On the WLF Legal Pulse

Timely commentary from WLF's blog

Washington Legal Foundation
Advocate for Freedom and Justice®
2009 Massachusetts Avenue, NW
Washington, DC 20036
202.588.0302 wlf.org

August 23, 2022

Fourth Circuit Decision Continues to Shrink the Citizen Suit Diligent Prosecution Bar

by Jim Wedeking

Major environmental laws, such as the Clean Water Act, include "citizen suit" provisions allowing anyone with Article III standing to become a private attorney general and prosecute environmental violations. In theory, these private attorneys general are relieved of duty if federal or state agencies have already filed their own enforcement actions and are "diligently prosecuting" them. Courts, however, are increasingly allowing citizen plaintiffs to file parallel enforcement actions through an often imperfect reading of a complicated pair of procedural statutes establishing the "diligent prosecution bar." The Fourth Circuit's decision in *Natureland Trust v. Dakota Finance, LLC*[1] further diminishes the diligent prosecution bar.

Under the Clean Water Act, "any citizen may commence a civil action on his own behalf" for certain violations of the Act.[2] However, "[n]o action may be commenced" where "the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance" with the Act.[3] This constitutes half of the diligent prosecution bar. The other half prohibits citizen suits when either EPA or a State "has commenced and is diligently prosecuting an action" to require compliance.[4] For state administrative actions, the statute adds that the state must be "diligently prosecuting an action under a State law comparable to this subsection."[5] The Supreme Court commented that "[t]he bar on citizen suits when governmental enforcement action is under way suggests that the citizen suit is meant to supplement rather than to supplant governmental action. The legislative history of the Act reinforces this view of the role of the citizen suit."[6] The Fourth Circuit's *Natureland Trust* decision, however, contributes to a body of decisions that are increasingly allowing citizen suit plaintiffs to *supplant* environmental agencies responsible for enforcement and remediation.

Defendant Dakota Finance, doing business as Arabella Farm, established the company as a working orchard and vineyard, as well as a publicly available event space. Bounded by three streams, Arabella Farm cleared forested land without a Clean Water Act stormwater permit, believing that it was exempt. Without any runoff or erosion controls, stormwater carried significant amounts of sediment into the area streams, prompting an inspection from the South Carolina Department

---

[1] Slip Opinion, Case No. 21-1517 (4th Cir. July 20, 2022) ("Slip Op.").
[2] 33 U.S.C. § 1365(a).
[3] *Id.* § 1365(b).
[4] *Id.* § 1319(g)(6)(A).
[5] *Id.*
[6] *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found'n, Inc.*, 484 U.S. 49, 60 (1987).

Jim Wedeking is counsel with Sidley Austin LLP's Washington, D.C. office. He typically defends large companies in criminal and civil enforcement actions, toxic torts, and complex civil litigation. *The opinions expressed are those of the author and do not necessarily reflect the views of Sidley Austin LLP or its clients.*

of Health & Environmental Control ("DHEC"). As the agency with delegated authority to enforce the Clean Water Act, DHEC issued a letter prohibiting any further clearing activity and requiring erosion and sediment controls. DHEC then issued a Notice of Violation and Notice of Enforcement Conference.

Shortly afterwards, two environmental groups issued a 60-day notice that they would sue Dakota Finance in federal court for Clean Water Act violations and then filed suit after the 60-day period ran. One month later, DHEC and Arabella Farm entered into a consent order requiring the farm to submit a permit application, site stabilization plan, investigate the possibility of stream remediation, and pay a $6,000 administrative penalty. Arabella Farm moved to dismiss the environmental groups' suit, arguing that DHEC's diligent prosecution of an administrative action involving the same alleged Clean Water Act violations barred the citizen suit. The district court agreed; the Fourth Circuit reversed in a 2-1 opinion.

To the Fourth Circuit, the key question was whether the Notice of Violation "commenced" DHEC's administrative action prior to the citizen suit. According to the majority, "it seems odd" to think of a Notice of Violation "as commencing 'an action'" because "an action" can only be defined as "an adversarial proceeding initiated by a formal, public document," according to the *Oxford English Dictionary*.[7] Because the Notice of Violation included a Notice of Enforcement Conference, where Arabella Farm could present its own position in response to DHEC's allegations of Clean Water Act violations, the majority reasoned that the Notice of Violation could not be the start of an adversarial proceeding.[8]

The majority also held that the NOV could not "commence" an administrative action because South Carolina's administrative process differed from EPA administrative enforcement regulations.[9] Specifically, the NOV did not allow for public notice and comment within 30 days of serving the administrative complaint, as EPA's regulations require.[10] Instead, South Carolina law requires public notice and comment upon issuing a consent order. Since the majority did not view South Carolina's enforcement scheme to be "comparable" to the requirements under Section 1319, it held that an administrative enforcement action could only begin at its end—with the issuance of a consent order.[11]

The Fourth Circuit's decision is open to criticism at nearly every step of its analysis. Judge Quattlebaum's dissenting opinion walks the reader through the majority's questionable reasoning, such as choosing to define "action" instead of "commence," its misunderstanding of what South Carolina's Notice of Violation actually is, the majority's overly stringent reading of public notice and comment requirements—a reading that practically requires the adoption of EPA's own regulations for administrative enforcement actions, and misreading case law that purportedly supporting the majority's analysis.[12] It is not, however, the first court to search for ways around the diligent prosecution bar.

To be clear, there are many cases where a diligent prosecution defense should fail. The most common instance is where a citizen plaintiff sues over the same incident as the state or federal government (*e.g.*, the same discharge to a river) but alleges at least one additional violation of the

[7] *Id.* at 11 ("defining 'action' as '[t]he taking of legal steps to establish a claim or obtain judicial remedy") (quoting 1 *Oxford English Dictionary* 128 (J.A. Simpson & E.S.C. Weiner, eds., 1989)).
[8] *Id.* at 14.
[9] *Id.* at 11-12.
[10] *Id.* at 12.
[11] *Id.* at 12-13.
[12] *See generally id.* at 20-40 (Quattlebaum, J., dissenting).

Clean Water Act that is not in the government's own complaint.[13] However, courts traditionally employed a deferential standard in favor of state or federal enforcement actions, making it difficult for citizen suit plaintiffs to pierce the diligent prosecution bar when their complaint generally addressed the same violations.[14] Within the past 20 years, however, many courts have made the bar easier to avoid, with at least one court declaring that the high burden for citizen suit plaintiffs has now been reversed.[15] Some courts stumbled on the poorly written statutory provisions involved, such as a Sixth Circuit *en banc* decision that appeared to rule that state administrative enforcement actions could never invoke the diligent prosecution bar despite Section 1319(g) specifically allowing for such actions.[16] Others appear to overlook the long history of giving the enforcement agency the benefit of any doubt.[17]

Despite the points raised by the dissent, the *Naturland Trust* decision further erodes the diligent prosecution bar by significantly reducing its application to state administrative enforcement actions. This is a more significant issue than it might initially seem. Administrative enforcement schemes generally exist to deal with lower priority, non-emergency violations by parties that are not inclined to fight the agency hammer and tongs. They require fewer resources than a judicial enforcement action and provide more flexibility, such as when the agency wishes to defer final resolution until the respondent has completed preliminary studies. In *Natureland Trust*, for instance, the DHEC required Arabella Farms to study the damage it had done to the area streams prior to ordering remediation.[18] Now, for states in the Fourth Circuit, to obtain the benefit of the diligent prosecution they would have to change their administrative enforcement schemes to mirror those adopted by EPA even though they comply with the requirements of Section 1319. And that may be a best case scenario. There are indications that the majority would not permit *any* administrative enforcement action to trigger the diligent prosecution bar.[19]

---

[13] *See, e.g.*, *Tennessee Clean Water Network v. Tennessee Valley Auth.*, 206 F. Supp. 3d 1280, 1291-93 (M.D. Tenn. 2016) (declining to dismiss five claims that plaintiffs identified as unique to their complaint). Other cases have held that a state's administrative enforcement scheme is not "comparable" under Section 1319(g) even under the most deferential standard. *See Stringer v. Town of Jonesboro*, 986 F.3d 502, 508 (5th Cir. 2021) (Sanitary Code enforcement provisions provided no public participation opportunities at all); *Sierra Club v. Powellton Coal Co.*, 662 F. Supp. 2d 514, 529-31 (S.D. W. Va. 2009) (West Virginia scheme not comparable because the Secretary of the Department of Environmental Protection could not unilaterally impose penalties on a violator without the violator's consent).

[14] *See, e.g.*, *Piney Run Preservation v. Carroll County*, 523 F.3d 453, 459 (4th Cir. 2008) ("diligence is presumed"); *Paper, Allied-Industrial, Chem. and Energy Workers Int'l Union v. Continental Carbon Co.*, 428 F.3d 1285, 1293-94 (10th Cir. 20040 (state enforcement scheme need only be "roughly comparable" to apply diligent prosecution bar) (citing cases); *Tennessee Clean Water Network*, 206 F. Supp. 3d at 1293-94 (diligence is a low bar that requires a showing of bad faith or that state action cannot bring defendant into compliance); *N.C. Shellfish Growers Ass'n v. Holly Ridge Associates, LLC*, 200 F. Supp. 2d 551, 558 (E.D. N.C. 2001) (state scheme is comparable if it "has the same overall enforcement goals as the CWA"); *Friends of the Earth v. Laidlaw Envt'l Svcs.*, 890 F. Supp. 470, 486-87 (D. S.C. 1995); *Orange Environment, Inc. v. County of Orange*, 860 F. Supp. 1003, 1017 (S.D.N.Y. 1994) (where diligent prosecution questioned, state is "entitled to a good degree of deference").

[15] *Cape Fear River Watch v. Duke Energy Progress*, 25 F. Supp. 3d 798, 811 (E.D.N.C. 2014) ("Courts have construed the diligent prosecution bar *narrowly* to prevent violators from escaping liability.") (emphasis added).

[16] *Jones v. City of Lakeland, Tennessee*, 224 F.3d 518 (6th Cir. 2000) (*en banc*).

[17] *See, e.g.*, *Yadkin Riverkeeper v. Duke Energy Carolinas*, 141 F. Supp. 3d 428, 442-43 (M.D.N.C. 2015) (declaring that state agency acted in bad faith was not diligently prosecuting federal enforcement action as it took no depositions within a year of commencing suit and moved to stay pending decision on motion to dismiss citizen suit); *Cape Fear River Watch*, 25 F. Supp. 3d at 812 (refusing to apply diligent prosecution bar, in part, due to mere "allegations of possible improper influence").

[18] Slip Op. at 6.

[19] The dissent objected that the majority's reliance on a definition of "action" effectively requires a lawsuit, precluding application of the diligent prosecution bar for administrative enforcement actions even though "[e]veryone agrees that Congress contemplated administrative penalty actions to be different from lawsuits." *Id.* at 23; *see also Hallstrom v. Tillamook County*, 493 U.S. 20, 29 (1989) ("In many cases, an agency may be able to compel compliance through

There is a good reason Congress intended citizen suits only as a "supplement" to state and federal enforcement efforts when "the government cannot or will not command compliance."[20] "Appropriate limitations on citizen suits generally 'allow for smoother operation of ordinary enforcement mechanisms' and encourage out-of-court settlements between agencies and polluters."[21] Even more, when defendants must deal with parallel suits, one by an agency and one by a citizen suit plaintiff, this can significantly postpone actions to reduce future pollution and remediate past environmental harm. For instance, where an agency is negotiating for a remedy that requires significant capital expenditures and lead time for design, engineering, and permitting, such as the implementation of significant new pollution controls, no defendant will come to terms while a citizen suit plaintiff plows ahead in a separate court, demanding everything from more expensive pollution controls to an injunction shutting down the facility. If the citizen suit plaintiff prevails, any agreement with the state will be superseded. In other words, citizen suit plaintiffs can completely displace the agencies entrusted by statute with both enforcement discretion and technical expertise.

An example is *Tennessee Clean Water Network v. Tennessee Valley Authority*, where the court dismissed all but two citizen suit claims under the diligent prosecution bar.[22] The State enforcement action required the defendant to implement an extensive "Environmental Investigation Plan ('EIP') that is intended to better investigate and understand the environmental features" of the defendant's coal ash impoundment.[23] The citizen suit plaintiffs, however, pushed ahead in federal court and won on the question of liability.[24] Despite being "unable to benefit from the more detailed study of the area's hydrology and geology that the EIP process is apparently intended to yield"[25] and admitting that plaintiffs' experts provided no information on whether the Clean Water Act violations were "particularly severe, in terms of the harm done or the amount of pollutants released,"[26] the court ordered the defendant to excavate all coal ash from its impoundment and dispose of it in a lined site.[27] Thus, by moving faster and with less information, the citizen suit plaintiffs effectively relegated the state agency responsible for environmental management to a spectator. *Natureland Trust* will continue to minimize the responsibility and expertise of state environmental agencies.

---

administrative action, thus eliminating the need for any access to the courts. See 116 Cong. Rec. 33104 (1970) (comments of Sen. Hart)."); *McAbee v. City of Fort Payne*, 318 F.3d 1248, 1249 (11th Cir. 2003) (1987 Clean Water Act amendments "extended the bar on citizen suits, instructing that an administrative penalty action is enough to preclude a citizen suit"). As noted above, the *Natureland Trust* majority would not be the first court to get so turned around by the confusing diligent prosecution bar statutes to effectively rule out administrative enforcement actions. *See Jones v. City of Lakeland, Tennessee*, 224 F.3d 518 (6th Cir. 2000) (*en banc*); *Cape Fear River Watch*, 25 F. Supp. 3d at 811 (incorrectly holding that a state administrative action cannot bar a citizen suit in any instance).

[20] *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60, 62 (1987); *see also Ohio Valley Envt'l Coal. v. Fola Coal Co., LLC*, 845 F.3d 133, 145 (4th Cir. 2017) (citizen suits are for when "the traditional enforcement agency declines to act.").

[21] *Friends of the Earth*, 890 F. Supp. at 487 (quoting *Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co.*, 777 F. Supp. 173, 179, 186 (D. Conn. 1991)).

[22] 273 F. Supp. 3d 775, 832 (M.D. Tenn. 2017), *rev'd on other grounds*, 905 F.3d 436 (6th Cir. 2018).

[23] *Id.* at 786.

[24] *Id.* at 842.

[25] *Id.* at 838.

[26] *Id.* at 844.

[27] *Id.* at 848.