Company* to secure dismissal of a citizen suit seeking civil penalties when violations still existing or threatened at the time the citizens filed suit were nonetheless cured prior to trial. Citizen plaintiffs in *Laidlaw* notified the targeted company of their intent to sue for violations of the company’s industrial wastewater NPDES permit. Within the statutory 60-day notice period, the company resolved the Clean Water Act (CWA) violations in a consensual lawsuit with the state, paying a moderate civil penalty and undertaking the duty to make every effort to comply with its permit obligations. After the citizen plaintiffs filed their lawsuit, the company violated its permit limitations on several additional occasions. The trial court entered judgment awarding civil penalties on the basis of their deterrent effect regarding future potential violations, but denying injunctive relief on the basis of the company’s substantial compliance with its permit for the last several years. The appellate court declared the civil penalty action moot based on the reasoning that the company’s pre-trial compliance with the permit left the citizen plaintiffs without a redressable injury.<sup>17</sup>

In reversing the appellate court, the U.S. Supreme Court chose to liberally apply considerations of injury-in-fact and redressability, and narrowly define the circumstances when a citizen suit is moot. Although the appellate court

had not dealt with the issues of injury-in-fact and redressability, the Supreme Court chose to address them. The Court declared that the focus of the standing inquiry was not injury to the environment but injury to the plaintiff.

The Supreme Court found sufficient injury-in-fact from affidavits and deposition testimony asserting that the plaintiffs lived in the general vicinity of the plant, had in the past used portions of the river downstream of the plant for recreation, and would like to use the river segments near the plant but for their concerns about the targeted company's effluent exceedances. Despite the absence of proof of discernable impacts from the plant on water quality, the Court held that the ongoing discharges exceeding the permit and the citizens' reasonable concerns about their effects constituted a direct injury to the citizens' recreational, aesthetic and economic interests. The Court downplayed the need to prove direct harm to the citizen plaintiffs' individual interests stemming from the targeted entity's violations and focused more on the reasonableness of the citizens' fears about the possible impacts of the targeted company's continuous and pervasive discharges.<sup>18</sup>

The Court found a redressable injury based on the fact that, in addition to functions of restitution and retribution, civil penalties can serve the function of deterrence of violations. Here, the citizens were both injured and faced the threat of future injury due to illegal conduct ongoing at the time of suit. Consequently, it could not be doubted that an award of civil penalties could both encourage abatement of the existing violation and prevent future recurrence by removing any economic benefit derived from violating the law. Unlike *Laidlaw*, the earlier *Steel Company* case did not involve allegations of any continuing or imminent violation at the time of suit. The *Laidlaw* Court declared that, on the facts of any particular case, a trial court can determine that civil penalties are an adequate way to redress current or imminent violations.<sup>19</sup>

Regarding mootness, the *Laidlaw* Court rejected the notion that mootness is simply the doctrine of standing applied to the facts of a case

existing after the commencement of litigation. Standing requires the plaintiff to prove at the point of commencement of litigation that, if unchecked by litigation, the defendant's conduct will likely continue or occur and that the threatened injury is certainly impending. Mootness, on the other hand, requires the defendant to prove that subsequent events make it absolutely clear that the alleged wrongful behavior cannot reasonably be expected to recur. Mere voluntary cessation of an alleged violation will *not* moot a claim. The Court declared the rationale for the shifted and heightened burden for mootness to be the sunk costs of the judicial system in ongoing actions and the objective of wise allocation of judicial resources. It was therefore up to the targeted company in *Laidlaw* to prove stringent mootness criteria to the trial court, namely that its voluntary compliance with NPDES requirements or plant closure meant that the challenged conduct could not reasonably be expected to start up again.<sup>20</sup>

*Laidlaw* limits the potential reach of *Steel Company* by declaring that in cases of continuing or threatened violations an award of civil penalties can be found to redress a citizen plaintiff's injuries. *Laidlaw* also embraces a concept of standing that focuses on the citizen plaintiff's subjective sense of injury-in-fact and traceability rather than on an objective finding of harm. Thus, for entities targeted by citizen suits, *Laidlaw* and *Steel Company* present both an opportunity and a challenge. The opportunity is to maximize the use of the statutory pre-suit notice period to resolve any alleged violations in such a way as to prevent suit once the right to file otherwise accrues. The challenge is to manage *Laidlaw's* apparent redefinition of environmental standing so as to preserve the right carefully to scrutinize citizen plaintiffs' standing early in any litigation. Review of the latest case law reveals defensive strategies to deal with the implications of *Laidlaw*.

### Standing Decisions After *Laidlaw*

Prior to *Laidlaw*, a standing challenge was a very fact-intensive inquiry, often handled by summary judgment motion or separate pre-trial hearing.

## CITIZEN SUIT DEFENSE STRATEGIES

As stated in *Lujan*, “[s]tanding is not an ingenious academic exercise in the conceivable, but [requires] a factual showing of perceptible harm.”<sup>21</sup> There is no reason why post-*Laidlaw* this level of scrutiny should not continue. The case law, however, demonstrates the challenge ahead.<sup>22</sup>

The Fourth Circuit’s ruling in *Citizen Local Environmental Action Network (CLEAN) v. Gaston Copper Recycling Corp.*<sup>23</sup> demonstrates the potential for future courts to view *Laidlaw* as lowering the bar for standing in environmental suits. A metal smelting plant had NPDES regulated discharges to an onsite lake with an overflow to a branch of a creek that was a tributary to a river that emptied into a tidal estuary. The plant had numerous exceedances of its permit limitations for metals. The nearest citizen plaintiff alleged various recreational injuries in relation to waters four miles from the plant. Other plaintiffs alleged injuries to waters eighteen miles downstream. There was evidence of environmental impacts to the defendant’s onsite lake from the discharges but no evidence of the targeted entity’s discharges in off-site waters or of any related impacts to the environment of the off-site waters. Prior to *Laidlaw* a panel of the Fourth Circuit held that plaintiffs had no standing because of lack of proof of any injury-in-fact to the waters they used from the targeted company’s discharges and parallel lack of traceability between their injuries and discharges from the plant.<sup>24</sup>

After rehearing en banc post-*Laidlaw*, the majority of the Fourth Circuit ruled that the evidence presented by the neighbor living four miles downstream that he altered the fishing and swimming activities his family engaged in the water on his property because of concern about pollution from the smelting plant and that he had suffered property damage constituted a typical example of a justiciable injury traceable to the targeted company’s conduct that could be redressed by the court. Key considerations seem to have been the numerosity and frequency of the targeted company’s NPDES violations after the action had been filed and the existence of some downstream impact.<sup>25</sup> In the wake of this

ruling, if a defendant can prove it has ceased its violations or is implementing significant corrective actions to eliminate future violations or can demonstrate lack of significant impact to any waters from its discharges, a court may be more willing to probe and question the substance of plaintiffs’ standing assertions.

In *Texans United For A Safe Economy Education Fund v. Crown Central Petroleum Corp.*,<sup>26</sup> the defendant refinery attempted to defend against citizen plaintiffs’ general allegations of having to breathe and smell sulfurous odors causing physical discomfort by challenging whether the plaintiffs could prove a connection between defendant’s emissions and plaintiffs’ injury, rather than other area emissions. The Fifth Circuit held that traceability did not entail plaintiffs’ having to establish a connection between their alleged injury and the exact dates defendant’s exceedances of regulatory standards occurred. For standing, citizen plaintiffs did not have to prove Clean Air Act (CAA) violations by the target entity on the days they suffered injury. Circumstantial evidence of emissions from the target’s plant at the time they smelled odors combined with expert testimony that excess emissions were detected in the plaintiff’s neighborhood on some days when the target had process upsets and evidence of frequent exceedances of regulatory levels was adequate.<sup>27</sup> The court felt that otherwise citizen plaintiffs would have to prove its case on the merits just to prove standing.

The *Texans United* defendant also challenged whether a remedy directed against the refinery would redress the citizen plaintiffs’ injury given the other area emissions. The court held that all that was required was a showing that an injunction or penalties would prevent specific pollutive conditions which contribute to the area pollution that injures plaintiff citizens.<sup>28</sup> *Texans United* appears to be another situation when strong evidence of continuing unresolved permit violations color the court’s view of plaintiffs’ proof of standing. This again points to the need to make corrective action an essential part of the defense strategy.

*Laidlaw* certainly does not mean, however, that any assertion of environmental injury will suffice for citizen standing. In *Grand Council of the Crees v. Federal Energy Regulatory Commission*, plaintiffs asserted that in addition to the citizen groups' environmental interests, they had standing as power consumers to challenge a decision of the Federal Energy Regulatory Commission (FERC) to allow a Canadian company to sell electricity in the United States at market rates. The citizen plaintiffs argued that FERC's decision would preempt protective state regulation of electricity sales and they would be damaged by higher prices. The Court found no injury-in-fact based on an analysis that there was no preemptive conflict between the federal agency's order and the jurisdiction of state regulatory bodies.<sup>29</sup>

Thus, despite the concern expressed by some judges, it does not yet appear that *Laidlaw* has fundamentally changed the rules of constitutional standing. The standing rulings in *Gaston Copper* and *Texans United* appear to be explainable as situations involving strong facts on injury and significant continuing unresolved violations of environmental requirements. Moreover, it should be borne in mind that *Laidlaw* did not address prudential standing limitations on lawsuits and the statutory and common law defenses available.

### ***Laidlaw* Does Not Affect The Defense of Lack of Prudential Standing**

After *Laidlaw*, prudential standing limitations remain intact and available as means to defend citizen suits.

Paralleling the prudential concern with *jus tertii*, in the recent U.S. Supreme Court case of *Vermont Agency*, the Court was faced with a standing challenge to qui tam claims based on an argument that citizens should not have the right to assert the federal government's rights. The Court ruled that even though a citizen who pursues a qui tam lawsuit on the relation of the government has a pecuniary interest in the outcome of the suit which is not a traditional injury-in-fact, the citizen nonetheless has standing because the cause of action defined by

the False Claims Act effectively makes the relator a partial assignee of the United States' rights.<sup>30</sup> The Court was heavily influenced by the fact that qui tam claims predated the Constitution's "cases and controversies" standing requirement. The concept of "cases and controversies" was intended to encompass matters traditionally amenable to judicial resolution.<sup>31</sup>

Challenging a citizen suit based on the prudential concern with a litigant's not being in a statute's zone of interest requires careful identification of the legal provisions the citizen plaintiff is asserting have been violated and determining that those provisions do not protect the interests of the litigant. While the "zone of interest" test is not onerous for the citizen to satisfy, it has defeated numerous lawsuits.<sup>32</sup> A citizen plaintiff is only outside the zone of interest if its interests are so marginally related to or inconsistent with the purposes implicit in the statutory provision at issue that it cannot reasonably be assumed that Congress intended to permit the suit.<sup>33</sup>

Just because an agency must take account of environmental considerations under certain provisions of a regulatory scheme does not mean that an environmental organization will be in the zone of interest sufficient to enable it to bring a challenge under some other aspect of the statute. Thus, just because FERC must take account of environmental considerations in plant siting and construction decisions did not mean that environmental groups were within the zone of interests of the Federal Power Act's (FPA) rates and charges setting mechanism. In the *Grand Council* case, the D.C. Circuit narrowly focused on determining the interests arguably protected by the rate setting provision of the FPA. It concluded environmental interests were not protected by a provision designed to balance the rights of electric power consumers and producers.<sup>34</sup> Parsing FERC's statutory authority regarding rate setting, the Court was able to conclude that environmental interests were not congruent with the issues pertinent to rate setting.

Finally, it should be noted that there is no prudential limitation on citizen suits rendering them the exclusive preserve of those seeking to advance environmental enforcement. The Supreme Court's ruling in *Bennet v. Spear* makes clear that citizen suits are equally available to the regulated community to prompt or challenge agency action, so long as the plaintiff regulated industry can demonstrate that it falls within the zone of interest of the statutory provision in issue.<sup>35</sup>

### ***Laidlaw* Has No Impact On The Defense Of Lack of Procedural Injury Standing**

Imminence of injury and redressability standing requirements are modified when the citizen plaintiff alleges an injury that is associated with an agency's failure to follow procedural requirements in its decision-making. Normally, the available redress of compelling an agency to go back and make its decision again using the proper procedure does not rise to the level of proof of likelihood of curing the injury. Using the proper procedure, the agency may ultimately come to the same conclusion as before, leaving the plaintiff's injury unremedied. Consequently, modified standing requirements are applied when the citizen plaintiff can demonstrate a procedural right to protect the interest forming the basis of its concrete injury.<sup>36</sup> Such a citizen plaintiff does not have to prove that adherence to required procedures would necessarily change the agency's ultimate decision.<sup>37</sup>

This modified standing test is applied often in the context of the National Environmental Policy Act (NEPA), or of an alleged failure to subject a rule requirement to public comment. Injury in fact based on agency failure to follow NEPA has been declared to consist of a two-part showing: (1) in making its decision without following NEPA, the agency must have created an increased risk of actual, threatened, or imminent environmental harm, and (2) this increased risk of environmental harm must have injured the litigant's concrete interests in the geographical location subject of the agency action.<sup>38</sup>

Procedural rights such as citizen plaintiff rights to assure compliance with NEPA, however, can still be defeated by such considerations as prudential standing limitations. Thus, a NEPA injury has been held inadequate to ground standing when the "citizens" have no interests arguably protected by the statute at issue and thus fail to satisfy the "zone of interests" prudential requirement.<sup>39</sup>

## **CORE PROCEDURAL DEFENSIVE STRATEGIES AFTER LAIDLAW**

### **Inadequate Notice**

*Steel Company* and *Laidlaw* illustrate the importance of taking prompt and carefully crafted defensive action immediately upon receipt of a valid citizen suit notice. Before filing suit, citizens must typically give a statutorily-required notice in advance of filing a complaint (often 60 or 90 days) identifying alleged violations to the target, the U.S. EPA and the state.<sup>40</sup> From regulated industry's perspective, the primary function of the notice is to allow a period of time to come into compliance or settle violations with the proper governmental agency and thereby avoid litigation. From the agencies' perspective the notice also allows them an opportunity to assume the lead on enforcement.

Under some statutory provisions, the form and content of the notice are clearly specified by regulation.<sup>41</sup> Under others they are not. Because of its functional importance, courts have interpreted the notice requirement as a prerequisite to subject matter jurisdiction, the absence of which results in dismissal.<sup>42</sup> Based on its function, any notice that does not clearly identify the violations and facilities at issue and answer the basic questions when, where and how for each separate claim, should be challenged.

While defects in the content of the notice can justify dismissal, the citizen suit target is more likely to be successful if it can demonstrate that the challenged defect impairs the notice's underpinning function. For example, in a

Resource Recovery and Conservation Act (RCRA) imminent and substantial endangerment claim, while conclusory assertions that minimum contaminant level (MCL) exceedances constitute an endangerment were deemed adequate notice, the failure to specifically identify the target's sites where this condition existed was fatal.<sup>43</sup> While the subsequent litigation of additional violations directly related to or arising out of the same episode as those in the notice will be unlikely to result in their dismissal for lack of notice, dismissal is likely when the subsequently pleaded claims are for different types of violations.<sup>44</sup>

Beyond considering notice defect defenses, the recipient of a citizen suit notice should immediately consider making contact with the appropriate government agencies to resolve any alleged violations short of litigation. Time is clearly of the essence in such matters.

### **Wholly Past Violations and Voluntary Compliance During Notice Period**

In addition to the defense of defective notice, *Gwaltney* and *Steel Company* stand for the propositions that as a matter of statutory language (depending on the statute in question, of course) or standing, a citizen suit cannot be pursued without allegation and ultimate proof of a violation which at the time the complaint is filed is ongoing or likely to recur. The type of allegation and proof sufficient to demonstrate a violation which is either ongoing or likely to recur will vary depending on the particular citizen suit at issue.

Under some citizen suit provisions, some good-faith allegations of continuous or intermittent violations will not suffice to prevent dismissal. For example, a recent RCRA citizen suit involved claimed breaches of RCRA's prohibition of open dumping, which the court defined as disposal of solid waste in a manner inconsistent with the sanitary landfill requirements of 40 C.F.R. part 257. Citizen plaintiffs alleged completed past disposal practices with ongoing consequences to the environment. The Second Circuit dismissed the

action because such past disposal allegations did not qualify as introducing substances into the environment that would cause MCL exceedances outside the boundary of a solid waste area.<sup>45</sup> Similarly, a recent citizen suit under the CWA alleged ongoing discharges of pollutants from unpermitted point sources. The Court granted a summary judgment of no standing based on evidence that the sources of alleged releases were cured by pre-suit technical repairs and upgrades to the wastewater management system.<sup>46</sup>

Contrasted with this is a line of cases construing RCRA's imminent and substantial endangerment enforcement provision, 42 U.S.C. § 6972(a)(1)(B), to allow citizen suits for wholly past violations which have led to contamination constituting a continuing endangerment to health or the environment. When the past conduct has led to a current endangerment which could be subjected to court-ordered corrective action, these cases hold that a RCRA citizen suit action is viable on the basis that the endangerment is a continuing violation.<sup>47</sup> Similarly, past failure properly to close underground storage tanks under RCRA has been found to give rise to a continuing violation in the form of a duty to abate remaining contamination.<sup>48</sup>

The extent to which past violations might still serve as the basis of a citizen suit turns on reconciliation of the language of the citizen suit provision and the standing principles underpinning the *Steel Company* case. For example, while the 1990 amendments to the CAA permit a citizen suit against a person "who is alleged to have violated (if there is evidence that the alleged violation has been repeated)," the courts have rationalized this as based on a presumption that the repeated violations evidence an ongoing compliance problem with violations that may be repeated in future. As such the claim states a redressable injury.<sup>49</sup> Obviously, such a presumption can be overcome with evidence that the facts are now such that the past violations are unlikely to recur. When scientific evidence is in issue, tools such as pre-trial *Daubert* hearings can be used to defeat

thinly-supported assertions of ongoing or likely-to-recur violations.<sup>50</sup>

Of course, as confirmed by *Steel Company*, some alleged ongoing violations that have been corrected, cured through a technical solution, or that have not recurred for a considerable period of time prior to suit will not survive a well-crafted motion for summary judgment asserting that the violations are passed and non-justiciable.

### **Settlement with Governmental Agency Prior to or During Notice Period**

A potent defense to citizen enforcement is settlement of the claims with the pertinent governmental authority either prior to the citizens' notice or prior to the filing of any citizens action. This defense was pushed to its extreme in *Laidlaw* and ultimately foundered based on the district court's determination that the whole lawsuit and settlement had been orchestrated by the defendant and resulted in a civil penalty which did not recover for the state the defendant's economic benefit from the violations.<sup>51</sup> Properly implemented, however, the defense of res judicata or claim preclusion should be successful. Preparation for these defenses should take these considerations into account.

Principles of full faith and credit require that a federal court adjudicating a citizen suit give preclusive effect to a state judgment whenever the state court that was the source of the judgment would give it such effect. The defense of claim preclusion is a matter of state law. Subject to the caveat that it varies from state to state, claim preclusion typically requires a demonstration by the defendant of (1) identity of the thing sued for, (2) identity of the cause of action, (3) identity of the persons and parties to the action, and (4) identity of the quality of the person for or against whom the claim is made.<sup>52</sup> Targeted entities have had some difficulty in convincing courts that citizens and state agencies are sufficiently in privity to satisfy the identity of person element, that there is identity of claims between the two actions, and that administrative

settlements should be accorded the same respect as settlements entered in a court of law.

Consistent with citizen suits' subsidiary role and the notion of citizens as private attorneys general, most courts hold that a state and its citizens are in privity and thus meet the identify of person requirement when the state, acting as *parens patriae*, brings an action for damage to a public resource.<sup>53</sup> The recent case of *CLEAN, Inc. v. Premium Standards Farms, Inc.*,<sup>54</sup> however, continued a disturbing trend of confounding common law and statutory concepts by declaring that the identity of persons requirement for claim preclusion is statutorily defined by the terms of the statutory prohibition in the CWA and CAA against commencement of citizen suits when a state "has commenced and is diligently prosecuting" an action. Converting a limitation clearly phrased in the present tense into the past, the court declared that a citizen suit is "barred only when a state has 'diligently prosecuted' an action with respect to the same violations." Only in that situation is there identity between the state and the citizen plaintiff. The court went on to determine that citizens could pursue claims unidentified in the state's settlement but encompassed by its broad general release on the basis they were not diligently prosecuted.<sup>55</sup>

The only statutory bar in respect of which the *CLEAN* court's merger of defenses argument has credibility is the unique bar to citizen enforcement of civil penalties under the CWA when the governmental agency has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under 33 U.S.C. § 1319(g) or the comparable state law. But such defense is not subject to any precondition of diligent prosecution.<sup>56</sup> This statutory provision also partially deals with another challenge faced by targeted entities asserting claim preclusion, namely the reticence of some courts to give final administrative orders or settlements preclusive effect equal to that accorded judicial consent judgments or final judgments.<sup>57</sup> Obviously, if state law affords preclusive effect to final administrative determinations, then such a determination should

defeat a later filed citizen suit concerning the same subject matter.

In laying this defense, nuances in state claim preclusion law must be carefully understood and applied. Some courts have circumvented broad application of the doctrine based upon the rule that each permit violation or exceedance constitutes a separate cause of action. These courts have held that violations occurring after the settlement remain actionable.<sup>58</sup> Other courts have narrowly applied the required element that the two sets of claims arise from the same nucleus of operative facts, insisting upon express statement in both the complaint and settlement in the underlying proceeding of the claims resolved before applying claim preclusion against the same claims in the citizen suit.<sup>59</sup>

Properly applied to the facts of a particular situation, claim preclusion can be an effective defense even to claims not specifically asserted by the settling federal or state agency. As was acknowledged in *CLEAN*, claims preclusion also extends to claims that a settling agency could have brought at the time of its enforcement action. A consent judgment can extend to claims not explicitly asserted if that is the intent of the settling parties. Since a settling agency should be on notice of adequately noticed citizen suit claims by virtue of the

### **Diligent Prosecution of a Governmental Action**

Arising out of the citizen suit's function as a mere supplement to government enforcement, statutory citizen suit mechanisms contain a prohibition against commencing suit whenever EPA or a state is diligently prosecuting a civil action regarding the same subject matter.<sup>61</sup> In addition, certain citizen suits contain provisions barring suit when an agency is pursuing an administrative action.<sup>62</sup>

The majority of courts to consider the matter have concluded that the definition of the preclusive EPA or state "civil action in a court" does not extend to administrative enforcement actions.<sup>63</sup> The Third Circuit, however, has adopted a more functional approach holding that

statutory notice requirement, a subsequent properly crafted settlement should be effective to preclude the claims known to the agency at the time of settlement but not specifically enforced.

It should be noted, however, that some courts may make strenuous efforts to avoid this result, perhaps taking advantage of a defendant's natural reticence to address additional claims beyond those enforced upon in a settlement. This was precisely the result in *CLEAN* when the court found that the defendant could not prevail on claim preclusion because it had failed to adduce sufficient evidence of the intended content of the settlement with the state agency and because the state could have had no knowledge of the violations occurring after the settlement was entered into. The *CLEAN* court consequently limited the reach of the claim preclusion defense to claims specifically referred to in the consent judgment.<sup>60</sup> An effective defense will thus address these types of considerations by flushing out the full scope and extent of the claims noticed by the citizen plaintiffs and carefully wording the pleadings and settlement papers used to resolve the chosen agency enforcement proceeding.

an administrative agency can be considered a court if it has the power to grant relief substantially equivalent to that available under the statute containing the citizen suit.<sup>64</sup> As explained above, a more defensible approach to dealing with this issue is to recognize the limiting effect of the "civil action in a court" language, but at the same time to acknowledge that administrative claims preclusion (*res judicata*) may operate as a distinct defense to citizen suit enforcement.

Targeted entities must pay particular attention to proving each element of the distinct diligent governmental action defense under the various environmental statutes. Some courts appear reticent to deny citizen plaintiffs access to the courts. Thus, in a recent RCRA case, a

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district court applied the terms of the prohibition strictly in holding that an action by the state in state court enforcing RCRA's underground storage tank requirements operated to defeat citizens' claim seeking to enforce the RCRA UST requirements but not their claim of an imminent and substantial endangerment. Regarding the latter claim, only an action by the state under the citizen suit mechanism itself would be effective to prevent the citizens from proceeding.<sup>65</sup>

As touched on earlier, an additional statutory defense available under the CWA to any civil penalty claim arises when it can be demonstrated either that a state has commenced and is diligently prosecuting an action under a comparable state law, or that a state has issued a final order and the violator has paid the assessed penalty.<sup>66</sup> Comparability has been interpreted to include both comparability of remedies and of opportunity for those interested meaningfully to participate in the enforcement action.<sup>67</sup> In *Jones v. City of Lakeland*, this meaningful public participation opportunity element was interpreted to require proof of a state process for non-discretionary participation by stakeholders and affected citizens in the decision-making process adequate to safeguard the legitimate interests recognized by the CWA.<sup>68</sup> Regarding comparability of remedies, there is a clear split of authority between those cases holding that only an action in which penalties are asserted will suffice to defeat a CWA citizen suit penalty action, and those holding that a compliance order issued by an agency merely having the authority to seek penalties suffices.<sup>69</sup> Given the deference that should be afforded to government enforcement over citizen suits and drawing upon the analogy to claim preclusion law to the effect that a claim that could have been brought but was not is also precluded by that defense, the better line of cases is that holding that a claim by an agency with the power to seek penalties will preclude such a citizen penalty action.

The standard of "lack of diligent prosecution" was recently usefully articulated and applied in the case of *Community of Cambridge Environmental Health and Community*

*Development Group v. City of Cambridge*.<sup>70</sup> Citizen plaintiffs have the burden of proof of non-diligent prosecution. Enforcement agency diligence is presumed. Lack of diligence requires a pattern of agency conduct that could be considered dilatory, colusive, or otherwise in bad faith. Deference should be accorded agency decision making and diligent prosecution does not equate to successful prosecution. A competent attempt will suffice.<sup>71</sup>

On the facts, the district court determined that the enforcement agency's civil action to bring the city's combined sewage and stormwater collection and drainage system into compliance with CWA NPDES requirements was diligent. Before citizen plaintiffs got involved, the city had: entered into a consent order and final judgment including a schedule of investigatory and corrective actions to implement a plan to study, design and construct new sewer and stormwater systems, agreed to pay a small fine, and subjected itself to the continued supervision of the court. In addition, the environmental agency had approved the city's resulting sewer upgrade and implementation plan. After plaintiffs got involved, the consent judgment was revised to take account of claims made by the citizens and of slippage in scheduled deadlines. Additionally, phase one of the upgrade project was completed to the agency's satisfaction. The court further determined that failure to levy a significant penalty was not lack of diligence in light of the defendant city's status as a tax-funded entity, the enforcement agency's discretion to decide penalties and reservation of its discretion so to do in future, and the substantial capital investment required of the city.<sup>72</sup>

Case law indicates that diligent prosecution involves a consideration of factors including: (1) the length and success of enforcement; (2) the continuance of pollutive discharges and their level of human and environmental risk; (3) the level of government response to known ongoing pollutive discharges; (4) the extent to which compliance deadlines are enforced, waived or extended; (5) the amounts of penalties imposed compared with amounts

authorized to be imposed and any extenuating circumstances, such as the level of investment required of defendant in the corrective measures imposed; and (6) the level of collusion between the parties and extent to which public participation occurred.<sup>73</sup> Years of ineffective enforcement with continuing violative emissions which pose a significant risk, waiver of these violations and token penalties has been held to be legally sufficient to overcome an assertion of diligent enforcement.<sup>74</sup>

Of course, only a diligently prosecuted government enforcement action filed prior to the commencement of the citizen suit can serve as the basis for this defense. A targeted entity should also be aware that in some cases the statutory authority is written so that a citizen suit notice served prior to the filing of any enforcement action will defeat any defense based on the pendency of enforcement action.<sup>75</sup> Nonetheless, principles of mootness and claim preclusion may be employed to deal with such situations.

### **The Defense of Statute of Limitations**

The general five-year statute of limitations for federal actions has been applied to citizen suit actions seeking penalties under a variety of environmental statutes. 28 U.S.C. § 2462 provides that unless there is an alternative statute of limitation, actions for enforcement of any civil fine, penalty, or forfeiture must be commenced within five years from the date the claim first accrued.

This default statute of limitation has been used effectively to defeat or limit the scope of civil penalty actions. Certain courts, however, have grafted common law concepts such as equitable tolling and the discovery rule onto the limitations statute. Courts that have considered the issue have held that the limitation period is tolled during the citizen suit statutory notice period, making a claim timely so long as the required statutory notice was given during the five-year period.<sup>76</sup> Courts have also held that the discovery rule applies to the point of accrual and a claim exists when the citizen plaintiff knew or should have known of the violation causing

the injury.<sup>77</sup> Typically, the date the citizen plaintiff should have known of the violations at issue is measured from the date a statutorily-required report is submitted to the appropriate government agency or the agency issues a notice of violation and these documents become public records.<sup>78</sup> Target corporations, however, should not assume that these concepts will prevail and be applied in all jurisdictions and appropriate arguments should be advanced whenever permissible.

### **Obtaining An Award of Legal Fees and Costs For The Defense**

Typically, citizen suits provide that legal costs and fees may be awarded to the substantially prevailing party. Targeted entities should be aware that this includes the award of fees to a citizen plaintiff who can prove that its lawsuit was a substantial factor in or significant catalyst for the defendant's resolution of a subsequently filed government enforcement action.<sup>79</sup> On the other hand, there are several road blocks that have been thrown up in the path of a successful defendant's recovery of costs and fees using this vehicle.

On remand in the *Steel Company* case, the citizen argued that the ruling of no jurisdiction also inevitably meant the court had no jurisdiction to award fees and costs to the targeted company under the statutory fee-shifting mechanism. The Seventh Circuit ruled the citizen's failed claim fell within EPCRA's provision permitting an award of costs and fees "in any action brought pursuant to this section."<sup>80</sup> The Court also ruled that a defendant who secures a ruling that forecloses citizens from suing for an alleged violation satisfies the required element of securing a material change in the parties' legal relationship.<sup>81</sup> It concluded that costs could be awarded despite the Court's lack of subject matter jurisdiction over the merits of the claim.

Nonetheless, the Seventh Circuit chose not to follow the U.S. Supreme Court ruling in *Fogerty v. Fantasy, Inc.*,<sup>82</sup> holding that language materially identical to EPCRA's fee-shifting mechanism must be applied to prevailing

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plaintiffs and defendants equally. Instead, the Court extended to EPCRA earlier U.S. Supreme Court case law declaring that the fee-shifting mechanism of the CAA should be governed by the same principles as fee-shifting under the Civil Rights Act. Pursuant to this approach, a prevailing targeted entity is only entitled to recover its legal expenses if the citizen suit was frivolous, groundless, pursued in bad faith, or maintained after its baselessness became apparent.<sup>83</sup> A similar vehicle for relief in such situations is Federal Rule of Civil Procedure Rule 11's provision for awarding fees against attorneys who file frivolous suits. Consequently, a defense award of attorneys fees in citizen suits will likely remain elusive unless the U.S. Supreme Court is inclined to extend the reach of its *Fogarty* ruling to other statutes.

### CONCLUSION

Handled properly, citizen suits can be successfully defended without huge cost to the targeted defendant. Despite the constraints placed upon citizen suit claims resolved prior to

the citizen plaintiff filing suit by the U.S. Supreme Court ruling in *Steel Company*, the later ruling in *Laidlaw* and recent ruling applying it have confirmed that the citizen suit enforcement tool is alive and well. Addressed immediately upon receipt of notice, however, citizen suits can be effectively defended using a variety of constitutional standing, statutory and common law procedural defenses. A key consideration is the form and content of the defendant's chosen resolution of the alleged violations, be it voluntary compliance or formal settlement with the appropriate environmental agency. The utility of the available defenses is, however, somewhat limited if the targeted entity is unwilling or unable to resolve any actual violations with the appropriate authorities. In such situations, recent case law reflects a judicial willingness to find a way to circumvent procedural defenses to citizen suit enforcement. Those entities with a forthright approach to environmental compliance are going to find threats of citizen suits can be a manageable incident to conducting business.

## ENDNOTES

1. Mr. Ashton is of counsel in the Miami office of Morgan, Lewis & Bockius LLP and a member of the Tort, Environmental and Construction Practice Group. His biography appears elsewhere in this Deskbook.
2. 523 U.S. 83 (1998).
3. 120 S. Ct. 693 (2000).
4. See, e.g., Clean Air Act, Section 304, 42 U.S.C. § 7604; Federal Water Pollution Control Act, Section 505, 33 U.S.C. § 1365; Resource Conservation and Recovery Act, Section 7002, 42 U.S.C. § 6972 (1984); Emergency Planning and Community Right-to-Know Act, Section 326, 42 U.S.C. § 11046; Endangered Species Act, Section 11 (g), 16 U.S.C. § 1540(g); Toxic Substances Control Act, Section 20, 15 U.S.C. § 2619; Safe Drinking Water Act, Section 1449, 42 U.S.C. § 300j-8; Surface Mining Control and Reclamation Act, Section 520, 30 U.S.C. § 1270; Marine Protection, Research, and Sanctuaries Act, Section 105(g), 33 U.S.C. § 1415(g); Noise Control Act, Section 12, 42 U.S.C. § 4911; Deepwater Ports Act, Section 16, 33 U.S.C. § 1515; Outer Continental Shelf Lands Act, Section 23, 43 U.S.C. § 1349(a); Comprehensive Environmental Response, Compensation, and Liability Act, Section 310, 42 U.S.C. § 9659.
5. See, e.g., Clean Water Act § 505(a)(2), 33 U.S.C. § 1365(a)(2); *Mississippi River Revival, Inc. v. EPA*, 107 F. Supp.2d 1008, 1012-13 (D. Minn. 2000) (U.S. EPA had no duty to act on an NPDES permit application by a municipal separate storm sewer system operator because program had been delegated to state).

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6. See, e.g., *Mississippi River*, 107 F. Supp.2d at 1015 (authority to enforce standards, limitations, permits and orders does not extend to a challenge to the contents of a pending permit application); *Amigos Bravos v. Molycorp, Inc.*, 166 F.3d 1220 (10th Cir. 1998) (citizen suit enforcement mechanism is unavailable collaterally to challenge the terms of a permit).
7. 529 U.S. 1858, 120 S. Ct. 1858, 1870 (May 22, 2000) (former employee claimed Vermont Agency of Natural Resources had submitted false claims to EPA by overstating amounts of time agency employees had worked on various projects funded by EPA-administered grant programs).
8. 523 U.S. 83 (1998).
9. 120 S. Ct. 693 (2000).
10. 523 U.S. at 101.
11. See, e.g., *In re Holocaust Victim Assets Litigation*, 225 F.3d 191, 195 (2000).
12. *Bennett*, 520 U.S. at 164-65 (Endangered Species Act citizen suit provision modified the zone of interests test).
13. See, e.g., *Grand Council of the Crees v. Federal Energy Regulatory Commission*, 198 F.3d 950, 954 (D.C. Cir. 2000).
14. 523 U.S. at 102-04.
15. 118 S.Ct. at 1018-19.
16. 484 U.S. 89 (1987).
17. 120 S. Ct. at 702-03.
18. 120 S. Ct. at 704-06.
19. 120 S. Ct. at 706-08. See, e.g., *Old Timer*, 51 F. Supp.2d at 1117.
20. 120 S. Ct. at 708-11.
21. 504 U.S. at 556.
22. See, e.g., *Pinney Run Preservation Association v. Carroll County*, 82 F. Supp.2d 464, 467-68 (D. Md. 2000) (reasonable fears concerning river pollution justified standing under *Laidlaw* test).
23. 179 F.3d 107 (4th Cir. 1999), *rev'd en banc* 204 F.3d 149 (2000).
24. 179 F.3d at 113-15.
25. 204 F.3d at 161-63.
26. 207 F.3d 789 (5th Cir. 2000).
27. 207 F.3d at 792-93.
28. 207 F.3d at 793.
29. 198 F.3d at 958.
30. 120 S. Ct. at 1861-65.

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31. 120 S. Ct. at 1863-65.
32. See, e.g., *National Wildlife Federation v. Westphal*, 116 F. Supp.2d 49 (D.D.C. 2000) (environmental group had no interests protected by the local government cost share provisions of the Water Resources Development Act).
33. 198 F.3d at 955, citing *Clarke v. Securities Industry Association*, 479 U.S. 388, 399 (1987); *Desert Citizens Against Pollution v. Bisson*, 231 F.3d 1172, 1179 (9th Cir. 2000) (citizen group's interest in seeking to invalidate an allegedly unlawful transfer of federal land that would deprive its members of their aesthetic and recreational interest in the land was within the zone of interest of the Federal Land Policy and Management Act).
34. 198 F.3d at 957-58.
35. 520 U.S. 154, 166 (1997).
36. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992).
37. *Desert Citizens*, 231 F.3d 1172, 1179.
38. *Save the Rio Hondo v. Lucero*, 102 F.3d 445, 449 (10th Cir. 1996).
39. 198 F.3d at 958-59; *Heartwood, Inc. v. United States Forest Service*, 230 F.3d 947 (7th Cir. 2000) (plaintiffs' made sufficient declarations of impact to their interests arising from Forest Service's procedures for creating categorical exclusions for timber harvesting on government land).
40. See, e.g., 42 U.S.C. § 6972(b)(2)(A) (90 days for RCRA).
41. See, e.g., 40 C.F.R. § 135 (CWA citizen suit notice); 40 C.F.R. § 254.3 (RCRA requirement enforcement).
42. See, e.g., *Hallstrom v. Tillamook County*, 110 S. Ct. 304 (1989); *Painesville Township v. City of Painesville*, 200 F.3d 396, 400 (6th Cir. 1999).
43. *Northern California River Watch v. Humboldt Petroleum, Inc.*, No. C-00-1329 VRW, 2000 WL 1639524, \*4 (N.D. Cal. Oct. 30, 2000); see also *Community of Cambridge Environmental Health and Community Development Group v. City of Cambridge*, 115 F. Supp.2d 550, 559 (D. Md. 2000) (generic identification of plaintiffs insufficient).
44. See, e.g., *Friends of the Earth, Inc. v. Chevron Chemical Company*, 900 F. Supp. 67, 77-78 (E.D. Tex. 1995) (summary judgment against NPDES permit violation claims asserting different parameters than those noticed); *Old Timer*, 51 F. Supp.2d at 1118 (violations directly related to those in NOV incorporated by reference in notice could be litigated; unrelated sewer blockages and overflows could not).
45. *South Road Associates v. IBM Corporation*, 216 F.3d 251, 255-57 (2d Cir. 2000).
46. *Woodward v. Goodwin*, No. C 99-1103 MJJ, 2000 WL 694102, \*7 (N.D. Cal. May 12, 2000) (summary judgment granted when sewer pipe and connector leaks and sewage overflow problems were fixed prior to suit and no additional incidents occurred).
47. *L.E.A.D. v. Exide Corporation*, No. CIV 96-3030, 1999 WL 124473, \*7-11 (E.D. Pa. Feb. 19, 1999).
48. *Raymond K. Hoxie Real Estate Trust v. Exxon Education Foundation*, 81 F. Supp.2d 359, 364-65 (D.R.I. 2000).
49. 42 U.S.C. § 7604(a)(1); *L.E.A.D.*, 1999 WL 124473 at \*15, \*23-25.
50. See, e.g., *Woodward*, 2000 WL 694102, \*14.
51. 120 S. Ct. at 702 n.1.
52. See, e.g., *Harmon Industries, Inc. v. Browner*, 191 F.3d 894, 902 (8th Cir. 1999).

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53. See, e.g., *Old Timer*, 51 F. Supp.2d at 1117-18.
54. No. 97-6073-CV-SJ-6, 2000 WL 220464 (W.D. Mo. Feb. 23, 2000).
55. 2000 WL 220464 at \*11-14.
56. 33 U.S.C. § 1319(6)(A)(iii).
57. Compare *United States v. Allegheny County Health Department*, 116 F. Supp.2d 624, 631 (W.D. Pa. 2000) (administrative settlement of air violations not res judicata of EPA enforcement) with *Old Timer*, 51 F. Supp.2d at 1118 n.2 (res judicata effect given to administrative decision).
58. See, e.g., *Old Timer*, 51 F. Supp.2d at 1118.
59. See, e.g., *CLEAN*, 2000 WL 220464 at \*7-10 (“first lawsuit’s preclusive effect reaches, at the very most, to those claims and violations to which the Petition and Consent Judgment specifically refer”).
60. 2000 WL 220464, at \*6-10.
61. See, e.g., 42 U.S.C. § 7604(b)(1)(B); 33 U.S.C. § 1365(b)(1)(B).
62. See, e.g., 33 U.S.C. § 1319(g)(6)(A) (CWA); 15 U.S.C. § 2619(b)(1)(B) (TSCA); 42 U.S.C. § 6972(b) (HSWA).
63. *Texans United*, 207 F.3d at 794-95 (summarizing the conflicting authorities and holding administrative proceeding is not included in “civil action in a court”); *Jones v. City of Lakeland*, 224 F.3d 518, 521-22 (6th Cir. 2000).
64. *Baughmann v. Bradford Coal Co.*, 592 F.2d 215, 217-19 (3d Cir. 1979).
65. *Humboldt*, 2000 WL 1639524, \*2-3.
66. 33 U.S.C. § 1319(g)(6)(A)(ii) and (iii).
67. *Jones*, 224 F.3d at 523-24.
68. 224 F.3d at 523-24.
69. See, e.g., *Old Timer, Inc. v. Blackhawk-Central City Sanitation District*, 51 F. Supp.2d 1109, 1113-15 (D. Colo 1999) (summarizing the cases and siding with the view that only a pending civil penalty action defeats a citizen suit action).
70. 115 F. Supp.2d 550 (D. Md. 2000).
71. 115 F. Supp.2d at 554-55; see also *Humboldt*, 2000 WL 1639524, \*2.
72. 115 F. Supp.2d at 555-57.
73. See, e.g., 224 F.3d at 522-23; 115 F. Supp.2d at 555-57; 890 F. Supp. at 470 (district court ruling on the diligence issue in the *Laidlaw* case).
74. 224 F.3d at 522-23.
75. See, e.g., 33 U.S.C. § 1319(g)(6)(B)(ii).
76. *LE.A.D. v. Exide Corporation*, 1999 WL 124473, \*3 (E.D.Pa. Feb. 19, 1999) (summarizing cases).
77. 1999 WL 124473, \*3-4.

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78. 1999 WL 124473, \*4 (filing of discharge monitoring reports and reports of continuous emissions monitoring systems, and issuance of notices of violation constitute discovery for accrual).
79. *Old Timer*, 51 F. Supp.2d at 1119.
80. 42 U.S.C. § 11046(f).
81. *Citizens For A Better Environment v. The Steel Company*, 230 F.3d 923, 929 (7th Cir. 2000).
82. 510 U.S. 517 (1994).
83. 230 F.3d 923 at 930-31.