No Comparison: Barring Citizen Suits in Dual Enforcement Actions

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Roughly speaking, there is no comparison—or is there? This is one question pondered recently by federal courts in an attempt to formulate a test for determining whether state water pollution control laws are comparable to the federal Clean Water Act (CWA) for purposes of barring citizen suits. *See McAbee v. Fort Payne*, 318 F.3d 1248 (11th Cir. 2003) (adopting the "rough comparability" test). Under the CWA, individuals or groups of citizens may sue alleged violators in federal court after providing the requisite notice to the U.S. Environmental Protection Agency (EPA), the appropriate state agency, and the alleged violator. Problems arise when citizens bring actions against an alleged violator and the applicable state environmental agency has already commenced an administrative enforcement action for the same alleged violations. In order to prevent the burden imposed by dual actions for the same violations, Section 309(g) of the CWA, 33 U.S.C. §§ 1319(g)(6), bars citizens from filing suit if, among other things, the state is diligently prosecuting an administrative penalty action under a "State law comparable" to the CWA's administrative penalty provisions. In addition to Section 309(g), there are other statutory and extrastatutory bars to citizen suits. These statutory bars have in some instances been interpreted in widely disparate manners by the courts. For example, two circuit courts of appeal have recently reached diametrically opposed interpretations of the meaning of "comparable" in the context of CWA citizen suits. *Compare McAbee v. Fort Payne*, 318 F.3d 1248 (11th Cir. 2003) *with Lockett v. EPA*, 319 F.3d 678 (5th Cir. 2003).

If there is one thing on which the courts do agree, or at least pay consistent lip service to, it is the underlying rationale for citizen suits. The CWA contemplates that state and/or federal agencies have primary enforcement authority and citizen enforcement simply acts as a backstop to ensure adequate enforcement. *See North & South Rivers Watershed Ass'n v. Scituate,* 949 F.2d 552, 555 (1st Cir. 1991) (stating, "The primary function of the provision for citizen suits is to enable private parties to assist in enforcement efforts where Federal and State authorities appear unwilling to act."). The limitation on citizen suits when the government is diligently prosecuting an action "suggests that the citizen suit is meant to *supplement rather than to supplant* governmental action." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, 484 U.S. 49, 60 (1987) (emphasis added).

The CWA's legislative history supports the notion that citizen suits are only proper when the government has failed to carry out its duties. "The Committee intends the great volume of enforcement actions [to] be brought by the State," and citizen suits are proper only "if the Federal, State, and local agencies fail to exercise their enforcement responsibility." S. REP. NO. 92-414, at 64 (1971), *reprinted in* 2A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 1482 (1973). Therefore, once the government is diligently prosecuting an action, the citizen suit becomes unnecessary. *See Scituate*, 949 F.2d at 555 (citing *Gwaltney*, 484 U.S. at 60–61).

Generally speaking, federal environmental statutes authorize three types of citizen suits. First, most environmental statutes, including Section 505(a) of the CWA, 33 U.S.C. § 1365(a), allow "citizen enforcement actions," which typically state that any person may commence a civil action against any person alleged to be in violation of the statute, regulations, or a particular permit. These citizen enforcement actions empower citizens with the ability to act as "private attorneys general" by supplementing government enforcement against violators. Second, many federal environmental statutes allow "deadline" or "action-forcing" citizen suits, authorizing any person to file suit to force a government official to perform a nondiscretionary act or comply with a statutory deadline. *See, e.g.*, 42 U.S.C. § 7604(a). Finally, certain environmental laws, such as Section 307(g) of the Clean Air Act (CAA), 42 U.S.C. § 7607(b), authorize citizens to seek judicial review of the legality of agency actions. These "judicial review suits" basically supplement the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §§ 701–706.

Over the first fifteen years of modern environmental statutes, citizen groups were relatively successful in their enforcement initiatives, especially when suing under statutes, like the CWA, that required dischargers to voluntarily report their permit violations. In fact, by 1983, citizens were pursuing more CWA enforcement actions against alleged violators than EPA. *See* ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 1057 (3d ed. 2000). As a result, dischargers began looking more closely at the language of the CWA citizen suit provisions to find inherent limits on the ability of citizens to file enforcement actions, and over the following decade, courts began to oblige by recognizing certain statutory "bars" to environmental citizen suits. Specifically, with

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respect to the Clean Water Act, three bars to citizen suits emerged. First, Section 309(g) bars citizen suits where the state is diligently prosecuting an administrative penalty action under "comparable" state law. Likewise, Section 505(b) of the CWA bars citizen suits where, regardless of whether comparable state law is used, the state is diligently prosecuting a civil enforcement action in court. Last, some courts have been willing to look beyond the statutes to the common law and will bar citizen suits, under the doctrine of *res judicata*, if the state has prosecuted an enforcement action to a final order.

While there are certainly other limitations on CWA citizen suits, whether they be jurisdictional or otherwise, this article focuses on these three bars to citizen suits based on the state's decision to take its own enforcement action. In fact, at first glance, it may appear that for purposes of barring citizen suits, little difference exists between administrative and civil enforcement. Interestingly, however, the extent to which a discharger is shielded from a CWA citizen suit often depends heavily on whether the state pursued administrative enforcement, with its comparable state law requirement, or pursued civil action, which imposes no comparability requirement.

Comparability under Section 309

CWA § 309(g) precludes a citizen suit if "a State has commenced and is diligently prosecuting an action under a State law comparable to [CWA § 309(g)]." Absent any United States Supreme Court interpretation of the meaning of comparability, lower courts have issued varying opinions on the extent to which a state's administrative penalty provisions must compare to the CWA. In fact, in a matter of days, two federal courts of appeal recently issued entirely different interpretations of comparable state laws. On January 23, 2003, the Eleventh Circuit held that Alabama's water pollution control statute did not constitute state law comparable to the CWA's administrative enforcement provisions because Alabama's program failed to provide adequate public participation. *McAbee v. Fort Payne*, 318 F.3d 1248 (11th Cir. 2003). One day later, however, the Fifth Circuit held that Louisiana's water quality laws were sufficiently similar to the CWA to constitute comparable state law even though its public participation provisions were no more substantial than Alabama's program. *Lockett v. EPA*, 319 F.3d 678 (5th Cir. 2003).

Anecdotal evidence suggests that the practical effect of the Eleventh Circuit's ruling in Alabama was to discourage alleged violators from entering into administrative consent orders with state regulators, resulting in a sharp reduction in the amount of penalties collected by the Alabama Department of Environmental Management (ADEM) after the decision was handed down. Because ADEM's only other alternatives are to either issue unilateral orders (which are often appealed to the circuit court) or sue alleged violators in a court (which consumes more time and resources than the administrative enforcement process), ADEM's enforcement efforts were reportedly hindered by the ruling. In an effort to restore the incentive for regulated industries to enter administrative orders, the Alabama legislature responded to the Eleventh Circuit's decision by amending the state's environmental enforcement statute to ensure comparability with the CWA.

In the ten years prior to the Eleventh and Fifth Circuit decisions, at least four other circuit courts interpreted the comparability standard, and out of these four decisions came two theories. The first theory, adopted by the First, Eighth, and Sixth Circuits looked to the "overall regulatory scheme" applied to the states' clean water laws. *See North & South Rivers Watershed Ass'n v. Town of Scituate*, 949 F.2d 552 (1st Cir. 1991) (considering Massachusetts' clean water laws); *Arkansas Wildlife Fed'n v. ICI Americas, Inc.*, 29 F.3d 376 (8th Cir. 1994) (considering Arkansas' clean water program); *Jones v. City of Lakeland*, 224 F.3d 518 (6th Cir. 2000) (considering Tennessee's water quality laws). These circuits established several criteria for comparability, which required state water quality laws to provide similar penalty-assessment provisions, to prohibit the same violations, and to "provide interested citizens a meaningful opportunity to participate at significant stages of the [administrative] decision-making process." *Arkansas Wildlife Fed'n*, 29 F.3d at 381. The third criterion, the public participation requirement, would prove to be the most controversial aspect of comparability in 2003.

Of these three rulings, only the Sixth Circuit held the state enforcement scheme to be incomparable to the CWA, reasoning that the Tennessee Water Quality Control Act lacked adequate public involvement because it did not require public notice of hearings and failed to allow third parties to join enforcement proceedings. On the other hand, the First and Eighth Circuits found the regulatory schemes at issue to be comparable. Interestingly, the Eighth Circuit held that the Arkansas clean water program was comparable to the CWA even though the Arkansas program, much like the Tennessee program, only gave citizens an *ex post facto* right to intervene and did not require public notice or an opportunity to comment on the proceedings at any time.

The second theory, adopted by the Ninth Circuit, imposed a more rigorous test for comparability. Instead of looking to the entire regulatory scheme, the Ninth Circuit required that the specific state enforcement provision at issue be comparable to Section 309(g) of the CWA. *See Citizens for a Better Env't v. Union Oil Co.*, 83 F.3d 1111 (9th Cir. 1996). Under this more rigorous standard, the Ninth Circuit held that California had not acted under comparable state law when, as part of a settlement, it required an oil refinery to pay several million dollars for clean water violations because the statute at issue did not contain penalty provisions comparable to the CWA.

The Eleventh Circuit got its chance to review the comparability issue when Kim McAbee—a riparian landowner whose property abutted a creek near the waste-treatment plant of Fort Payne, Alabama—filed suit against the city for violations of its National Pollutant Discharge Elimination System (NPDES) permit. However, ADEM had already issued an administrative enforcement order fining the city $11,200 and requiring it to publish general information about the violations. In addition, according to the city's brief filed with the Eleventh Circuit, the compliance cost associated with the administrative consent order, which included renovating the waste-treatment plant, totaled more than $13 million. Nonetheless, the district court held that McAbee's citizen suit was not precluded by the state's enforcement action because Alabama's statutory scheme was not comparable to the CWA.

On appeal, after deciding that the comparability standard applies to the penalty, public participation, and judicial review provisions, the Eleventh Circuit contemplated "whether courts should (1) insist that each class of state-law provisions be roughly comparable to its corresponding class of federal provisions or (2) perform a balancing test that compares the overall effect of a state statutory regime against the overall effect of the federal CWA." *McAbee*, 318 F.3d at 1254. The court rejected the second option, which it characterized as a "loose" and "nebulous" standard that would result in arbitrary comparability determinations as judges attempted to "weigh incommensurable values." *Id.* at 1255. Instead, the court adopted the "rough comparability standard," which it reasoned would provide more certainty by simply requiring that "each class of state-law provisions must be roughly comparable to the corresponding class of federal provisions." *Id.* at 1255–56. In other words, the "rough comparability standard" requires a court to compare each class of state law provisions (i.e., penalty-assessment provisions, public participation provisions, and judicial review provisions) to its "federal analogue." *Id.* at 1256.

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Analyzing the Alabama Water Pollution Control Act (AWCPA) and the Alabama Environmental Management Act (AEMA), the Eleventh Circuit reasoned that, even though Alabama's penalty provisions were comparable to the CWA, the state's public participation provisions fell short of the federal standards. The court pointed to two specific reasons for this conclusion. First, Alabama's regulatory scheme only required public notice after the issuance of an enforcement order. The CWA, on the other hand, requires public notice before the enforcement agency issues a penalty order. Second, the AEMA only gave aggrieved parties fifteen days after the publication of newspaper notice to request a hearing to contest a penalty assessment. According to the Eleventh Circuit, this brief time made requests for a hearing nearly impossible. In contrast, the Clean Water Act allows thirty days after the issuance of an order for interested persons to request a hearing. As a result of the discrepancies between Alabama and federal public participation provisions, the Eleventh Circuit held that the plaintiff's citizen suit was not precluded by ADEM's enforcement action.

Only a day after the *McAbee* decision, the Fifth Circuit held that Louisiana's enforcement scheme was comparable to the CWA despite the fact that Louisiana's statute suffered from the same types of deficiencies that the Eleventh Circuit found fatal to Alabama's enforcement scheme. In *Lockett*, a group of property owners brought an action against the Village of Folsom for NPDES permit violations at the village's sewage treatment facility. 319 F.3d 678. Prior to this lawsuit being filed, the Louisiana Department of Environmental Quality (LDEQ) issued a compliance order to the village and assessed a $400,000 penalty. The district court dismissed the lawsuit because LDEQ was diligently prosecuting an action under comparable state law.

Importantly, Louisiana's clean water enforcement statute does not require LDEQ to provide public notice before issuing any compliance order or penalty assessment. Broadly interpreting comparability to give states flexibility to enforce the water quality laws, the Fifth Circuit reasoned that the *ex post facto* nature of the public participation provisions in Louisiana's statute was inconsequential because the public is allowed to participate after the enforcement action. For example, the public may submit comments if the violator requests a hearing to challenge the enforcement action. Likewise, the public may submit comments and demand a hearing before LDEQ may enter a settlement with the violator. Finally, an aggrieved person may request a hearing to challenge an enforcement order after it is issued. In any event, the public is given no opportunity to participate at any point prior to the issuance of an enforcement order. Despite this statutory scheme, which would certainly have failed under the Eleventh Circuit's opinion in *McAbee*, the Fifth Circuit apparently found it sufficient that LDEQ made a list of administrative actions publicly accessible.

After the Eleventh Circuit's decision in *McAbee*, citizens were no longer precluded by CWA § 309(g) from filing suit for alleged NPDES permit violations in Alabama even if ADEM had already commenced an administrative enforcement action against the permittee for those same violations. As a result, the only viable mechanisms available to preclude duplicate citizen suits in Alabama was for the state to issue appealable unilateral orders or file civil judicial actions, which essentially eviscerated the efficiency benefits of administrative enforcement.

In an attempt to correct the deficiencies identified by the Eleventh Circuit, the Alabama legislature amended the Alabama Environmental Management Act in June 2003. Foremost among its purposes was to grant more meaningful public participation in the administrative enforcement process. For instance, the amendments require public notice of proposed administrative orders, instead of post-issuance public notice of final orders under the old provisions. Not only is public notice provided "the old-fashioned way" through newspaper publication, but the amendments also require public notice to be made available on ADEM's website and to be mailed to any person who signs up on a public notice mailing list maintained by ADEM. *See* ALA. CODE § 22-22A-5(18)a.

Furthermore, the amendments provide the public with the opportunity to comment on proposed orders and to re-

quest a hearing with ADEM before an order is issued, where none existed before. If the information submitted in support of the request for a hearing is deemed "material" and if a hearing may clarify issues raised in the comments, ADEM may hold a hearing, at which time persons subject to the proposed order, as well as persons who submitted written comments, can be heard and submit additional "information" to ADEM. However, the amendments make clear that the pre-issuance hearing is not a "full-blown" evidentiary hearing. After considering all available information, ADEM may issue the order as proposed, issue a modified order, or withdraw the proposed order. *See* ALA. CODE § 22-22A-5(18)a.

The amendments also require ADEM to provide written notice of the issuance of an order to persons who submitted written comments on the proposed order. Before the issuance of an order, persons subject to the order and aggrieved persons who submitted written comments on the proposed order are also, upon proper request, entitled to a hearing before the Alabama Environmental Management Commission. Aggrieved parties who participate in the hearing may seek judicial review in state court. The pre- and post-issuance hearing opportunities provided by the amendments closely reflect the hearing opportunities in the CWA and thus clearly meet the "rough comparability" standard adopted by the Eleventh Circuit. In fact, the amendments to the Alabama Environmental Management Act arguably provide more opportunities for public participation than the CWA. *Compare* ALA. CODE § 22-22A-5(18)a with 33 U.S.C. § 1309(g)(4).

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Depending on the approach adopted by the governing federal circuit court, states may need to evaluate the extent to which their water quality enforcement schemes compare to the CWA. For example, *ex post facto* public participation fails to meet the Eleventh Circuit's test for comparability but not the Fifth Circuit's standard. At stake are the state environmental agencies' ability to coax alleged violators into administrative orders, regulated industries' desire to avoid duplicative enforcement actions, and the public's desire to be involved in the water quality enforcement process.

With some circuits adopting a rough comparability standard, others adopting a more rigorous approach, and still others, like the Fifth Circuit, giving states flexibility in fashioning an enforcement scheme, the definition of "comparability" will remain unresolved unless the United States Supreme Court finally settles the matter. With no chance of that happening (i.e., none of the litigants in *McAbee* and *Lockett* petitioned the Supreme Court for review), industry may remain weary of entering administrative orders in states with limited public participation in the enforcement process. The Alabama legislature may be leading the way, however, to restoring both the public's prerogative to participate in water quality enforcement and the permit-holders' shield from duplicative enforcement.

No Comparability under Section 505

Even before courts recognized the "comparability" issue under Section 309, dischargers were attempting to use other provisions of the CWA to defend against citizen suits. After repeated misfires at the lower court level, dischargers finally found an effective weapon in Section 505 of the Clean Water Act. That section, as the United States Supreme Court recognized in *Gwaltney of Smithfield Ltd. v. Chesapeake Bay Foundation*, 484 U.S. 49 (1987), bars citizen suits against ongoing violations if EPA or the state has "commenced and is diligently prosecuting a civil or criminal action" in federal or state court.

Interestingly, unlike Section 309(g), the citizen suit bar found in Section 505(b) does not require that the state enforcement action be conducted pursuant to comparable state law. In other words, a citizen suit is barred under Section 309(g) only if the state law used to enforce the administrative penalty is comparable to the CWA; however, a citizen is barred under Section 505(b) if the state takes civil enforcement action regardless of the comparability of the state law. The underlying justification for this difference is found in the CWA's legislative history; specifically, when Congress amended the CWA in 1987 to include administrative enforcement provisions of Section 309, it intended administrative penalties to be imposed for minor violations that did not warrant the time and expense of a civil action. *See* S. REP. NO. 99-50, at 27 (1985). Nonetheless, to prevent states from using the administrative penalty provisions to impose relatively light punishments for relatively egregious environmental violations, Congress allowed citizen suits to go forward despite the issuance of administrative penalties if the state enforcement provisions were not comparable to the CWA. As a result, CWA citizen suits following civil actions by a state agency are more likely to be barred than citizen suits following administrative enforcement.

Res Judicata

Finally, a third bar to CWA citizen suits has emerged, arising not from the statute but from the common law. As previously discussed, if a state commences an action before the citizen suit, then the citizen may be statutorily barred from maintaining the lawsuit. However, the statutory bar may not apply when a citizen files a suit first and the state

subsequently commences an action, be it administrative or judicial, against the alleged violator. *See, e.g., Citizens Legal Envtl. Action Network v. Premium Standard Farms, Inc.*, No. 97-6073-CV-SJ-6, 2000 WL 220464 at *2 (D. Mo. Feb. 23, 2000) (stating that the CWA precludes citizen suits only "when the EPA or the relevant state has commenced" an administrative penalty action, or civil or criminal action); *but see* 33 U.S.C. § 1319(g) (providing that the Section 309(g) bar does not apply when a citizen suit is filed before the state or EPA commences its administrative enforcement action). Despite this hurdle to barring citizen suits, some courts have applied the long-standing principle of *res judicata* (also termed "claim preclusion") to bar citizen suits where the state has brought a subsequent enforcement action to address the same alleged violations.

In general, *res judicata* bars a citizen suit if (1) an earlier action resulted in a final judgment on the merits by a court with proper jurisdiction; (2) both suits involved the same cause of action; and (3) both suits involved the same parties or their privies. *See U.S. EPA v. City of Green Forest*, 921 F.2d 1394, 1403 (8th Cir. 1991). In fact, when courts have addressed *res judicata* in the context of CWA citizen suits, the discussion most often focuses on whether the government and citizen actions involve the same issues and whether the government is in privity with the citizens.

For example, in *City of Green Forest*, the Eighth Circuit held that *res judicata* barred a citizen suit where an EPA enforcement action resulted in a court-approved consent decree even where EPA filed its action after the commencement of the citizen suit. *Id.* Specifically, a citizen group filed suit against Tyson Foods for various CWA violations. A few months prior to the citizen suit's trial date, the court approved a settlement agreement between EPA and Tyson Foods, and as a result, the citizen group's CWA claims were dismissed. Reasoning that the consent decree constituted "final judgment on the merits" and that EPA was a "privy" of the citizens (under the doctrine of *parens patriae*, whereby the government brings an action on behalf of the citizens), the court dismissed the citizen group's CWA claims. *Id.* at 1404. Notably, however, in *Comfort Lake Ass'n v. Dresel Contracting, Inc.*, 138 F.3d 351 (8th Cir. 1998), the Eighth Circuit expressly limited the application of *res judicata* to "judicially approved consent decrees," as in *City of Green Forest*, as opposed to "administrative enforcement agreements," stating that a mere stipulation agreement without judicial approval is insufficient to trigger *res judicata*.

On the other hand, in *Citizens Legal Environmental Action Network*, a Missouri federal court delved more deeply into the violations covered by a court-approved consent decree than the Eighth Circuit, holding that *res judicata* only barred claims based on those "specific incidents" covered by the consent decree. 2000 WL 220464 at *17. In fact, according to the court, the citizen's claims were precluded only to the extent that the consent decree addressed the same "particular facts, upon a particular date, at a particular facility or facilities, that violate a particular provision of law." *Id.* Thus, while barring claims based on the "precise violations" addressed by the government in a court-approved consent decree, *res judicata* does not preclude citizen groups from bringing different CWA claims even if these claims could have been raised by the government in its action. *Id.* at *7.

Moreover, unlike the Eighth Circuit, the Missouri federal court reasoned that the citizen group was not in privity *per se* with the government based simply on the doctrine of *parens patriae*; rather, the citizen group is the "same party" as the government only as to those claims that the government has "diligently prosecuted." *Id.* at *11. Citing *Harmon Indus. v. Browner*, 191 F.3d 894 (8th Cir. 1999), where the Eighth Circuit held that the Resource Conservation and Recovery Act's (RCRA) "in lieu of" language precluded EPA from duplicating a state's enforcement action, the court explained that the CWA's language also determines whether parties are identical or in privity for purposes of *res judicata*. That is, unlike the RCRA in *Harmon*, the CWA does not provide that one particular party always represents the interests of another; instead, the court examined whether the government had "diligently prosecuted" the case. Thus, under at least one court's determination, the common law bar of *res judicata* depends greatly on the requirements of the statutory bar. As a result, given this relationship between the common law and statutory bars, the statutory concepts of diligent prosecution and comparability may carry over into the common law doctrine of *res judicata*. Nonetheless, while relatively few cases actually address in detail the application of this common law doctrine to the CWA, litigants have more often than not been successful when employing *res judicata* to bar citizen suits.

As a practical matter, the nature of *res judicata* as an affirmative defense somewhat minimizes its effectiveness as a bar to CWA citizen suits. For instance, Rule 8(c) of the Federal Rules of Civil Procedure lists *res judicata* as an affirmative defense that must be raised by the defendant in its answer to the complaint. Moreover, as an affirmative defense, the defendant bears the burden of proof at trial to show that the doctrine of *res judicata* precludes the citizen suit. Therefore, unlike the CWA statutory bars to a citizen suit that require the plaintiffs to show that they satisfy the statutory requirements for bringing the citizen suit as a jurisdictional matter, the common law bar of *res judicata* is a burden that must be carried by the defendant.

In summary, there is much to compare between the statutory and common law bars to citizen suits. As explained above, whether a defendant may successfully raise a statutory citizen suit bar often depends substantially on the jurisdiction in which the violation takes place. Considerations of sufficient notice, diligence of a state's prosecution, and the comparability of applicable state law each present opportunities for courts to delve into the appropriate role for citizen-plaintiffs in the CWA enforcement framework. However, in the end, if courts believe violations alleged in citizen suits have been (or are being) addressed by the state, they will often try to find a way to resolve the issue in a way that recognizes the primacy of state enforcement responsibilities, even if it means looking beyond the statutory bars to the common law.