



DILIGENT PROSECUTION BAR HOLDS FIRM IN A RECENT CITIZEN SUIT DECISION DESPITE INCREASINGLY NARROW JUDICIAL APPLICATION

by Jim Wedeking

A recent decision from the U.S. District Court for the District of Columbia dismissed environmental groups' Toxic Substances Control Act ("TSCA") citizen suit under the statute's "diligent prosecution bar." However, what was once a common holding has become increasingly rare as a January 2023 decision from the U.S. District Court for the District of Minnesota, discussed further below, demonstrates.

In *Center for Public Health v. Enhance Technologies USA*, environmental groups alleged that a plastics company illegally created per- and polyfluoroalkyl compounds (more commonly known as "PFAS" chemicals) as byproducts of its manufacturing process in violation of a TSCA Significant New Use Rule governing PFAS manufacture.¹ Their TSCA citizen suit came eight days *after* the United States had filed its own civil suit in a Pennsylvania federal court alleging that the same conduct violated the same TSCA regulations and seeking the same relief as the *Center for Public Health* plaintiffs.² The defendant, supported by an *amicus curiae* brief by the United States, moved to dismiss the citizen suit citing the diligent prosecution bar.

As with similar environmental citizen suit provisions, TSCA prohibits a citizen suit where "the Attorney General has commenced and is diligently prosecuting a civil action ... to require compliance" with TSCA.³ This preclusion can be broken down into two requirements: (1) the United States filed a suit prior to the citizen suit plaintiffs and alleged the same violations, and (2) the United States is "diligently prosecuting" that suit.⁴ In *Center for Public Health*, the Plaintiffs contested only that the United States' diligent prosecution of its own enforcement action. This a difficult gambit given that courts generally presume diligent prosecution and require plaintiffs to raise facts rebutting

¹ *Center for Env'tl Health v. Enhance Technologies USA*, Case No. 22-cv-3819 (Apr. 6, 2023 D.D.C.) (Slip Op.) at 2-3.

² *Id.* at 3.

³ 15 U.S.C. § 2619(b)(1)(B). There is one notable difference between TSCA's citizen suit and those of other statutes, such as the Clean Water Act or the Clean Air Act. Because States cannot be delegated TSCA enforcement authority, unlike substantial portions of other environmental statutes, only a "civil action" by "the Attorney General" in "a court of the United States" trigger the diligent prosecution bar. Compare 15 U.S.C. § 2619(b)(1)(B) with 42 U.S.C. § 7604(b)(1)(B) (Clean Air Act) (barring citizen suits when "the [U.S. Environmental Protection Agency ("EPA")] Administrator or State" previously filed "a civil action in a court of the United States or a State").

⁴ Slip Op. at 4.

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that presumption.⁵ Here, the court rejected Plaintiffs' argument that it must presume that their allegations of a lack of diligent prosecution are true under Federal Rule of Civil Procedure 12, holding that this is a legal argument, not a factual allegation.⁶ This left Plaintiffs with only their complaints that the United States was not diligently prosecuting its TSCA civil suit because the seriousness of the violations warranted criminal charges, it consented to the waiver of formal service, and the EPA took too long investigating those violations prior to filing suit.⁷ The court quickly rejected these complaints as irrelevant to the question of whether the United States, subsequent to filing its civil suit, was diligently prosecuting it.⁸

As the United States' *amicus* brief stated, "[i]t is hard to conceive of a more clear-cut case for precluding a citizen suit under TSCA's diligent prosecution bar."⁹ Such clear-cut cases, however, are becoming harder to find as recent decisions continue to erode the diligent prosecution bar's force, allowing citizen plaintiffs to essentially supplant federal and state agencies and control enforcement litigation through more aggressive tactics. The Fourth Circuit's opinion in *Naturaland Trust v. Dakota Finance LLC* was among the more high-profile recent decisions limiting the diligent prosecution bar by taking a very narrow view of when State law proceedings may preclude a citizen suit for the same alleged violations.¹⁰ Briefing on Dakota Finance's petition for *certiorari* is underway,¹¹ but even if the Supreme Court takes the case, lower courts are finding other ways to circumvent the diligent prosecution bar.

The most recent is *Clean Water and Air Legacy v. Tofte Wastewater Treatment Association* from the U.S. District Court for the District of Minnesota.¹² An environmental group filed a Clean Water Act citizen suit against the Tofte Wastewater Treatment Association ("Tofte") alleging that its Bluefin Bay wastewater treatment plant's discharges to Lake Superior violated the plant's Clean Water Act permit.¹³ Tofte argued that a compliance agreement with the Minnesota Pollution Control Agency for the same alleged violations barred Clean Water and Air Legacy's suit. The Plaintiff countered that the compliance agreement was not the result of a "diligent prosecution," relying on *Friends of the Earth v. Laidlaw Environmental Services*, a 1995 case that would have judges undertake the constitutionally questionable task of evaluating for themselves whether an executive branch agency imposed an adequate civil penalty, calculated the economic benefit the defendant allegedly gained from the violations, permitted appropriate citizen participation, entered into the agreement too quickly, or required appropriate stipulated penalties for any future breaches of the agreement.¹⁴

⁵ *Id.* at 5 (citing *Piney Run Pres. Ass'n v. Cnty. Comm'rs*, 523 F.3d 453, 459 (4th Cir. 2008)).

⁶ *Id.* at 8.

⁷ *Id.* at 6-8.

⁸ *Id.* at 7.

⁹ *Center for Env'tl Health v. Enhance Technologies USA*, Case No. 22-cv-3819, Dkt. No. 20 (filed Mar. 6, 2023) at 2.

¹⁰ 41 F.4th 342 (4th Cir. 2022). The *Naturaland Trust* decision, and similar holdings limiting the diligent prosecution bar's application, are discussed [here](#). *Natureland Trust* is one of two important circuit court decisions from 2022 on the diligent prosecution bar. The other being *Blackstone Headwaters Coalition v. Gallo Builders*, 32 F.4th 99 (1st Cir. 2022) (*en banc*), holding that the Clean Water Act's diligent prosecution bar can *never* apply to citizen suits requesting prospective injunctive relief even when all agree that a federal or state agency is diligently prosecuting the same defendant for the same alleged violations.

¹¹ See Docket No. [22-720](#).

¹² 2023 WL 35902 (D. Minn. Jan. 4, 2023).

¹³ *Id.* at *1.

¹⁴ *Id.* at *8 (citing *Friends of the Earth v. Laidlaw Env'tl Servcs., Inc.*, 890 F. Supp. 470 (D.S.C. 1995)). To understand how constitutionally suspect such an analysis is, imagine an executive branch agency examining for itself a judicial decision and, finding that it lacks the hallmarks of a "legitimate" decision, declining to follow it.

Although *Clean Water and Air Legacy* does not break new ground, it appears to be the newest evidence that district and circuit courts are giving less mind to the Supreme Court's admonition "that the citizen suit is meant to supplement rather than to supplant governmental action."¹⁵ Either through *Naturaland*, or some similar case, the Supreme Court may need to remind the lower courts of that maxim.

¹⁵ *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 60 (1987).