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Interpreting the Citizen Suit Provision of the Clean Water Act

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INTERPRETING THE CITIZEN SUIT PROVISION OF THE CLEAN WATER ACT

As an additional means of enforcement, the Clean Water Act contains a provision authorizing private citizens to bring suit against violators. Most courts, until Friends of the Earth II, have only allowed these citizen suits where there was no pending agency action or no diligent prosecution of that action. The author argues that this restrictive interpretation of the Clean Water Act's citizen suit provision should be discarded in favor of a more liberal application, to better effectuate the letter and spirit of the Act.

INTRODUCTION

THE FEDERAL WATER Pollution Control Act Amendments, 1 enacted by Congress in 1972, established a permit-based scheme which requires water pollution dischargers to comply with standards set by the United States Environmental Protection Agency (EPA). 2 To facilitate enforcement of the Act, Congress included a citizen suit provision 3 basically identical to that contained in the Clean Air Act. 4 The Clean Water Act allows citizens to sue viola-

2. Section 1311(b) of the Act directs the EPA to set effluent limitations prescribing the technological control standards that dischargers must meet and to set compliance deadlines. These limitations are enforced through the Act's permit program. Section 1311(a) declares the discharge of pollutants unlawful unless the discharger has acquired a permit, while § 1342(a)(1) states that such permits must require dischargers to comply with the effluent limitations.
4. 42 U.S.C. § 7604 (1978). The only difference between the citizen suit provisions in the Clean Air and Clean Water Acts is that, under § 1365(a) of the Clean Water Act, civil penalties may be imposed against the violator. Such penalties are not recoverable by the citizen plaintiff, but rather are deposited into the Federal Treasury. S. REP. No. 414, 92d
tors unless the Environmental Protection Agency or a 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 . . . .”

Many courts interpreting the Clean Water Act's citizen suit provision have held that an administrative agency may constitute a court with the agency's enforcement action qualifying as diligent prosecution. Such a conclusion effectively precludes a citizen suit under section 1365(b). In reaching the decision that an administrative agency is a "court" and has diligently prosecuted violators, these courts have failed to develop precise, uniform standards for determining what agency action will be sufficient to preclude a citizen suit. Instead, the courts have espoused a variety of conflicting tests.

Recently, the Second Circuit, in Friends of the Earth v. Consolidated Rail Corporation, rejected precedent permitting agency action, in some instances, to preclude citizen suits under the Clean Water Act. The Friends court held that citizen suits are precluded only if the agency is diligently prosecuting a court action against the violator. This holding, unlike the reasoning rejected by the court, is consistent with the plain language of the Clean Water Act, congressional intent, and the underlying policy considerations. Furthermore, the Friends holding eliminates the danger of applying the inconsistent and imprecise tests previously developed to determine when agency action will preclude citizen suits. Because the Second Circuit's standard, which allows citizens to sue violators unless an actual court action is pending, comports more precisely with the language and intent of the Clean Water Act, it should be accepted as the uniform standard by which future cases are decided.

This Note first analyzes the statutory language and legislative intent of the Clean Water Act, highlighting the indications that Congress intended to bar citizen suits only when a court action is

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6. See infra notes 44-68 and accompanying text.
7. 768 F.2d 57 (2d Cir. 1985) [hereinafter Friends II].
8. Id. at 62.
pending.\textsuperscript{9} Second, this Note discusses the various judicial interpretations of the provision, focusing on those courts which have held that a citizen suit may be precluded by agency action independent of pending court actions.\textsuperscript{10} This Note considers these decisions misguided because they are not supported by any of the possible policy explanations.\textsuperscript{11} Additionally, the failure of those courts to fashion a meaningfully concrete test to determine sufficiently preclusive agency action and the danger that might result from inadequate guidance support allowing only pending court actions to prevent citizen suits.\textsuperscript{12} This Note concludes that the proper interpretation of the Clean Water Act's citizen suit provision is that citizen suits will not be frustrated notwithstanding agency action unless an actual court action is pending.\textsuperscript{13}

I. LANGUAGE AND PURPOSE OF THE CLEAN WATER ACT CITIZEN SUIT PROVISION

A. Statutory Language

Following precedent established by the Clean Air Act,\textsuperscript{14} Congress included the section 1365 citizen suit provision in the Clean Water Act to supplement the Act's enforcement provisions.\textsuperscript{15} This section provides that "any citizen may commence a civil action on his own behalf . . . against any person . . . who is alleged to be in violation" of standards established pursuant to the Act.\textsuperscript{16} Section 1365 also specifies the only significant restriction on a citizen's right to sue violators: "No action may be commenced [by a citizen against a violator] . . . if the Administrator [of the EPA] . . . has commenced and is diligently prosecuting a civil or criminal action in a court of the United States . . . to require compliance with the

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  \item \textsuperscript{9} See infra notes 14-43 and accompanying text.
  \item \textsuperscript{10} See infra notes 44-77 and accompanying text.
  \item \textsuperscript{11} See infra notes 78-93 and accompanying text.
  \item \textsuperscript{12} See infra notes 94-116 and accompanying text.
  \item \textsuperscript{13} See infra notes 117-25 and accompanying text.
  \item \textsuperscript{14} 42 U.S.C. § 7604(b) (1978).
  \item \textsuperscript{15} See City of Evansville v. Kentucky Liquid Recycling, Inc., 604 F.2d 1008, 1016 (7th Cir. 1979), cert. denied, 444 U.S. 1025 (1980) (Act's enforcement mechanisms "reinforced by citizen suit provisions"). See also Feller, Private Enforcement of Federal Anti-Pollution Laws Through Citizen Suits: A Model, 60 Den. L.J. 553, 553 (1983) (purpose of the citizen suit provision in the Clean Air and Clean Water Acts is to encourage "federal agencies and corps of local private attorneys general to work together to conserve and enhance the country's air and water resources through administrative actions and private citizen suits."). For a discussion of the Clean Water Act's enforcement scheme, see supra note 2.
The starting point for interpreting the Clean Water Act's citizen suit provision is the language of the statute itself. Section 1365(b) plainly states that a citizen suit under the Act is precluded only if the government has instituted a court action against the violator and the action constitutes "diligent prosecution." Because the language is so explicit, it is difficult to see any justification for allowing certain agency actions not constituting court action to preclude citizen suits.

A number of other environmental statutes support this reading of the Act. In these provisions, Congress has specifically authorized agency proceedings alone to bar private citizens from filing suit against violators. The fact that Congress did not include such a provision in the Clean Water Act further supports the view that only a court action can preclude citizen suits brought under that Act. Thus, the statutory language strongly supports the proposition that agency proceedings cannot preclude citizen suits under the Clean Water Act.


22. Friends II, 768 F.2d at 63. "Congress has frequently demonstrated its ability to explicitly provide that either an administrative proceeding or a court action will preclude citizen suits. Had Congress wished to impose this broader prohibition on citizen suits under the Clean Water Act, it could easily have done so. It did not." Id.
B. Congressional Intent

The primary objective of the Clean Water Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."\(^{23}\) Legislative statements about the Act suggest that because protecting environmental quality is important to the public at large, the public should also be authorized to help enforce the Act.\(^ {24}\) Such participation not only builds public confidence in the government's efforts to improve water quality,\(^ {25}\) but also ensures enforcement of the Act.\(^ {26}\)

Citizen suits aid in enforcement by motivating the agencies charged with enforcement responsibility to take action against violators.\(^ {27}\) The possibility that a citizen suit might be brought to enforce pollution standards, which the agency itself should enforce, is likely to prod the agency into taking action. Actions to force agency compliance may occur unilaterally or via the courts.\(^ {28}\) If the agency does not take action to enforce the standards, citizen suits

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24. "Perhaps more than in any other Federal program, the regulation of environmental quality is of fundamental concern to the public. It is appropriate, therefore, that an opportunity be provided for citizen involvement." 117 CONG. REC. 38,821 (1971) (statement of Sen. Cooper), reprinted in 2 LEGISLATIVE HISTORY, supra note 4, at 1253, 1306. See also Natural Resources Defense Council, Inc. v. Train, 510 F.2d 692, 700 (D.C. Cir. 1975) ("The legislative history of the Clean Air Act Amendments reveals that the citizen suits provision reflected a deliberate choice by Congress to widen citizen access to the courts . . . ."); Note, Baughman v. Bradford Coal Co., Inc.: A Reaffirmation of Citizen Suits Policy Within the Clean Air Act, 82 W. VA. L. REV. 709, 711 (1980) (Clean Air Act citizen suit provision served to widen "citizen access to the courts, enabling citizens to participate in the fight against air pollution, which directly affects their health and safety.").

25. See H.R. REP. No. 911, 92d Cong., 1st Sess. 132 (1972), reprinted in 1 LEGISLATIVE HISTORY, supra note 4, at 753, 819 ("Steps are necessary to restore the public's confidence and open wide the opportunities for the public to participate in a meaningful way in the decisions of government.").

26. See S. REP. No. 414, 92d Cong., 1st Sess. 80 (1971), reprinted in 2 LEGISLATIVE HISTORY, supra note 4, at 1415, 1498 (Committee's intent in including the citizen suit provision was "[t]hat enforcement of these control provisions be immediate."). See also Natural Resources Defense Council, Inc. v. Train, 510 F.2d 692, 700 (D.C. Cir. 1975) ("The citizen suits provision [in the Clean Air Act] reflected a deliberate choice by Congress to widen citizen access to the courts, as a supplemental and effective assurance that the Act would be implemented and enforced.").

27. S. REP. No. 1196, 91st Cong., 2d Sess. 35-36 (1970). See also Friends of the Earth v. Carey, 553 F.2d 165, 173 (2d Cir. 1976) ("[T]he very purpose of the citizens' liberal right of action [under the Clean Air Act] is to stir slumbering agencies."); Note, supra note 24, at 711 (Clean Air Act citizen suit provision "attempted to motivate and goad the EPA and state agencies charged with the responsibility of enforcing anti-pollution statutes into appropriate action.").

28. See infra notes 32-37 and accompanying text.
can serve as an "antidote to agency inaction" by enforcing the Act through the courts. As with the Clean Air Act, the public must be allowed liberal access to the courts to serve the purpose of the citizen suit provision.

The statutory restrictions on citizen suits lends additional support to the assertion that Congress intended to allow considerable public participation in enforcement of the Clean Water Act. Specifically, the citizen suit provision serves to "facilitate the citizen's role in the enforcement of the Act, both in renouncing those concepts that make federal jurisdiction dependent on diversity of citizenship and jurisdictional amount, and in removing the barrier, or hindrance, to citizen suits that might be threatened by challenges to plaintiff's standing."

To prevent abuses of the Act's extensive scope, however, Congress imposed three statutory restraints on the use of citizen suits. Besides prohibiting citizen suits when the agency has instituted judicial proceedings and is diligently prosecuting the violator, the Act restricts citizen suits only to enumerated violations, and requires the citizen to give notice to the enforcement agency and the violator sixty days prior to the commencement of the suit. These restraints were thought to be necessary to prevent excessive public litigation that might effectively frustrate the Act's implementation and to minimize the burden on the judicial system.

The restrictions are notable in several ways. First, the notice

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30. See S. Rep. No. 414, 92d Cong., 1st Sess. 80 (1971), reprinted in 2 Legislative History, supra note 4, at 1415, 1498 ("Citizens should be unconstrained to bring these actions, and . . . the courts should not hesitate to consider them . . . ."). See also Friends of the Earth v. Carey, 535 F.2d at 172 ("Citizen groups are not to be treated as nuisances or troublemakers . . . . The [Clean Water] Act seeks to encourage public participation rather than to treat it as curiosity or a theoretical remedy.").

31. Natural Resources Defense Council, Inc. v. Train, 510 F.2d 692, 700 (D.C. Cir. 1975). See also Carey, 535 F.2d at 172-73 ("Possible jurisdictional barriers to citizen actions, such as amount in controversy and standing requirements, are expressly discarded by the [Clean Air] Act.").

32. Friends II, 768 F.2d at 62 (discussing identical Clean Air Act provisions).


36. Train, 510 F.2d at 700.
requirement safeguards against this danger of abuse by signalling to the pertinent agency that there is a violation. Second, the sixty day period allows the agency time to bring suit against the violator or otherwise force compliance prior to commencement of the citizen suit.\textsuperscript{37} The balance struck between unrestricted public access to the courts and the restraints imposed by the statute essentially ensures that all citizen suits will be heard unless such suits are rendered unnecessary because of compliance efforts.

In addition to removing traditional restrictions on citizen suits under the Clean Water Act, Congress also provided for the award of litigation costs, where appropriate, to citizen suit litigants.\textsuperscript{38} This provision was intended to bolster enforcement of the Act by encouraging citizens to bring meritorious actions against violators.\textsuperscript{39} Reimbursement of litigation costs to citizen plaintiffs indicates that Congress considered such plaintiffs to be performing a "public service" for which they should be compensated.\textsuperscript{40} That Congress viewed citizen suits as vehicles to be promoted by awarding litigation costs is demonstrated by Congress' intention that such costs be awarded anytime a citizen suit results in enforcement, regardless of whether a verdict has been reached in the suit.\textsuperscript{41} Given Congress'
intention to provide citizens liberal access to enforce the Act, as well as the statutory safeguards against abusive litigation, a court-developed doctrine that precludes citizen suits when no court action has commenced appears to contravene Congress' intention.

In determining whether citizens should be allowed to sue violators under section 1365, courts are mindful that, in many cases, no alternative relief is available to citizen plaintiffs. In a decision involving water pollution, the Supreme Court has stated that the citizen suit provisions preempt both private rights of action independent of the Clean Water Act and federal common law nuisance actions. Although state common law remedies remain available to citizens wishing to sue violators, state laws generally do not contain pollution standards as rigorous as those in the Clean Water Act. The citizen suit provision, therefore, may be the only means by which citizens are able to enforce the Act's standards. Consequently, courts should not impose restrictions on enforcement methods beyond those intended by Congress.

II. JUDICIAL INTERPRETATION OF THE CITIZEN SUIT PROVISION

A. Competing Judicial Approaches


Prior to July 1985, courts interpreting the Clean Water Act's citizen suit provision generally held that agency proceedings against violators can, in some instances, preclude citizen suits. Those
courts were not consistent, however, in determining what sort of agency action constitutes the equivalent of a court action. *Baughman v. Bradford Coal Co.*, the first case to hold that some agency actions constitute court action sufficient to preclude citizen suits, is the paradigm preclusion precedent under both the Clean Water and Clean Air Acts. The test enunciated by *Baughman*, however, was itself imprecise, and variations developed by later courts have added to the uncertainty surrounding the preclusion issue.

The *Baughman* test was originally developed to interpret the Clean Air Act citizen suit provision. Essentially, "an administrative board may be a 'court' if its powers and characteristics make such a classification necessary to achieve statutory goals." Furthermore, the agency's enforcement ability must be sufficiently similar to that of a court. The agency's ability to impose injunctive relief or civil penalties equal to those available through the courts under the Clean Air Act should also be considered.

Courts faced with determining whether a citizen suit is precluded under the Clean Water Act have often used this analysis. There is confusion, however, concerning whether agency action

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45. 592 F.2d 215 (3d Cir. 1979). While the *Baughman* court allowed the citizen suit in question, it stated that some agency actions could preclude such suits, and discussed the standard to be applied in the determination. See supra notes 20-21; infra notes 47-48 and accompanying text.

46. *Baughman*, 592 F.2d at 216.

47. *Id.* at 217.

48. See *id.* at 218. For agency action to preclude a citizen suit, "that tribunal must be empowered to grant relief which will provide meaningful and effective enforcement of an implementation plan." *Id.*

49. *Id.* The court found that since § 7413 of the Clean Air Act authorizes a court to grant either injunctive relief or civil penalties up to $25,000 per day of violation, or both, where the EPA sues the violator, Congress must have believed that effective enforcement of the Act requires the availability of both these penalties. Thus, the court concluded that these penalties must be available to an agency for that agency's enforcement ability to be sufficient to preclude a citizen suit.

50. See, e.g., Student Pub. Interest Research Group of N.J., Inc. v. Monsanto Co., 600 F. Supp. 1479, 1482 (D.N.J. 1985) (to preclude citizen suit, agency must be empowered to grant an injunction or civil penalties up to $10,000 per day of violation, or both, as the courts are authorized to do under § 1319 of the Clean Water Act).
may be equivalent to a court action when the agency is “empowered to grant relief which will provide meaningful and effective enforcement.” The Third Circuit has indicated that the availability of either injunctive relief or civil penalties may be sufficient for agency action to substitute as a court proceeding; the controlling factor being “whether the coercive powers that the administrative agency possesses compel compliance.” However, a District Court within the Second Circuit has implied that an agency’s general ability to impose civil penalties, without regard to whether the penalties equal those available in a court, is the appropriate factor. Thus, the standard to decide whether an agency has available appropriate and sufficient penalties is far from clear. As more courts hear the agency action issue, the standard may become increasingly imprecise.

An additional factor to be considered to determine whether the agency is capable of enforcing the Act is whether citizens may intervene in the proceeding. Baughman, unfortunately, pointedly left undecided whether an agency can constitute a “court” absent a right to intervene in the agency’s proceeding.

Court rulings after Baughman have created more conflict than those decisions discussing the sufficiency of penalties available to an agency. Several courts have followed Baughman’s implication that the right of citizen intervention may be an element in determining the agency’s enforcement ability. The Western District of New York has held that agency action cannot preclude a citizen suit...
where there is no right to citizen intervention,\(^\text{57}\) while the Northern District of New York has held that the absence of such a right is irrelevant.\(^\text{58}\) The Third Circuit has also implied that a variety of procedural safeguards must be present for an agency action to constitute a court proceeding. These safeguards include holding hearings before independent decisionmakers, the opportunity for opposing parties to present evidence and call witnesses, and the preparation and maintenance of formal transcripts and records of decisions.\(^\text{59}\) Plainly, \textit{Baughman} and its progeny provide no clear guidelines for future courts to determine whether an agency action can be considered a court proceeding for purposes of the citizen suit provision.

In addition to requiring that agency action must be the equivalent of a court proceeding, the Clean Water Act citizen suit provision also requires that the action be diligently prosecuted.\(^\text{60}\) Thus, even if an agency action is found sufficiently equivalent to a court proceeding, the action must also meet the diligent prosecution requirement.\(^\text{61}\) As with the sufficiency of the agency action, the courts have not clearly defined what diligent prosecution means.\(^\text{62}\)

The first case to discuss the issue, \textit{Gardeski v. Colonial Sand \& Stone Co.},\(^\text{63}\) indicated that the diligent prosecution requirement was imposed "to assure Congress, the courts, and the public that agency enforcement efforts were real and sufficient."\(^\text{64}\) Real and sufficient prosecution, combined with prompt agency efforts to enforce the Act's requirements, would meet the diligent prosecution requirement.\(^\text{65}\) The court further stated that a formal proceeding was required. To qualify as a formal proceeding,
Later court opinions have not always followed Gardeski's formal agency requirement to define diligent prosecution. Several courts have held that a consent order alone is sufficient, provided the agency enforces the order. One court has even held that a consent order which provides only for "eventual" compliance with the Act constitutes diligent prosecution. Like the court action requirement, the diligent prosecution requirement is vague and imprecise. There are few guidelines for future courts to follow if they accept that agency actions may occasionally preclude citizen suits.

2. The Second Circuit's Disavowal of Baughman

In *Friends of the Earth v. Consolidated Rail Corp.*, the Second Circuit explicitly rejected the *Baughman* test and its variations. *Friends II* held that only a judicial proceeding can preclude a citizen suit under section 1365(b) of the Clean Water Act; agency action alone is never sufficient to preclude such a suit. The court, basing its decision on the language of the statute, stated that "[t]he Clean Water Act citizen suit provision unambiguously and without qualification refers to an 'action in a court of the United States, or a State.' . . . It would be inappropriate to expand this language to

66. *Id.* at 1168.
67. *See Friends I*, 22 Env't Rep. Cas. (BNA) at 1149 ("[A] consent order may be sufficient to satisfy the requirement of diligent prosecution [unless] the . . . agency fails to monitor compliance with the order or if insufficient corrective action is taken by the polluter."); *Sierra Club v. SCM Corp.*, 572 F. Supp. 828, 831 n.3 (an agency "may . . . fail the test of diligent prosecution if it fails to adequately monitor or enforce the consent order.").
69. 758 F.2d 57 (2d Cir. 1985).
70. *Id.* at 62.
71. *Id.* at 62-63.
include administrative enforcement actions."\(^{72}\)

The court, not content to rest its decision on the statutory language, also examined the legislative history of the Act. *Friends II* noted that "Conrail has not cited to and our own research has failed to disclose any indication that Congress meant other than what it plainly stated in [section 1365(b)]."\(^{73}\) Focusing on Congress’ intent to encourage citizen participation in enforcement of the Act,\(^{74}\) and on the statutory safeguards against unlimited citizen actions,\(^{75}\) the court concluded that "[t]o interpret section [1365(b)] to include administrative as well as judicial proceedings [as preclusions to citizen suits] is in our view contrary to both the plain language of the statute and congressional intent."\(^{76}\) On the basis of these considerations, as well as various policy factors,\(^{77}\) this approach is clearly preferable to that enunciated in *Baughman*.

**B. Criticism of the Baughman Approach**

1. **Unpersuasive Policy Rationales**

   The *Baughman* court provided scant justification for adopting the view that agency action may preclude citizen suits by generally asserting that "an administrative board may be a ‘court’ if its powers and characteristics make such a classification necessary to achieve statutory goals."\(^{78}\) Several policy arguments support *Baughman's* reasoning. These arguments are rendered moot however, because they are remedied by the statute and, in some cases, common law.\(^{79}\) Policy considerations to be examined include possible frivolous and harassing citizen suits, danger of multiple suits against one violator, and the risk of inconsistent enforcement of the Act’s standards.

   Excessive concern for citizen plaintiffs bringing frivolous and harassing suits, although understandable, is unwarranted given Congress’ clear intention to encourage citizen suits in these cases.\(^{80}\)

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\(^{72}\) Id. at 62.

\(^{73}\) Id.

\(^{74}\) Id.

\(^{75}\) Id.

\(^{76}\) Id. at 63.

\(^{77}\) See infra notes 79-116 and accompanying text.

\(^{78}\) 592 F.2d at 217.

\(^{79}\) See *Friends II*, 758 F.2d at 62. "The court [in *Student Public Interest Research Group of New Jersey, Inc v. Fritzsche, Dodge & Olcott, Inc.*] failed to question or even to comment on the strength of the basis for, or the soundness of, the *Baughman* formulation."

\(^{80}\) See *supra* notes 15-34 and accompanying text; Schwartz & Hackett, *supra* note 4, at
Two factors substantially reduce the likelihood of meritless suits. First, the statute authorizes the court to award litigation costs to the “prevailing or substantially prevailing” party where “appropriate.” Congress acknowledged that frivolous and harassing citizen suits could be deterred by awarding litigation costs to defendants in such cases. Furthermore, although the same provision authorizes the court to award costs to prevailing citizen plaintiffs, the provision is unlikely to encourage citizens to bring suits which they would not otherwise bring because they must bear the initial expense themselves.

The second statutory barrier against excessive or meritless litigation is that citizen plaintiffs cannot collect civil damages in citizen suits against violators of the Clean Water Act. Although the statute provides for civil penalties to be assessed against such violators, those penalties are deposited into the Treasury, rather than directly distributed to citizen plaintiffs. The lack of civil damages removes

333-35 (original House bill would have authorized suits by only those citizens within the geographical area having a direct interest that may be infringed). The final conference version, however, only limited standing to those “having an interest which is or may be adversely affected.” S. REP. NO. 1236, 92d Cong., 1st Sess. 145-46 (1972), reprinted in 1 LEGISLATIVE HISTORY, supra note 4, at 328-29. Accord Natural Resources Defense Council, Inc. v. EPA, 489 F.2d 390, 411-12 (5th Cir. 1974), rev’d in part sub nom. Train v. Natural Resources Defense Council, Inc., 421 U.S. 60 (1975) (“Congress made it clear that considerations of economic cost or technical feasibility were always to be subordinate to considerations of public health [in enforcement of the Clean Air Act].”).


82. [T]he courts may award costs of litigation [to the prevailing party] . . . whenever the court determines that such action is in the public interest. The court could thus award costs of litigation to defendants where the litigation was obviously frivolous or harassing. This should have the effect of discouraging abuse of [the citizen suit] provision.

S. REP. NO. 414, 92d Cong., 1st Sess. 81 (1971), reprinted in 2 LEGISLATIVE HISTORY, supra note 4, at 1415, 1499. See also H.R. REP. NO. 911, 92d Cong., 1st Sess. 134 (1972), reprinted in 1 LEGISLATIVE HISTORY, supra note 4, at 753, 821 (By providing for an award of litigation costs to the prevailing party, “the Committee is satisfied that defendants who were subjected to needless harassment or frivolous suits may be reimbursed for their expenses. This should have the effect of discouraging abuse of the ‘citizen suit’ provision.”). See Schwartz & Hackett, supra note 4, at 367 (“Congress sought to provide for attorneys’ fees in two circumstances: (1) to a plaintiff who performs ‘a public service’ in litigation brought under an environmental statute, and (2) to a defendant subjected to ‘frivolous or harassing’ litigation.”).

83. Feller, supra note 15, at 564 (“Economic disincentives may stifle the prospective plaintiffs’ initiative. . . . The expectation that plaintiffs may be reimbursed by the court through an award of fees does not remove the immediate burden of such expenses.”).


85. “[A]ny [civil] penalties imposed [as the result of a Clean Water Act citizen suit]
a powerful incentive to a citizen bringing frivolous and harassing actions.\textsuperscript{86} Thus, there is no need to further restrict citizen suits by holding that certain agency action precludes them to prevent unwarranted litigation.

The prospect of multiple litigation against one violator may further support Baughman's approach. However, the concept of virtual representation alleviates much of the concern about multiple litigation. According to this doctrine, a plaintiff is barred from bringing an action against a defendant if that defendant has already been sued by a plaintiff having essentially the same interests as the prospective plaintiff.\textsuperscript{87} This doctrine may be particularly effective in deterring multiple Clean Water Act citizen suits, because citizen plaintiffs are often viewed as "private attorneys general." Consequently, one citizen suit against a violator may serve to bar all other citizen suits against the same violator.\textsuperscript{88} Moreover, the Clean Water Act expressly bars multiple citizen suits where the agency is "diligently prosecuting" the violator in a court action.\textsuperscript{89} The risk of multiple citizen litigation against a single violator, therefore, is slight. Thus, like the fear of frivolous and harassing suits, multiple litigation is an insufficient reason to find that some agency actions should preclude citizen suits.

A third possible policy justification for Baughman is that if citizens are allowed to sue violators under the Act even after the agency has undertaken some action to force compliance, such suits will result in inconsistent enforcement of the Act. Congress addressed this issue and discounted it on the ground that, under the Act, the EPA must formulate the applicable environmental standards. Only these standards must be enforced, regardless of whether the agency or a citizen seeks enforcement.

\textsuperscript{86} See Feller, \textit{supra} note 15, at 564 ("Since private enforcement precludes recovery of damages, plaintiffs are deprived of a powerful, personal motive to sue. In addition, citizens must consider the economic risk of liability for defendants' attorneys fees.").

\textsuperscript{87} See Environmental Defense Fund v. Alexander, 501 F. Supp. 742 (N.D. Miss. 1980), \textit{modified on other grounds sub nom}. Environmental Defense Fund v. Marsh, 651 F.2d 983 (5th Cir. 1981) (under doctrine of virtual representation, res judicata will bar plaintiff from suing if the defendant has already been sued by plaintiff with essentially similar interests).

\textsuperscript{88} See Schwartz & Hackett, \textit{supra} note 4, at 362-63.

The standards for which enforcement would be sought either under administrative enforcement or through citizen enforcement procedures are the same. Therefore, the participation of citizens in the courts seeking enforcement of water pollution control requirements should not result in inconsistent policy. . . . [T]he issue before the courts would be a factual one of whether there had been compliance.90

Congress provided protection against inconsistent enforcement by explicitly allowing the EPA to intervene in any citizen suit,91 presumably to ensure uniform enforcement of the Act’s standards.92 Furthermore, the only effective cause of action which a citizen may have against a violator is that authorized by the Act’s citizen suit provision. This provision has been held to preempt any private right of action independent of the Act.93 Thus, the only standards which could be enforced by a citizen suit are those established by the agency. Since the Act was designed to prevent inconsistent enforcement, prohibiting citizen suits as a result of certain agency actions is a needless restriction.

2. Vagueness Causing Uncertain Enforcement

The Baughman test is unclear and offers only general guidelines.94 Courts following Baughman have formulated a variety of tests determining when an agency constitutes a “court.” Sometimes, the tests directly conflict.95 The second analytical tier dealing with diligent prosecution has produced equally confusing results.96 Most cases subsequent to Baughman, although finding

90. S. REP. NO. 414, 92d Cong., 1st Sess. 80 (1971), reprinted in 2 LEGISLATIVE HISTORY, supra note 4, at 1415, 1498. See also id. at 79, reprinted in 2 LEGISLATIVE HISTORY, supra note 4, at 1415, 1497:
[Section 1365] 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 in [sic] other considerations at the enforcement stage. These matters will have been settled in the administrative procedure leading to the establishment of such effluent control provision. Therefore, an objective evidentiary standard will have to be met by any citizen who brings an action under this section.

Id.

92. See Student Pub. Interest Research Group of N.J., Inc. v. Monsanto Co., 600 F. Supp. 1479, 1483 (D.N.J. 1985) (Section 1365(o)(2) “gives the EPA the right to intervene in any citizen’s suit. Should the EPA feel that this suit interferes with its attempts to secure compliance with the Act, it may avail itself of this right.”).
93. See supra notes 42-43 and accompanying text.
94. See supra notes 44-49, 51, 54, 55 and accompanying text.
95. See supra notes 44, 50, 52, 53, 56-59 and accompanying text.
96. See supra notes 61-68 and accompanying text.
that citizen suits may sometimes be precluded by agency action, have allowed the particular citizen suits to proceed. Nevertheless, the vagueness of Baughman-type tests as well as the absence of clear guidelines for courts to follow present a real threat to enforcement of the Clean Water Act.

The danger of nonenforcement is exemplified by the holding in Hudson River Sloop Clearwater, Inc. v. Consolidated Rail Corp., which allowed an agency proceeding to frustrate a citizen suit under the Baughman analysis. Although there was no right to citizen intervention in the agency proceeding, the Hudson River court nevertheless held that the agency constituted a 'court,' based on its ability to impose injunctive relief and civil penalties similar to those available to a court. The court, furthermore, held that the agency consent order, which required only eventual compliance, constituted diligent prosecution. In so holding, the court stated that "[t]o the extent the consent order has brought Conrail into eventual compliance . . ., it is irrelevant that certain post order violations have not been the subject of independent prosecution." Fortunately, Hudson River was reversed by the Second Circuit in Friends II. Notwithstanding the Second Circuit's reversal, it is by no means certain that future courts will hold that a particular agency action has not met the threshold for preclusion of a citizen suit. Once that conclusion has been reached the prohibition on citizen suits will thwart the purposes of the Act.

The danger behind the vagueness of the Baughman approach lies in the fact that agencies may not be as strict in enforcing the


[T]he courts . . . have uniformly found that an administrative proceeding or order could be deemed to be in a "court" for the purposes of the "diligent prosecution" provision of section 1365(b). The courts often have found, however, that such administrative enforcement activity has failed the "diligent prosecution" test for other reasons.


100. Id. at 351 n.5.

101. 768 F.2d 57 (2d Cir. 1985).
Clean Water Act as was intended by Congress. Although the Act's pollution standards are initially established by the EPA, the EPA and state agencies may be lax in enforcing them. There are several reasons for such passive enforcement, including delay in agency proceedings, lobbying pressure from violators, and the apparent willingness of agencies to allow deviations from the set standards. The courts following Baughman have generally failed to recognize that these reasons work against exclusive agency enforcement. Nonetheless, these factors must be addressed and, in light of Congress' expressed desire to allow liberal citizen access to the courts as an aid to effective enforcement, the Baughman approach must be abandoned.

The tendency of administrative agencies toward delay and inaction is well known. Even when an agency has instituted some enforcement proceeding, it may be a considerable amount of time before the violator is forced to comply, if ever. It is clear that one of the purposes behind allowing citizens to sue violators of the Clean Water and Air Acts is "to stir slumbering agencies and to circumvent bureaucratic inaction that interferes with the scheduled satisfaction of the . . . goals." To preclude citizen suits simply because an agency has taken some action would be to run the risk that the Act will never be enforced against a particular violator.

A second factor contributing to lack of effective agency enforcement is the political pressure put on agencies by special interest groups and particularly by large corporate violators.

The major problem in pollution control is the vast economic and political power of large polluters. Water pollution exists, in large

102. See infra notes 105-15 and accompanying text.
103. See Gardeski v. Colonial Sand & Stone Co., 501 F. Supp. 1159, 1167 (S.D.N.Y. 1980) ("Agency enforcement policy [under the Clean Air Act], when it is reasonable in light of the difficulties posed by a given set of circumstances, should be protected from disruption by private efforts."); id. at 1163 (suggesting that an agency proceeding may preclude a citizen suit if it might result in "substantially the same relief that could be obtained from a court") (emphasis added); id. at 1166 (implying that a consent order which would require the violator to comply with the law "in some enforceable form" is sufficient to preclude a citizen suit) (emphasis added); Hudson River Sloop, 591 F. Supp. at 351-52 (citizen suit precluded where agency and violator had entered consent order providing for eventual compliance).
104. See supra notes 24-43 and accompanying text.
105. See, e.g., Friendly, A Look at the Federal Administrative Agencies, 60 COLUM. L. REV. 429, 432 (1960) (regulatory agencies can handle delays and burdens which should not be placed on the judiciary).
part, because polluters have more influence over government than do those they "pollute." As long as this disproportionate influence persists, so will the pollution. It is a mistake to suppose that new laws with higher cleanup requirements and tougher penalties will ultimately succeed in eliminating environmental contamination; unless new laws also tip the scales of influence over government in favor of the public, the requirements they set will be consistently violated and the penalties rarely used. 108

Agencies under pressure from violators tend to delay enforcement proceedings or to overlook certain violations, "becoming the arm of industries they are supposed to regulate." 109 While courts hold that agency action may preclude Clean Water Act citizen suits, they overlook the danger that political pressure may prevent agency action from being as stringent as it could be.

A final cause of ineffective agency enforcement is that the government has shown a tendency to take a relaxed approach in enforcing the Act's standards. 110 Decisions modeled after Baughman retain the possibility that minimal agency action might preclude a citizen suit brought to compel compliance. Train v. Natural Resources Defense Council Inc. 111 presents such an example. Train did not involve a citizen suit; rather, the Natural Resources Defense Council sued the EPA directly for not strictly enforcing the Clean Air Act standards against a particular violator. The EPA's enforcement of standards allowed variations, such as dispersion of pollutants. Instead of reducing pollution, this practice merely dilutes it by spreading the pollutants over a broader geographical area. 112

The Supreme Court held that the EPA could properly grant such variances, although the requirements of the Clean Air Act are not achieved. 113 An agency's frequent explanation for its failure to

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109. Note, supra note 106, at 953 (citing J. GALBRAITH, THE GREAT CRASH 171 (1955)). Such law enforcement is also likely to result when political pressure is applied to state agencies since the continued existence of large industry within a state or region will greatly affect the economic well-being of the state. Id.
110. See Note, supra note 106, at 945 ("The problems in enforcement [of environmental laws] are rooted in the EPA's discretionary power not to enforce. This discretionary power has resulted in a critical lack of enforcement in the federal government's attempts to clean up the nation's waters."). The EPA's passivity may be due, in part, to the absence of mandatory enforcement provisions.
111. 421 U.S. 60 (1975).
113. In approving the variance allowing dispersion, the Supreme Court did not address the principle of non-degradation. See Note, Enforcement of the Clean Air Act Amendments of 1970, 10 URB. L. ANN. 294, 303 (1975). "[T]he dispersion enhancement strategy . . . [approved in Train v. Natural Resources Defense Council, Inc.] ignored the principle of non-
enforce the Act's requirement by granting variances is that the requirements "are difficult to enforce for policy or economic considerations." However, "Congress has made it clear that considerations of economic cost or technical feasibility were always to be subordinate to considerations of public health . . . [and] were not to be considered in meeting the three-year deadlines for attaining national primary standards." Thus, Congress intended for the agencies to enforce the Act to their fullest ability.

Where the courts will allow suboptimal enforcement of the Act, the danger of ineffective enforcement may prohibit citizen suits under some formulations of the Baughman test. Congress recognized that agency enforcement efforts are often conservative, and subsequently enacted the Clean Water Act citizen suit provision as a remedy. Compliance with the Act's purpose requires the courts to abandon the Baughman approach, thereby avoiding the risk of ineffective agency action which might preclude needed citizen suits.

III. CONCLUSION

The Friends II holding, that Clean Water Act citizen suits are only precluded when the EPA or a state environmental agency is diligently prosecuting a violator, should serve as the model to future courts faced with this issue. Although a minority position, it is

degradation implicit in the federal law." Id. The principle of non-degradation "means that a state [or the EPA] must not allow the present quality of the air to deteriorate, even if the air quality level is above the national standards set by the Clean Air Act Amendments." Id. at 303. The Supreme Court inferred this principle from the Act's language, stating that the purpose of the Act is to "protect and enhance the quality of the nation's air resources." Id. See 42 U.S.C. § 1875(b). The Clean Water Act contains similar language: "[the purpose of the Act is] to restore and maintain the . . . integrity of the Nation's waters." See 33 U.S.C. § 1251(a) (1977). Dispersion methodology may actually result in an increase in air pollution. See Note, supra, at 303-04:

Given the present saturation levels of the atmosphere and inefficiency of dispersion methodology, the [variance allowed in Train v. Natural Resources Defense Council, Inc.] . . . may result in an increase in pollution not only in the local area but in adjacent regions as well, thus violating the principle of non-degradation. Overall, dispersion enhancement techniques are questionable pollution control devices and should be used . . . only as a last resort.

116. See S. Rep. No. 1196, 91st Cong., 2d Sess. 36-37 (1970) ("Government initiative in seeking enforcement under the Clean Air Act has been restrained. Authorizing citizens to bring suits for violations of standards should motivate governmental agencies charged with the responsibility to bring enforcement and abatement proceedings.").
117. See supra notes 44-68 and accompanying text.
better supported by the plain language of the citizen suit provision\textsuperscript{118} and the legislative history.\textsuperscript{119} The conflicting doctrine enunciated by \textit{Baughman}\textsuperscript{120} and its progeny, which prohibits citizen suits under some circumstances where an agency has instituted its own proceedings against a violator,\textsuperscript{121} contravenes Congress' language and purpose. In addition, the \textit{Baughman} doctrine is unsupported by possible policy considerations restricting citizens' access to the courts. By and large, the Clean Water Act reflects policy questions already settled by Congress.\textsuperscript{122}

\textit{Baughman} and subsequent cases should also yield to the \textit{Friends II} approach because they have resulted in conflicting tests to determine the circumstances under which agency action alone will bar citizen suits.\textsuperscript{123} The principal danger of \textit{Baughman} is that courts adopting this doctrine run the risk of hindering enforcement of the Clean Water Act by allowing preclusion of citizen suits. This risk is augmented when responsible agencies are unable or unwilling to strictly enforce the Act's requirements.\textsuperscript{124} Consequently, courts facing the problem of interpreting the Clean Water Act citizen suit provision should abandon the \textit{Baughman} approach and adopt the \textit{Friends II} approach which would preclude citizen suits only when the agency is diligently prosecuting a court action against the violator. In this manner, the courts can implement Congress' purpose of augmenting enforcement of the Act through citizen suits.

\textbf{GAIL J. ROBINSON}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{118} \textit{See supra} notes 16-22 and accompanying text.
\item \textsuperscript{119} \textit{See supra} notes 24-43 and accompanying text.
\item \textsuperscript{120} 592 F.2d 215 (3d Cir. 1979). \textit{See supra} note 45.
\item \textsuperscript{121} \textit{See supra} note 118.
\item \textsuperscript{122} \textit{See supra} notes 79-93 and accompanying text.
\item \textsuperscript{123} \textit{See id}.
\item \textsuperscript{124} \textit{See supra} notes 94-116 and accompanying text.
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