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ON YOUR MARK, GET SET, SUE: THE FOURTH CIRCUIT
CONSIDERS WHEN CITIZEN SUITS UNDER THE
CLEAN WATER ACT PROPERLY COMMENCE IN
NATURALAND TRUST V. DAKOTA FINANCE LLC

I. SETTING UP THE RACETRACK: AN INTRODUCTION TO THE
CLEAN WATER ACT

The United States has long struggled with water pollution and ensuring that citizens have access to safe drinking water.¹ In the eighteenth and nineteenth centuries, the frequent spread of water-borne illness created public concern and led to efforts to improve water quality.² By the early twentieth century, however, industrial and sewage pollutants became significant contributors to the already existing pollution problem.³ These pollutants had a devastating impact on drinkable water supplies and aquatic life in rivers.⁴

During the early twentieth century, state governments attempted to mitigate this rampant industrial water pollution.⁵ Due to state statutes giving agencies limited regulatory power and state officials declining to bring enforcement actions against industrial polluters, these attempts were largely ineffective.⁶ Instead, state officials preferred to cooperate and compromise with polluters, claiming strict enforcement of regulatory standards would be impractical.⁷

In 1948, the federal government joined the effort to mitigate the water pollution problem by passing the Federal Water Pollution

1. See William L. Andreen, *The Evolution of Water Pollution Control in the United States - State, Local, and Federal Efforts, 1789-1972: Part II*, 22 STAN. ENV'T. L.J. 145, 160-61 (2003) (discussing history of water pollution problems in United States).

2. See *id.* at 162-63 (observing epidemics as motivation to improve public water maintenance infrastructure).

3. See *id.* at 170, 181 (noting contribution of industrial waste to river pollution).

4. See *id.* at 181 (discussing impacts of industrial pollution on ecosystems).

5. See, e.g., *id.* at 182-84 (explaining state attempts to control water pollution in twentieth century); 35 PA. CONS. STAT. § 675(a) (2023) (giving text of June 1931 Public Bathing Law); John Emerson Monger, *Administrative Phases of Stream Pollution Control*, 16 AM. J. PUB. HEALTH 788, 790-91 (1926) (discussing 1925 Ohio state anti-stream pollution law).

6. See Andreen, *supra* note 1, at 186 (commenting on lack of effective water quality regulation in 1930s).

7. See *id.* at 186-87 (describing state officials' arguments for cooperating with polluters).

Control Act of 1948.⁸ This was the first significant anti-water pollution legislation and primarily gave the federal government permission to assist state and local governments' construction of water treatment plants to prevent water pollution.⁹ When Congress amended the Federal Water Pollution Control Act in 1972, it created a framework for the federal regulation of polluters discharging into waters within the United States.¹⁰ The framework within these amendments has evolved into what the general population knows as the Clean Water Act (the CWA).¹¹

The CWA is a comprehensive and complex regulatory scheme that involves actors at the individual, state, and federal levels.¹² As a result of this complex interplay of actors within different governmental bodies, the CWA implicates the doctrine of cooperative federalism.¹³ Cooperative federalism is an arrangement whereby the federal government effectuates a national policy in partnerships with state governments.¹⁴ Through this system, the federal government sets minimum standards for national policies that state governments may enforce using a method of their choosing.¹⁵

Additionally, federal courts have jurisdiction over citizen-initiated lawsuits against private entities violating the CWA, or against government entities that fail to adequately enforce anti-pollution

8. See *History of the Clean Water Act*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/laws-regulations/history-clean-water-act> (last visited Dec. 30, 2022) [hereinafter *History of the Clean Water Act*] (recounting history of water regulation in United States).

9. See Water Pollution Control Act, ch. 758, § 2, 62 Stat. 1155 (1948) (granting federal government power to remediate water quality).

10. See *History of the Clean Water Act*, *supra* note 8, (summarizing function of 1972 amendments).

11. See *Summary of the Clean Water Act*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/laws-regulations/summary-clean-water-act> (last visited Dec. 29, 2022) [hereinafter *EPA Clean Water Act Summary*] (giving overview of CWA).

12. For a discussion of actors involved in enforcing the CWA, see *infra* notes 61-73 and accompanying text.

13. Damien Schiff, *Keeping the Clean Water Act Cooperatively Federal — Or, Why the Clean Water Act Does Not Directly Regulate Groundwater Pollution*, 42 WM. & MARY ENV'T. L. & POL'Y REV. 447, 448 (2018) (categorizing CWA as acting within framework of cooperative federalism).

14. See *Cooperative Federalism 2.0: Achieving and Maintaining a Clean Environment and Protecting Public Health*, THE ENV'T COUNCIL OF THE STATES 2 (June 2017), <https://www.ecos.org/wp-content/uploads/2017/06/ECOS-Cooperative-Federalism-2.0-June-17-FINAL.pdf> [hereinafter *Cooperative Federalism*] (emphasizing states' power to create regulations which are stricter than federal minimums).

15. *Id.* at 3 (enumerating federal minimum standards as basic tenet of cooperative federalism).

standards.¹⁶ Courts refer to these suits as citizen suits.¹⁷ The circumstances in which citizens may bring suit have been the subject of much litigation.¹⁸ One well-known citizen-suit limitation is the diligent prosecution bar.¹⁹ Section 1319(g)(6)(A) of the CWA bars citizens from bringing suit to enforce “[a]ny violation . . . with respect to which a State has commenced and is diligently prosecuting an action under State law comparable to [the CWA]. . . .”²⁰

This Note discusses the Fourth Circuit’s decision in *Naturaland Trust v. Dakota Finance LLC*²¹ and its interpretation of the diligent prosecution bar.²² Part II explains the facts and procedural history of the case.²³ In Part III, this Note explores the case’s doctrinal background by examining the CWA and subsequent judicial decisions regarding citizen suits and the diligent prosecution bar.²⁴ Part IV discusses the court’s reasoning in *Naturaland Trust v. Dakota Finance LLC*.²⁵ Part V critiques the majority’s conclusions and argues that the Fourth Circuit’s analysis is inconsistent with existing precedent regarding the diligent prosecution bar.²⁶ Ultimately, in Part VI, this Note examines the potential impact the majority’s

16. 33 U.S.C. § 1365(a) (giving federal district courts jurisdiction over citizen-brought suits enforcing clean water standards).

17. *See, e.g.*, *Philadelphia v. Stepan Chemical Co.*, 544 F.Supp. 1135, 1139 (E.D.Pa. 1982) (referring to CWA § 1365(a) as citizen suit provision).

18. *See, e.g.*, *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found. Inc.*, 484 U.S. 49, 52 (1987) (determining citizen’s ability to bring suit for wholly past violations); *Naturaland Tr. v. Dakota Fin. LLC*, 41 F.4th 342, 348 (4th Cir. 2022) (considering interpretation of diligent prosecution bar).

19. *See* 33 U.S.C. § 1319(g)(6)(A)(ii) (limiting citizens’ ability to bring action against CWA violator after government commences action); *see also Naturaland Tr.*, 41 F.4th at 344 (asking question of whether state notice of alleged violation constitutes commencement of action under diligent prosecution bar).

20. 33 U.S.C. § 1319(g)(6)(A)(ii) (banning citizen-suit where state government has initiated action).

21. 41 F.4th 342, 348 (4th Cir. 2022) (introducing issue pertaining to citizen suits). On January 30, 2023, Arabella Farm filed a petition for writ of certiorari with the United States Supreme Court. *See* Petition for Writ of Certiorari at 1, *Naturaland Tr. v. Dakota Fin. LLC*, 41 F.4th 342 (4th Cir. 2022) (petitioning for writ of certiorari).

22. For a discussion of the majority’s holding and reasoning, see *infra* notes 156-82 and accompanying text.

23. For a narration of facts of *Naturaland Trust v. Dakota Finance LLC*, see *infra* notes 28-51 and accompanying text.

24. For discourse on the doctrinal background, see *infra* notes 52-153 and accompanying text.

25. For a discussion of the majority and dissenting opinions, see *infra* notes 156-217 and accompanying text.

26. For a critique of the majority’s holding, see *infra* notes 218-45 and accompanying text.

holding will have on environmental regulation within the Fourth Circuit.²⁷

II. MEET THE RUNNERS: THE FACTS OF *NATURALAND TRUST V. DAKOTA FINANCE LLC*

Ken and Sharon Smith (the Smiths) are members of Dakota Finance, LLC (Dakota).²⁸ In 2015, Dakota purchased a seventy-two acre parcel of land next to the Jocassee Gorges Area in South Carolina.²⁹ The Smiths' son-in-law, Willard Lamneck, Jr., owns the bordering property.³⁰ Three waterways — the Clearwater Branch, the Peach Orchard Branch, and a tributary to the Eastatoe River — border the land parcel.³¹ During rainstorms, the land parcel allegedly discharges stormwater into the three waterways which flow into waters under federal jurisdiction.³²

In 2017, the Smiths created the company, Arabella Farm LLC, to establish a farm and vineyard at which they planned to host weddings and events.³³ This Note refers to the Smiths, Lamneck, Jr., Dakota, and Arabella Farm LLC as “Arabella Farm.”³⁴ To expand the farm and wedding venue, Arabella Farm cleared twenty of the acres that Dakota bought.³⁵ These activities disturbed the natural terrain and large amounts of sediment.³⁶ Arabella Farm did not obtain permits from the South Carolina Department of Health and Environmental Control (DHEC) or implement any stormwater or sediment control systems despite the significant environmental impacts of clearing the site.³⁷ Arabella Farm claimed a CWA provision exempted it from obtaining stormwater permits for agricultural stormwater.³⁸

27. For a discussion of the impact of *Naturaland Trust v. Dakota Finance LLC* on environmental regulation, see *infra* notes 246-62 and accompanying text.

28. *Naturaland Tr. V. Dakota Fin., LLC*, 531 F.Supp. 3d 953, 957 (D.S.C. 2021) (noting Smiths' relationship to Dakota).

29. *Id.* (discussing case background).

30. *See Naturaland Tr.*, 41 F.4th at 344 (detailing Arabella Farm's relationship to site).

31. *Id.* (identifying waterways surrounding Arabella Farm site)

32. *Naturaland Tr.*, 531 F.Supp. 3d at 957 (introducing plaintiff's claim).

33. *Naturaland Tr.*, 41 F.4th at 344 (describing circumstances surrounding case).

34. *See id.* (acknowledging Lamneck, Jr., Smiths, and Smiths' companies as “Arabella Farm”).

35. *Id.* (explaining activities inciting litigation).

36. *Id.* (noting detrimental impacts of defendants' decision to clear land).

37. *See id.* (reporting on Arabella Farm's failure to obtain permitting).

38. *See Appellees' Response Brief* at 3 n.3, *Naturaland Tr. v. Dakota Fin. LLC*, 41 F.4th 342 (4th Cir. 2022) (No. 21-1517) [hereinafter Appellees' Resp. Brief]

In April of 2019, the DHEC investigated the site to assess whether Arabella Farm complied with the CWA's National Pollutant Discharge Elimination System (NPDES), which delegates to states the responsibility of issuing permits to entities discharging substances into waters of the United States.³⁹ Through its investigation, DHEC discovered Arabella Farm had “inadequate stormwater controls, significant erosion, and off-site impacts.”⁴⁰ Consequently, DHEC sent a cease-and-desist letter to Arabella Farm in August of 2019.⁴¹ The letter instructed Arabella Farm to obtain a NPDES permit and stop on-site construction for all purposes other than adding systems to mitigate the identified erosion and stormwater control issues.⁴² Further, in September of 2019, DHEC sent Arabella Farm a “Notice of Alleged Violation/Notice of Enforcement Conference” (Notice) advising Arabella Farm of a voluntary, informal enforcement conference that DHEC would convene at the end of the month.⁴³ In November 2019, concern over ongoing sediment discharges into the waterways bordering Arabella Farm motivated three nonprofit organizations — Naturaland Trust, South Carolina Trout Unlimited, and Upstate Forever — to send Arabella Farm a notice of intent to sue.⁴⁴ These organizations then filed a complaint in the United States District Court for the District of South Carolina on April 6, 2020, alleging CWA violations.⁴⁵ The following month, in May 2020, Arabella Farm entered into a consent order with DHEC.⁴⁶ The consent order mandated that Arabella Farm, among other things, pay a six thousand dollar penalty,

(arguing Arabella Farm's discharge is exempt from CWA regulation). Section 1362(14) of the CWA defines “point source” as excluding agricultural stormwater discharges. See 33 U.S.C. § 1362(14) (defining “point source”).

39. *Naturaland Tr.*, 41 F.4th at 344 (recounting beginning of South Carolina regulators' involvement with Arabella Farm); see also 33 U.S.C. § 1342 (defining NPDES).

40. *Naturaland Tr.*, 41 F.4th at 345 (explaining DHEC's findings from site inspections).

41. *Id.* (narrating investigation results and consequences).

42. See *id.* (explaining contents of cease-and-desist letter).

43. See *id.* (reviewing purpose of Notice).

44. See *id.* (noting how appellants became involved in violation); see also Appellants' Opening Brief at 4-5, *Naturaland Tr. v. Dakota Fin. LLC*, 41 F.4th 342 (4th Cir. 2022) (No. 21-1517), 2021 WL 4950544, at *6-7 [hereinafter Appellants' Opening Brief] (identifying legal claims).

45. See *Naturaland Tr. v. Dakota Fin., LLC*, 531 F.Supp. 3d 953, 961 (D.S.C. 2021) (describing appellants' original cause of action); see also Appellants' Opening Brief, *supra* note 44, at 9 (identifying date appellants filed complaint); Complaint at 16-26, *Naturaland Tr. v. Dakota Fin., LLC*, 531 F.Supp. 3d 953 (D.S.C. 2021) (6:20-cv-01299-DCC) (alleging multiple causes of action).

46. *Naturaland Tr.*, 41 F.4th at 345 (noting enforcement action against Arabella Farm).

apply for an NPDES permit, submit stormwater and site stabilization plans, and conduct a stream assessment.⁴⁷ Subsequently, the district court dismissed the complaint, concluding that the diligent prosecution bar applied and, thus, the court did not have subject-matter jurisdiction over the case.⁴⁸

In response, appellants — Naturaland Trust, South Carolina Trout Unlimited, and Upstate Forever — appealed the trial court's decision to the United States Court of Appeals for the Fourth Circuit.⁴⁹ On appeal, appellants argued that the district court erred by applying the diligent prosecution bar and holding the district court did not have federal subject matter jurisdiction.⁵⁰ The Fourth Circuit held that the district court had erred by finding it lacked jurisdiction to hear the case and remanded the suit to the trial court.⁵¹

III. GETTING THE LAY OF THE LAND: THE DOCTRINAL BACKGROUND

The CWA authorizes the federal government to regulate water pollution and impose water quality standards in the United States.⁵² The overarching goal of the CWA is to restore and maintain the “chemical, physical, and biological integrity of [the United States'] waters.”⁵³ To achieve this goal, the CWA creates federal effluent limitations and water quality standards.⁵⁴

While the CWA designates the EPA as its “Administrator,” the EPA is not the only actor with the power to enforce water regulations.⁵⁵ The CWA affirms and emphasizes that states have the right to regulate intra-state waters and set effluent and water quality regulations that are more stringent than those the federal government

47. *Id.* at 345-46 (describing terms of DHEC consent order).

48. *Id.* at 346 (explaining district court holding).

49. *See* Appellants' Opening Brief, *supra* note 44, at 1 (bringing appeal to Fourth Circuit).

50. *See id.* at 10-12 (supplying reasons to overturn district court holding).

51. *See Naturaland Tr.*, 41 F.4th at 346 (stating majority holding).

52. *See EPA Clean Water Act Summary*, *supra* note 11 (summarizing history and provisions of CWA).

53. 33 U.S.C. § 1251(a) (alteration in original) (announcing goals and policies of CWA).

54. *See id.* § 1311(a) (making water discharge illegal except in enumerated circumstances); *see also id.* § 1313 (instructing states to determine water quality standards for waters of United States).

55. *See id.* § 1251(d) (delegating administration of CWA to EPA); *but see, e.g., id.* § 1313(a) (giving states responsibility of setting and maintaining water quality standards); *Naturaland Tr.*, 41 F.4th at 346 (noting state's and citizen's ability to enforce CWA).

promulgates.⁵⁶ Additionally, private citizens may sue entities that violate CWA provisions or permits.⁵⁷

Because the CWA gives numerous actors the power to enforce its regulations, it is imperative that these actors exclusively exercise their statutorily granted authority.⁵⁸ This is especially critical for federal entities because their exceedance of statutorily granted power could unconstitutionally infringe on a state actor's authority.⁵⁹ Consequently, federal case law and multiple CWA provisions prevent confusion over the power of the various CWA enforcers by distinguishing the ways actors may legally exercise authority.⁶⁰

A. Citizen Suits: Separating the Powers of Individuals from the Powers of the State

The CWA allows individual citizens to commence a lawsuit against private or government entities that are in violation of a CWA provision or a permit that a state or the EPA issued pursuant to the CWA.⁶¹ The CWA also permits citizens to sue the EPA if it fails to perform a mandatory duty under the statute.⁶² A citizen's right to sue, however, is not unfettered because Congress built in several statutory limitations.⁶³

56. See 33 U.S.C. § 1370 (reaffirming state authority); see also *id.* § 1313(a) (directing states to set water quality standards for EPA approval).

57. *Id.* § 1365(a) (authorizing citizen suits). The CWA defines a citizen as any individual who the entity could harm with its CWA violation. *Id.* § 1365(g) (defining citizen under CWA).

58. See, e.g., *New York v. United States*, 505 U.S. 144, 155-59 (1992) (discussing constitutional history that necessitates division of power between state and federal governments); *Piney Run Pres. Ass'n v. Comm'rs of Carroll Cnty.*, 523 F.3d 453, 456 (4th Cir. 2008) (discussing intended relationship between government regulators and citizen suits in enforcing CWA).

59. See, e.g., *New York*, 505 U.S. at 176 (reasoning it is unconstitutional for Congress to force states take property of radioactive waste if they do not adopt federal regulatory scheme); *Arkansas v. Oklahoma*, 503 U.S. 91, 101-02 (1992) (explaining states' right under CWA to establish water quality standards).

60. See, e.g., *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found. Inc.*, 484 U.S. 49, 53 (1987) (distinguishing roles different actors play in administration of CWA); *Arkansas*, 503 U.S. at 98-100 (noting cases deciding whether action brought under CWA was appropriate exercise of federal authority).

61. See 33 U.S.C. § 1365(a)(1) (authorizing citizen suits against individual entities in violation of CWA).

62. See *id.* § 1365(a)(2) (authorizing citizen suits against EPA for failing to enforce duties under CWA).

63. See, e.g., *id.* § 1365(b) (describing sixty-day notice requirement); *id.* § 1319(g)(6)(A)(ii) (setting "diligent prosecution bar"); *id.* § 1365(b)(1)(B) (describing "judicial proceeding bar").

The most relevant limitations in this case are the diligent prosecution bar and the judicial proceeding bar.⁶⁴ The diligent prosecution bar prohibits an individual from suing if the EPA or a state has already begun “diligently prosecuting a civil or criminal action.”⁶⁵ Similarly, per the judicial proceeding bar, a citizen may not bring suit under the CWA if another citizen is pursuing litigation against the violator for the same violation.⁶⁶

Federal case law interpreting this statute has further restricted the role of citizen suits in enforcing the CWA.⁶⁷ In *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*,⁶⁸ the United States Supreme Court addressed whether it had subject matter jurisdiction over citizen suits for past, non-recurring CWA violations.⁶⁹ Looking at the diligent prosecution and judicial proceeding bans, the Court determined that the CWA allowed citizen suits as a tool to supplement government enforcement efforts.⁷⁰

Using this as a cornerstone for its holding, the Supreme Court predicted that allowing individuals to sue for wholly past actions could make entities vulnerable to suit despite entering into a consent order with the EPA or a state environmental agency.⁷¹ The majority, therefore, held that federal courts have jurisdiction over citizen suits brought to redress a “continuous or intermittent violation” of the CWA but not over past, non-recurring violations.⁷² Notwithstanding these restrictions, citizen suits remain a valuable enforcement tool in times when government actors abrogate their responsibilities to enforce the CWA.⁷³

64. *See* *Naturaland Tr. v. Dakota Fin. LLC*, 41 F.4th 342, 344 (4th Cir. 2022) (laying out limitations at issue in case).

65. § 1319(g)(6)(A)(ii) (declaring scenario where citizen suits are prohibited).

66. § 1365(b)(1)(B) (explaining judicial proceeding bar).

67. *See, e.g., Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found. Inc.*, 484 U.S. 49, 59 (1987) (holding citizen suits can only be brought against ongoing CWA violations).

68. 484 U.S. 49, 52 (1987) (evaluating breadth of citizen suits).

69. *Id.* (discussing interplay between arguments at issue and idea that citizen suits are supplemental actions).

70. *Id.* at 60 (analyzing purpose of citizen suits in CWA enforcement).

71. *See id.* at 61 (exemplifying problems that could result from allowing larger citizen suit role).

72. *Id.* at 64 (stating types of violations over which federal courts have subject matter jurisdiction).

73. *See Gwaltney of Smithfield, Ltd.*, 484 U.S. at 60 (referencing congressional intention for citizen suits to enforce CWA if government agencies do not).

B. Cooperative Federalism: Separating Sovereign Powers While Working Towards Common Goals

Cooperative federalism is a key aspect of federal environmental policy, including policy under the CWA.⁷⁴ Under this doctrine, federal lawmakers create national minimum standards and delegate the ability to enforce those standards to the states.⁷⁵ Additionally, states may create more stringent standards than the federal guidelines.⁷⁶ This doctrine has been effective.⁷⁷ Various states have used their respective programs to enforce a majority of federal environmental policies.⁷⁸ Federal courts are conscious of maintaining an appropriate balance between federal and state authority when called to decide cases involving the CWA.⁷⁹ For example, in *Sierra Club v. U.S. Army Corps of Engineers*,⁸⁰ the Fourth Circuit considered whether the U.S. Army Corps of Engineers could replace a state's special permitting condition with its own.⁸¹ The Fourth Circuit ultimately vacated the permit after highlighting that the language of the CWA specifically allocated the states "primary responsibilities and rights" to prevent, reduce, and eliminate water and land pollution.⁸² The court, therefore, reasoned that allowing the Army Corps of Engineers to substitute the state's permitting condition with its own condition would usurp state authority.⁸³ The Fourth Circuit determined such usurpation to be incompatible with the CWA's balance of powers.⁸⁴

Cooperative federalism, however, does not mandate complete deference to the states.⁸⁵ Federal courts will uphold CWA enforce-

74. See *Cooperative Federalism*, *supra* note 14, at 2 (reviewing importance of cooperative federalism in federal environmental policy); see also *New York v. United States*, 505 U.S. 144, 167 (1992) (discussing cooperative federalism in context of CWA).

75. See *New York*, 505 U.S. at 167 (defining cooperative federalism).

76. See *Cooperative Federalism*, *supra* note 14, at 2 (emphasizing states' power to create regulations which are stricter than federal minimums).

77. See *id.* at 2 (insinuating success of cooperative federalism scheme).

78. See *id.* (tracking states' assumption of delegable authorities under federal environmental statutes).

79. See, e.g., *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992) (discussing balance anticipated between regulatory powers of state and federal governments).

80. 909 F.3d 635, 639 (4th Cir. 2018) (laying out legal issue in case).

81. See *id.* at 642 (explaining tension between Army Corps of Engineers and state).

82. See *id.* at 639, 647 (tying purpose of CWA framework to state authority).

83. See *id.* at 647-48 (explaining why substitution of special conditions at issue is impermissible).

84. See *id.* at 648 (finding infringement on state powers impermissible).

85. See, e.g., *Ohio Valley Env't Coal. v. Fola Coal Co.*, 845 F.3d 133, 145 (4th Cir. 2017) (acknowledging supplementary role of citizen suits); see also *Cooperative*

ment actions, either in the form of federal enforcement actions or citizen suits, when states have refused to act on a violation.⁸⁶ The Fourth Circuit dealt with such a case when deciding *Ohio Valley Environmental Coalition v. Fola Coal Co.*⁸⁷ In this case, West Virginia issued the Fola Coal Company (Fola) an NPDES permit which did not outline limitations on water conductivity.⁸⁸ Fola's discharges, however, increased river conductivity in violation of West Virginia's general water quality standards.⁸⁹ Consequently, environmental groups brought a citizen suit against Fola.⁹⁰

On appeal, Fola argued that the state's water quality standards bound the West Virginia Department of Environmental Protection's (WVDEP) actions when it issued permits but did not require Fola to comply with the regulations.⁹¹ Fola, therefore, asserted that only the NPDES permit, which the WVDEP issued, bound its actions and that the WVDEP had given "an informal assurance that it [would] not pursue enforcement."⁹² The court, however, held that West Virginia's general water quality standards bound Fola, noting that instances of state entities declining to enforce water regulations motivated the CWA's enabling of citizen suits.⁹³

Both citizen suits and EPA actions challenging state environmental regulations implicate principles of cooperative federalism.⁹⁴ This is because a citizen suit would allow a federal court to make a judgment on a state action.⁹⁵ Given federal courts' emphasis on maintaining the balance of power between state and federal govern-

Federalism, *supra* note 14, at 3 (describing partnership as key part of cooperative federalism).

86. *See, e.g., Ohio Valley Env't Coal.*, 845 F.3d at 145 (acknowledging supplementary role of citizen suits).

87. *See id.* at 147 (concluding that district court's upholding action against Fola was correct).

88. *See id.* at 136 (discussing NPDES permit condition at issue).

89. *See id.* (noting violation of West Virginia water quality standard regulations).

90. *See id.* (setting forth procedural history).

91. *See Ohio Valley Env't Coal.*, 845 F.3d at 137, 139 (noting appellants' primary argument).

92. *See id.* at 137, 145 (listing Fola's supplemental arguments).

93. *See id.* at 145-46 (noting CWA enables relief from unlawful pollution when executive entities decline to enforce).

94. *See id.* at 145 (identifying successful operation of cooperative federalism principle in case where state agency refused to act); *see also Arkansas*, 503 U.S. at 101 (explaining that EPA enforcing state standards' conformity with federal regulations is part of anticipated federal-state partnership).

95. *See Ohio Valley Env't Coal.*, 845 F.3d at 145 (discussing that citizen suits are appropriate mechanism to combat pollution when state or federal environmental agencies do not).

ments, courts undertake careful analysis when considering whether a citizen has properly brought a citizen suit.⁹⁶

C. Commencing Actions and Comparability: Frameworks for Determining the Proper Separation of Individual and State Power

When reviewing challenges to a citizen suit under the diligent prosecution bar, many courts have implemented a three-part analysis to determine if the bar precludes the suit.⁹⁷ When determining if the diligent prosecution bar precludes a suit, a court first asks whether a state commenced an enforcement action against an alleged violator.⁹⁸ Second, the court determines whether the state's action constitutes diligent prosecution.⁹⁹ Finally, the court asks whether the state's regulatory scheme is comparable to the CWA's regulatory scheme.¹⁰⁰ There are circuit splits, however, about when an action commences and when a state statute is comparable to the CWA.¹⁰¹

1. *Definitions of Commencement*

In *Arkansas Wildlife Federation v. ICI Americas, Inc.*,¹⁰² the Eighth Circuit addressed when a state commences an action within the meaning of the diligent prosecution bar.¹⁰³ In that case, the defendant, ICI Americas, Inc. (ICI), was an herbicide manufacturer discharging wastewater into the Arkansas River.¹⁰⁴ Although the ICI had an NPDES permit allowing it to discharge, it continuously exceeded the permitted effluent amounts.¹⁰⁵

96. *See, e.g.*, *New York v. United States*, 505 U.S. 144, 168 (1992) (expanding upon benefits of cooperative federalism); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987) (considering Congress' intent for states to be primary enforcers of environmental regulations).

97. *McAbee v. City of Fort Payne*, 318 F.3d 1248, 1251 (11th Cir. 2003) (explaining three-part analysis used to interpret CWA § 1319(g)(6)(A)(ii)).

98. *Id.* (citing *Ark. Wildlife Fed'n v. ICI Americas, Inc.*, 29 F.3d 376, 379 (8th Cir. 1994)) (establishing first prong of analysis).

99. *Id.* (listing second prong of three-part analysis).

100. *Id.* (synthesizing authorities to create three-part analytical framework).

101. *See Naturaland Tr. v. Dakota Fin. LLC*, 41 F.4th 342, 349 (4th Cir. 2022) (discussing Seventh and Eighth Circuits' differing definitions between when action commences); *see also McAbee*, 318 F.3d at 1252-53 (discussing differing comparability standards).

102. 29 F.3d 376, 380 (8th Cir. 1994) (analyzing whether Arkansas regulatory agency commenced).

103. *Id.* at 379 (presenting issue on appeal).

104. *See id.* at 377 (describing defendant and its operations).

105. *See id.* (detailing defendant's violation of permit provisions).

Beginning in 1991, ICI entered into several consent orders with Arkansas's regulatory agency.¹⁰⁶ In 1992, after the parties entered into the first consent order, but before the later consent orders, Arkansas Wildlife Federation filed a notice of intent to file a citizen suit under the CWA and later filed suit in federal court.¹⁰⁷ ICI successfully moved for summary judgment because the district court found the diligent prosecution bar precluded the suit.¹⁰⁸ In support of its holding, the district court explained that the Arkansas regulatory agency was already prosecuting an enforcement action when the plaintiff filed its citizen suit.¹⁰⁹

On appeal, the Eighth Circuit upheld the district court's holding.¹¹⁰ In support of its conclusion, the Eighth Circuit held that state enforcement agencies may determine the specific methods they use to enforce water quality standards.¹¹¹ The court noted that the state entered into a consent order with ICI and penalized it for failure to comply.¹¹² The court held these actions sufficient to trigger the diligent prosecution bar.¹¹³

The Seventh Circuit addressed the same issue in *Friends of Milwaukee's Rivers v. Milwaukee Metropolitan Sewerage District*¹¹⁴ after the Milwaukee Metropolitan Sewerage District (MMSD), a Wisconsin sewage treatment agency, discharged waste exceeding what CWA regulations and the state's permit allowed.¹¹⁵ In an attempt to rectify this, in 1977, Wisconsin and MMSD entered into a stipulation requiring a two-billion dollar investment in MMSD's sewage treatment system.¹¹⁶ Despite reducing effluent during heavy rains, MMSD continued to discharge effluent in violation of environmental regulations.¹¹⁷

106. *See id.* at 378 (discussing factual background of case).

107. *See Ark. Wildlife Fed'n*, 29 F.3d at 378 (outlining procedural history of case).

108. *See id.* at 378-79 (explaining how court originally dismissed complaint).

109. *See id.* at 379 (explaining district court holding in *Arkansas Wildlife Federation*).

110. *See id.* at 383 (affirming district court order).

111. *Id.* at 380 (stating state enforcement proceedings need not be identical to federal enforcement proceedings).

112. *See Ark. Wildlife Fed'n*, 29 F.3d at 380 (describing actions Arkansas took with and against defendant).

113. *See id.* (justifying finding that state actions constituted action under diligent prosecution bar).

114. 382 F.3d 743, 752 (7th Cir. 2004) (considering if Wisconsin commenced administrative action sufficient to trigger diligent prosecution bar).

115. *See id.* at 748 (setting forth facts of case).

116. *See id.* at 749 (explaining history of 1977 Stipulation and Deep Tunnel).

117. *See id.* at 749-50 (discussing impacts of Deep Tunnel and MMSD sewer system).

Due to the continued discharges, Friends of Milwaukee's Rivers (Friends) intended to bring a citizen suit against MMSD.¹¹⁸ Friends sent MMSD, along with Wisconsin and federal agencies, notice of its intent to sue.¹¹⁹ Before Friends could file suit, Wisconsin addressed MMSD's violations, ultimately filing a stipulation with MMSD in Wisconsin's Dane County Circuit Court.¹²⁰ The judge, however, refused to enforce the stipulation.¹²¹

When consent order negotiations between Wisconsin, MMSD, and Friends failed, Friends filed a citizen suit in federal court.¹²² That same day, Wisconsin filed suit in state court and later entered into a consent order just with MMSD.¹²³ The federal court then, at MMSD's request, dismissed Friends' complaint citing the diligent prosecution bar.¹²⁴

On appeal, however, the Seventh Circuit determined that Wisconsin had not sufficiently prosecuted an administrative action against the defendant because the action the state took did not include public notice and participation.¹²⁵ The court stated that for the purposes of the CWA, "an administrative action 'commences' at the point when notice and public participation protections become available to the public and interested parties."¹²⁶ The court highlighted that Wisconsin's activities, including notices of non-compliance and meetings between Wisconsin and MMSD discussing the matter, did not constitute commencement of an enforcement action because they did not provide the public notice nor an opportunity to participate.¹²⁷ Thus, the court held that Wisconsin's

118. *See id.* at 750 (describing circumstances of case).

119. *See Friends of Milwaukee's Rivers*, 382 F.3d at 750 (explaining how Wisconsin learned Friends intended to bring citizen suit).

120. *See id.* (observing circumstances surrounding filing 2001 stipulation).

121. *See id.* (recounting judge's reasoning that court's involvement in cases must end at some point).

122. *See id.* (recounting procedural history).

123. *See id.* at 750-51 (narrating order in which parties filed complaints).

124. *See Friends of Milwaukee's Rivers*, 382 F.3d at 751 (explaining district court's dismissal of Friends' citizen suit). The district court also cited the judicial proceeding bar and *res judicata* to justify its dismissal of plaintiff's suit. *Id.* (listing district court's rationales for dismissing Friends' suit).

125. *See id.* at 757 (concluding State's non-judicial action did not commence administrative action).

126. *Id.* at 756 (defining when action under diligent prosecution bar commences).

127. *See id.* at 755, 757 (holding Wisconsin's activities were not equivalent to state enforcement action under diligent prosecution bar).

activities did not constitute commencement that would trigger the diligent prosecution bar.¹²⁸

2. *Testing Comparability*

Federal circuit courts also differ on what makes a state statute “comparable” to the federal enforcement framework in the CWA.¹²⁹ Some states engage in a case-by-case comparability analysis.¹³⁰ Other federal courts have developed and embraced tests to judge comparability.¹³¹

The Courts of Appeals for the First and Eighth Circuits adopted overall comparability tests which look to the entire state statute to determine if the statute’s regulatory provisions are comparable overall to the corresponding CWA provision.¹³² The First Circuit established this test in *North & South Rivers Watershed Ass’n v. Town of Scituate*¹³³ after the Massachusetts Department of Environmental Protection (MDEP) brought an action in the United States District Court for the District of Massachusetts against the town of Scituate for discharging effluent from a town-owned and operated waste-treatment plant into an estuary.¹³⁴ The MDEP eventually issued an administrative order against Scituate, with which the town made efforts to comply.¹³⁵ After the MDEP issued the administrative order, a citizen group initiated a lawsuit against Scituate, alleg-

128. *See id.* at 757 (concluding citizen suit at issue was not barred by CWA diligent prosecution bar).

129. *See McAbee v. City of Fort Payne*, 318 F.3d 1248, 1254 (11th Cir. 2003) (identifying various comparability tests).

130. *See Naturaland Tr. v. Dakota Fin. LLC*, 41 F.4th 342, 359 (4th Cir. 2022) (Quattlebaum, J., dissenting) (discussing Fourth Circuit precedent that dealt with comparability without citing specific comparability test); *see also* Terence J. Centner, *Challenging NPDES Permits Granted Without Public Participation*, 38 B.C. ENV’T. AFF. L. REV. 1, 26 (examining approaches for analyzing comparability other than specific comparability test).

131. *See, e.g., McAbee*, 318 F.3d at 1252-54 (mentioning comparability standards federal circuit courts adopted); *Naturaland Tr.*, 41 F.4th at 359 (Quattlebaum, J., dissenting) (explaining different circuit courts’ approach to comparability analyses).

132. *See* Centner, *supra* note 130, at 25 (discussing overall comparability test); *see also McAbee*, 318 F.3d at 1253 (indicating court looked to state’s statutory enforcement scheme to assess public-participation provisions).

133. 949 F.2d 552, 556 (1st Cir. 1991), *abrogated in part by* *Blackstone Headwaters Coal., Inc. v. Gallo Builders, Inc.*, 32 F.4th 99, 101 (1st Cir. 2022) (reasoning why Massachusetts’s regulations are comparable to CWA).

134. *See id.* at 553 (describing DEP’s allegations against Scituate).

135. *See id.* at 554 (explaining order MDEP issued and steps it took to remediate issues).

ing that the town continued discharging pollutants into the estuary, violating the CWA.¹³⁶

On appeal, the First Circuit upheld the district court's dismissal, holding that the diligent prosecution bar barred the suit.¹³⁷ The First Circuit rejected the argument that it should determine the comparability of a state's regulatory scheme to the CWA by only looking to the provision of the state statute under which MDEP could enter into the consent order with the town.¹³⁸ The court emphasized that because the state's enforcement statutes had provisions that outlined penalties, it did not matter that the provision of the statute authorizing administrative orders did not contain penalty provisions.¹³⁹

Moreover, highlighting that the purpose of the diligent prosecution bar is to prevent duplicative actions, the court reasoned that requiring a state to impose a financial penalty violated the spirit of the diligent prosecution bar.¹⁴⁰ The First Circuit emphasized that the MDEP was already taking appropriate steps to remedy Scituate's CWA violations.¹⁴¹ The court reasoned that permitting the citizen group to continue with its suit would not have any additional benefits but rather have an adverse effect when violators attempt to improve their performance after paying a higher financial burden.¹⁴²

In *Arkansas Wildlife Federation*, the Eighth Circuit also adopted the overall comparability test.¹⁴³ The majority expressly supported the court's reasoning in *Scituate*.¹⁴⁴ The Eighth Circuit held that a state law would be comparable to the CWA as long as the overall state law contained comparable penalty provisions, enforcement goals, and public participation opportunities.¹⁴⁵

136. *See id.* (stating citizen suit's charges were based on violations of MDEP's Order).

137. *See id.* at 558 (affirming district court's dismissal of complaint).

138. *N. & S. Rivers Watershed Ass'n*, 949 F.2d at 556 (rejecting citizen group's CWA comparability argument).

139. *See id.* (explaining totality of state's statutory scheme).

140. *See id.* 555-56 (undermining supplemental role envisioned for § 505 citizen's suits).

141. *See id.* at 556 (observing state's prior enforcement actions).

142. *See id.* (commenting that few practical reasons exist to permit citizen action to continue).

143. *See Ark. Wildlife Fed'n v. ICI Americas, Inc.*, 29 F.3d 376, 381 (endorsing court's finding in *Scituate*).

144. *See id.* (adopting overall comparability test).

145. *See id.* at 382 (observing conditional logic for regulatory scheme).

The overall comparability test is highly deferential to state regulatory schemes.¹⁴⁶ Some scholars and jurists, however, have criticized the overall comparability test as too indefinite to provide sufficient guidance as to what makes a state law comparable.¹⁴⁷ As a result, these courts formulated the rough comparability test as a doctrine that gives more guidance to courts.¹⁴⁸

Under the rough comparability test, three distinct categories determine whether a state statute is comparable to the CWA: penalty assessments, public participation, and judicial review.¹⁴⁹ A state statute must be comparable in all of these categories in order to satisfy the rough comparability test.¹⁵⁰ Because the rough comparability test is less vague and mandates that a state statute be similar to the CWA in three explicit categories, some jurists have considered it stricter than the overall comparability test.¹⁵¹ The Federal Courts of Appeal for the Tenth and Eleventh Circuits explicitly adopted the rough comparability test and the Ninth Circuit implicitly adopted it.¹⁵²

IV. RUNNERS, TAKE YOUR MARK: NARRATIVE ANALYSIS OF THE MAJORITY AND DISSENTING OPINION

The United States District Court for the District of South Carolina dismissed the citizen suit against Arabella Farm because it asserted that the diligent prosecution bar applied, thus preventing the district court from having subject matter jurisdiction.¹⁵³ The Court of Appeals for the Fourth Circuit, however, reversed the district court's ruling and held that the diligent prosecution bar did not implicate subject matter jurisdiction or prohibit the citizen

146. See Centner, *supra* note 130, at 25 (characterizing overall comparability test as deferential to state enforcement).

147. See *id.* at 26-27 (noting some courts' displeasure with overall comparability test).

148. See *id.* at 27 (describing rough comparability test as alternative to overall comparability test).

149. See *id.* (explaining rough comparability test); see also *Naturaland Tr. v. Dakota Fin. LLC*, 41 F.4th 342, 359 (4th Cir. 2022) (Quattlebaum, J., dissenting) (describing rough comparability test).

150. Centner, *supra* note 130, at 27 (listing necessities for test).

151. See *Naturaland Tr.*, 41 F.4th at 359 (Quattlebaum, J., dissenting) (explaining rigor of rough comparability test).

152. See Centner, *supra* note 130, at 27 (identifying courts adopting rough comparability test).

153. See *Naturaland Tr.*, 41 F.4th at 346 (recounting district court's holding).

suit.¹⁵⁴ The dissent, conversely, argued that the diligent prosecution bar should preclude the citizen suit.¹⁵⁵

A. The Majority's Opinion: Analyzing "Action" and Comparability Under the Diligent Prosecution Bar

The Fourth Circuit began its analysis by explaining why the diligent prosecution bar does not implicate subject-matter jurisdiction.¹⁵⁶ In its explanation, the court recognized that the diligent prosecution bar is analogous to the judicial proceeding bar which, historically, implicates subject-matter jurisdiction.¹⁵⁷ The court noted, however, that this was an insufficient reason to treat the diligent prosecution bar as also implicating subject matter jurisdiction.¹⁵⁸

Instead, the court noted that a provision implicates a court's subject matter jurisdiction only when the legislature indicates that it intended a provision to be jurisdictional.¹⁵⁹ Per the Supreme Court, legislatures can signal their intent by labeling a provision as jurisdictional or by placing the rule in a jurisdiction-granting provision.¹⁶⁰ The Fourth Circuit, consequently, determined that the diligent prosecution bar meets neither of these signaling requirements and "merely prohibits certain violations from being 'the subject of a civil penalty action[,]'" rather than impacting a court's jurisdiction to hear a case.¹⁶¹

154. *See id.* at 346-48 (analyzing diligent prosecution bar).

155. *See id.* at 351 (Quattlebaum, J., dissenting) (dissenting from majority holding).

156. *See id.* at 347 (refuting contention that diligent prosecution bar is jurisdictional).

157. *See id.* at 346 (citing *Piney Run Pres. Ass'n v. Cnty. Comm'rs of Carroll Cnty.*, 523 F.3d 453, 456 (4th Cir. 2008)) (demonstrating historical view of judicial proceeding bar as jurisdictional provision).

158. *See Naturaland Tr.*, 41 F.4th at 346 (discussing that previous opinions limited reasoning to judicial proceeding bar and not diligent prosecution bar).

159. *See id.* at 347 (citing *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011)) (explaining subject matter jurisdiction holding). When commencing its discussion, the Fourth Circuit emphasized that its full treatment of the subject-matter jurisdiction question is a response to the Supreme Court's desire to increase the precision in which courts label statutory language as jurisdictional. *See id.* at 346-47 (observing Supreme Court's desire to reduce instances of mischaracterizing statutory language as jurisdictional).

160. *See id.* at 347 (explaining why Supreme Court precedent does not consider diligent prosecution bar as jurisdictional provision). The Fourth Circuit noted that a rule which does not meet either labeling standard might still be jurisdictional "unless [the rule] governs a court's adjudicatory capacity." *Id.* (quoting *Henderson*, 562 U.S. at 435) (highlighting situation where court may find provision jurisdictional).

161. *Id.* (supporting court's reasoning regarding subject matter jurisdiction).

Having determined that the district court premised its holding on an erroneous subject matter jurisdiction analysis, the Fourth Circuit next considered whether the diligent prosecution bar foreclosed the citizen suit against Arabella Farm.¹⁶² The majority stated that DHEC's activities did not trigger the diligent prosecution bar because the activities did not constitute actions under the CWA.¹⁶³ In coming to this conclusion, the Fourth Circuit focused on the meaning of "action" under the CWA and what it means to commence an action comparable to the CWA.¹⁶⁴

The court started its analysis by examining the plain meaning of "action."¹⁶⁵ The majority noted that the term "legal action" usually refers to a lawsuit.¹⁶⁶ In coming to this conclusion, the majority further looked to the Oxford English Dictionary which states that an "action" is best understood as "an adversarial proceeding initiated by a formal, public document"¹⁶⁷

Because the diligent prosecution bar requires state actions be comparable to those brought under the CWA, the majority next analyzed the character of CWA actions.¹⁶⁸ Federal regulations provide that CWA proceedings begin when an agency files a complaint or issues a consent order.¹⁶⁹ The court also noted that federal proceedings under § 1319(g) allow for judicial review and require that complainants give public notice that they are commencing a § 1319(g) action.¹⁷⁰ The majority understood these features of § 1319(g) proceedings to "suggest [that] the diligent prosecution bar would not be triggered until a state agency has begun a comparable formal process that entails public notice."¹⁷¹

162. *See id.* at 348 (turning attention to diligent prosecution bar precluding citizen suit). The court specifically declined to comment on whether the district court properly classified the judicial proceeding bar as jurisdictional in nature. *See id.* (commenting that court need not decide whether judicial proceeding bar is indeed jurisdictional provision under described analytical framework).

163. *See Naturaland Tr.*, 41 F.4th at 348 (stating diligent prosecution bar does not apply to case).

164. *See id.* (analyzing language of § 1319(g)(6)(B)(i)).

165. *See id.* (discussing plain meaning of action).

166. *See id.* (observing Federal Rules of Civil Procedure dictate this understanding of "action").

167. *See id.* (referencing Oxford English Dictionary to discern "action").

168. *See Naturaland Tr.*, 41 F.4th at 348 (noting characteristics of § 1319(g) proceedings).

169. *Id.* (discussing federal regulations supporting majority holding).

170. *See id.* at 349 (elaborating on characteristics of § 1319(g) actions).

171. *Id.* at 348-49 (underscoring importance of public notice in commencing action).

After establishing the meaning of “action,” the Fourth Circuit opined that the DHEC’s issuance of a Notice was not a comparable commencement of an action.¹⁷² The majority highlighted that the Notice was not subject to judicial review and only began “an informal, voluntary, private conference”¹⁷³ The majority also stated the Notice did not invite the public to participate in the anticipated proceedings and failed to impose penalties on Arabella Farm.¹⁷⁴

The court noted that these features would be available after the DHEC officially issued a consent order; however, the court emphasized that the DHEC had yet to do so when appellants filed suit.¹⁷⁵ The Fourth Circuit only considered the activities the DHEC undertook prior to appellants filing suit.¹⁷⁶ Because those activities lacked the crucial features, the court noted that the DHEC did not commence an action similar enough to federal § 1319(g) actions to trigger the diligent prosecution bar.¹⁷⁷

The majority also looked to sister circuit precedents to support its analysis.¹⁷⁸ It highlighted the Seventh Circuit, which considers a federal action to have commenced when the public and interested parties receive notice of the action and have the opportunity to participate in the regulatory process.¹⁷⁹ Additionally, the opinion pointed to the Eighth Circuit’s holding that an action commences when a state files an administrative consent order.¹⁸⁰ Per these holdings, the DHEC’s issuance of a Notice did not commence an action.¹⁸¹ Consequently, the Fourth Circuit reversed the district court’s holdings and instead held the diligent prosecution bar did

172. *See id.* at 349 (characterizing Notice DHEC sent to Arabella Farm).

173. *See Naturaland Tr.*, 41 F.4th at 349 (comparing components of DHEC Notice with CWA enforcement action).

174. *See id.* (pointing to lack of sanctions if Arabella Farm did not attend DHEC conference).

175. *See id.* (distinguishing features of DHEC’s activities prior to appellants filing suit from features available after issuing consent order).

176. *See id.* (explaining why activities at issue do not constitute “action”).

177. *See id.* (holding Notice was not comparable to federal action).

178. *See Naturaland Tr.*, 41 F.4th at 349 (comparing Seventh and Eighth Circuit decisions to instant case).

179. *See id.* (quoting *Friends of Milwaukee’s Rivers v. Milwaukee Metro. Sewerage Dist.*, 382 F.3d 743, 756 (7th Cir. 2004)) (discussing how sister circuit case supports majority holding).

180. *See id.* (citing *Ark. Wildlife Fed’n v. ICI Americas, Inc.*, 29 F.3d 376, 380 (8th Cir. 1994)) (finding persuasive support for holding through separate circuit case).

181. *See id.* (comparing rules different circuits use to DHEC’s Notice).

not preclude appellants from bringing suit against Arabella Farm.¹⁸²

B. The Dissent: Discussing Cooperative Federalism and Comparability

Judge A. Marvin Quattlebaum dissented, emphasizing the supplemental role Congress intended citizen suits to play in CWA enforcement.¹⁸³ The dissent contended that the majority's conclusions broadened the citizen suit's role in enforcing the CWA to one that is incompatible with principles of cooperative federalism.¹⁸⁴ Moreover, the dissent argued that a plain-language reading of the statute, sister circuit precedent, and comparability analyses would preclude a citizen suit against Arabella Farm under the diligent prosecution bar.¹⁸⁵

1. Analyzing the Text of the CWA

The dissent began by highlighting the CWA text as evidence of an intent for state actions to be the driving means of enforcing the CWA.¹⁸⁶ Judge Quattlebaum explained the CWA encourages states to use regulatory techniques that best suit their needs.¹⁸⁷ Thus, the dissent asserted that any holding which upsets this enforcement hierarchy would contravene the CWA's cooperative federalism framework.¹⁸⁸

182. *See id.* at 350 (reiterating court's holding in instant case). The court also considered whether one of the appellants, South Carolina Trout Unlimited, could sue under the CWA. *Id.* (identifying third issue emerging). The court found that Arabella Farm could identify the entity's identity without confusion, therefore, permitting South Carolina Trout Unlimited to sue. *Id.* (reasoning South Carolina Trout Unlimited's imprecise self-identification did not create harm to Arabella Farm).

183. *See Naturaland Tr.*, 41 F.4th at 351 (Quattlebaum, J., dissenting) (contextualizing case issue).

184. *See id.* (Quattlebaum, J., dissenting) (explaining rationale behind dissent).

185. *See id.* at 352, 355 (Quattlebaum, J., dissenting) (discussing why DHEC's Notice was sufficient to commence "action" under diligent prosecution bar).

186. *See id.* at 351 (Quattlebaum, J., dissenting) (reviewing and analyzing pertinent provision of CWA).

187. *See id.* at 353-54 (Quattlebaum, J., dissenting) (discussing application of cooperative federalism to CWA).

188. *See Naturaland Tr.*, 41 F.4th at 351 (Quattlebaum, J., dissenting) (commenting on cooperative federalism in CWA). The dissent also cited various circuit court cases to support its proposition that, when enforcing the CWA, state actions are preferable to federal actions. *See id.* at 351 (Quattlebaum, J., dissenting) (finding support for dissenting opinion in sister circuit precedents).

The dissent expanded upon why the court should consider the DHEC's activities an action under the diligent prosecution bar.¹⁸⁹ Similar to the majority, the dissent looked to the plain meaning of the statute but began by focusing on the ordinary meaning of "commence" rather than "action."¹⁹⁰ Relying on Webster's Third New International Dictionary, the dissent defined commence as "to begin or to start [or]. . . to initiate formally by performing the first act of a legal proceeding."¹⁹¹ Per these definitions, the dissent concluded the DHEC's activities constituted a commencement.¹⁹²

The dissent also contested the majority's characterization of the Notice as an "informal inquiry."¹⁹³ The Notice is the official manner by which the DHEC begins enforcement proceedings against alleged violators.¹⁹⁴ The dissent underscored the features of the Notice, including steps the DHEC took before issuing the notice, specific violations the accused allegedly violated, and the demand for Arabella Farm to meet with the DHEC.¹⁹⁵ Further, failure to comply with the Notice's demand to attend the DHEC conference could result in a penalty in the form "an administrative ruling requiring [Arabella Farm] to pay monetary penalties" that they may have avoided.¹⁹⁶ Thus, because the CWA encourages states to create their own regulatory regime, the dissent argued that the court should have interpreted the Notice as the beginning of a state's legitimate enforcement action.¹⁹⁷

Judge Quattlebaum also argued that the DHEC's activities constituted an action comparable to a lawsuit, even by the majority's definition.¹⁹⁸ To prove that the DHEC proceedings were adver-

189. *See id.* at 352 (Quattlebaum, J., dissenting) (justifying why DHEC's activities commenced action for purposes of diligent prosecution bar).

190. *See id.* (Quattlebaum, J., dissenting) (discussing ordinary meaning of "commence").

191. *Id.* at 353 (Quattlebaum, J., dissenting) (discussing statutory language's plain meaning).

192. *Id.* (Quattlebaum, J., dissenting) (applying dictionary definitions to facts of case).

193. *See Naturaland Tr.*, 41 F.4th at 353 (Quattlebaum, J., dissenting) (discussing function of Notice in DHEC enforcement process).

194. *See id.* (Quattlebaum, J., dissenting) (referring to DHEC's standard enforcement methods).

195. *See id.* (Quattlebaum, J., dissenting) (enumerating characteristics of Notice).

196. *See id.* at 353 (Quattlebaum, J., dissenting) (explaining failure to attend DHEC conference).

197. *See id.* at 354 (Quattlebaum, J., dissenting) (maintaining that court should respect state's view of what commences regulatory proceeding).

198. *See Naturaland Tr.*, 41 F.4th at 354 (Quattlebaum, J., dissenting) (observing that majority created plain-language test without applying it to facts of case).

sarial, as the majority's test requires, the dissent highlighted that the DHEC accused Arabella Farm of violating laws and demanded that it answer the accusations in a meeting.¹⁹⁹ Additionally, the dissent insisted that Arabella Farm's failure to respond to DHEC proceedings meant risking the incursion of penalties.²⁰⁰ The dissent also highlighted that the Notice was sufficiently formal and public as it was available to the public and clearly stated both the actions DHEC had taken and the laws Arabella Farm allegedly violated.²⁰¹ While the Notice was not as accessible to the public as a lawsuit might be, the dissent pointed out that the public could learn of the resulting meeting's time and agenda because South Carolina law mandates that the DHEC publish this information.²⁰²

2. Discussion of Persuasive Circuit Court Precedents

Further, the dissent challenged the majority's reliance on sister circuit precedents.²⁰³ The dissent claimed that *Arkansas Wildlife Federation*, the case to which the majority gave a great deal of weight, supported a decision against the majority because of its emphasis on respecting states' individual regulatory schemes.²⁰⁴ As to the majority's reliance on *Friends of Milwaukee's Rivers*, the dissent reasoned that the Wisconsin agency's statutory inability to issue administrative penalties rendered its administrative proceedings incomparable to the proceedings which the diligent prosecution bar contemplated.²⁰⁵ Judge Quattlebaum's dissent distinguished South Carolina's statutory scheme from this and emphasized its ability to penalize CWA violators.²⁰⁶

199. *See id.* (Quattlebaum, J., dissenting) (describing factors proving DHEC proceedings were adversarial).

200. *See id.* (Quattlebaum, J., dissenting) (noting penalties to missing conference to support characterization of proceedings as adversarial).

201. *See id.* (Quattlebaum, J., dissenting) (arguing that DHEC's activities met all elements of majority's plain-language definition of "action").

202. *See id.* at 355 (Quattlebaum, J., dissenting) (finding proceedings to be sufficiently public because appellants were aware of DHEC communications).

203. *See Naturaland Tr.*, 41 F.4th at 355-56 (Quattlebaum, J., dissenting) (exploring cases majority used).

204. *See id.* at 356 (Quattlebaum, J., dissenting) (commenting that *Arkansas Wildlife Federation* undermines majority's position).

205. *See id.* (Quattlebaum, J., dissenting) (emphasizing distinct feature of Wisconsin regulatory system).

206. *See id.* (Quattlebaum, J., dissenting) (showing that distinguishing factors of *Friends of Milwaukee's Rivers* complicate question of when action commences more than majority purported).

3. Comparability Analysis

Finally, Judge Quattlebaum discussed whether the DHEC's actions were sufficiently comparable to actions under the CWA.²⁰⁷ To judge comparability, the dissent examined the features the South Carolina state law must have to be comparable to § 1319(g) under the rough comparability test.²⁰⁸ Specifically, Judge Quattlebaum examined whether South Carolina state law provided for penalties, public participation, and judicial review comparable to that which the CWA provides.²⁰⁹

With respect to public participation and notification, the dissent noted that the CWA requires public notice and participation before assessing a civil penalty, not before a state issues a consent order.²¹⁰ Accordingly, a state provision must simply allow third parties an opportunity to challenge a consent order before assessment of a civil penalty.²¹¹ The dissent highlighted that various South Carolina provisions ensure the public has notice of, and an opportunity to challenge, consent orders before the sanctioned party must comply.²¹² The dissent proceeded to compare South Carolina's penalty provisions and judicial review with the relevant CWA provisions and noted they were similar and, therefore, comparable.²¹³ Given that all the relevant provisions were comparable, Judge Quattlebaum in-

207. *See id.* at 358 (Quattlebaum, J., dissenting) (beginning comparability analysis). Before beginning the comparability analysis, the dissent noted that § 1319(g)'s wording invites a question of statutory interpretation. *See id.* (asking whether "comparable" modifies "state law" or "action" under state law); *see also* § 1319(g)(6)(A) (proscribing citizen suit where state has already commenced action). Drawing on canons of statutory interpretation and Fourth Circuit precedent, Judge Quattlebaum concluded that the word "comparable" modifies state law. *See id.* (relying on nearest reasonable referent canon and caselaw to determine what "comparable" modifies).

208. *See Naturaland Tr.*, 41 F.4th at 359 (Quattlebaum, J., dissenting) (explaining use of rough comparability test is due to its more rigorous standards). The dissent noted that the Fourth Circuit has not officially adopted any comparability test. *See id.* (Quattlebaum, J., dissenting) (observing former cases did not embrace one test or another).

209. *See id.* (Quattlebaum, J., dissenting) (listing provisions on which dissent focused). The dissent also highlighted that a state statute does not have to be identical to a federal provision to be comparable. *See id.* (Quattlebaum, J., dissenting) (explaining "guiding principles in [dissent's] analysis").

210. *See id.* at 360 (Quattlebaum, J., dissenting) (noting lack of rigid requirement in consent order).

211. *See id.* (Quattlebaum, J., dissenting) (emphasizing that CWA notice provision does not establish strict requirement).

212. *See id.* (Quattlebaum, J., dissenting) (explaining that DHEC must notify public of meetings and publicize enforcement documents).

213. *See Naturaland Tr.*, 41 F.4th at 362 (Quattlebaum, J., dissenting) (analyzing penalty and judicial review provisions).

sisted that South Carolina's overall environmental regulatory scheme is comparable to the CWA.²¹⁴

Ultimately, the dissent concluded that DHEC brought an action which precluded the citizen suit under the diligent prosecution bar.²¹⁵ Additionally, the dissent's conclusion prioritized the delicate balance between state and federal powers inherent to environmental regulation.²¹⁶ The dissent concluded that the majority's decision to allow appellants' suit to proceed despite the DHEC action disturbed this balance.²¹⁷

V. CRITIQUING THE RACE: A CRITICAL ANALYSIS OF THE MAJORITY HOLDING

Preliminarily, this Note recognizes that the majority correctly concluded that per Supreme Court precedent, the diligent prosecution bar does not implicate subject matter jurisdiction.²¹⁸ This Note, however, argues that the majority did not reach the correct conclusion by holding that the diligent prosecution bar did not preclude the citizen suit against Arabella Farm.²¹⁹ Importantly, the majority's rationale departs significantly from the doctrines that the Fourth Circuit's sister courts have established.²²⁰ Instead of minding the policy rationales which motivate state governments to enforce water standards with the methods they see fit, the court spent time analyzing the character of an "action."²²¹ Moreover, the majority did not place enough weight on the supplemental nature of citizen suits.²²² Ultimately, the majority incorrectly overlooked key

214. *See id.* (Quattlebaum, J., dissenting) (comparing CWA with South Carolina's approach).

215. *See id.* (Quattlebaum, J., dissenting) (declaring diligent prosecution bar should have precluded appellants' claim).

216. *See id.* at 365 (Quattlebaum, J., dissenting) (concluding discussion of decision's broader implications).

217. *See id.* (Quattlebaum, J., dissenting) (summarizing policy argument).

218. For a further discussion of the diligent prosecution bar and subject matter jurisdiction, see *supra* notes 67-73 and accompanying text.

219. For a critique of the majority's holding, see *infra* notes 224-34; see also *Naturaland Tr.*, 41 F.4th at 344 (stating DHEC's activities did not commence action for purposes of diligent prosecution bar).

220. *Compare Naturaland Tr.*, 41 F.4th at 348 (discussing if DHEC's activities constitute action under CWA), with *McAbee v. City of Fort Payne*, 318 F.3d 1248, 1251 (11th Cir. 2003) (explaining analytical framework federal circuit courts typically use when examining whether diligent prosecution bar applies).

221. For a discussion of the majority's analysis of "action," see *supra* notes 165-71 and accompanying text.

222. *Compare Naturaland Tr.*, 41 F.4th at 348-350 (discussing why diligent prosecution bar does not apply), with *Piney Run Pres. Ass'n v. Comm'rs of Carroll*

facts that would have supported a finding that the DHEC commenced an action comparable to one under the CWA.²²³

A. Critiquing the Majority's Deviation from the Traditional Approach

When examining the propriety of a citizen suit, many circuit courts engage in a three-step analytical process.²²⁴ The majority in *Naturaland Trust* departed from this approach and, instead, focused on whether the DHEC's activities constituted an action at all and if that action was comparable to a federal CWA action.²²⁵ The majority's emphasis on the nature of the action, however, conflates the commencement and comparability features of the diligent prosecution analytical framework in a manner distinct from precedential cases.²²⁶

In *Arkansas Wildlife Federation*, for example, both the district and appellate courts broke the analysis into three parts.²²⁷ The court examined whether (1) the state commenced an action; (2) the state diligently prosecuted that action; and (3) the regulatory scheme was comparable to the CWA.²²⁸ Additionally, in *Friends of Milwaukee's Rivers*, the Seventh Circuit held that a court must examine whether a state statute is comparable to the CWA when determining if an enforcement action commenced.²²⁹ Although this statement acknowledges that the three traditional inquiries are interrelated, it also belies the view that it is the overall regulatory pro-

County, 523 F.3d 453, 456 (4th Cir. 2008) (emphasizing citizen suit's role as supplemental enforcement mechanism).

223. See *id.* at 354-55 (Quattlebaum, J., dissenting) (explaining points majority did not consider).

224. *McAbee v. City of Fort Payne*, 318 F.3d 1248, 1251 (11th Cir. 2003) (narrating typical three-step analysis courts use to determine if diligent prosecution bar precludes case).

225. For a further discussion of the majority's reasoning, see *supra* notes 156-81 and accompanying text.

226. For a further discussion of the majority's argument that DHEC's action was not comparable to action under CWA, see *supra* notes 168-77 and accompanying text.

227. See *Ark. Wildlife Fed'n v. ICI Americas, Inc.*, 29 F.3d 376, 379 (8th Cir. 1994) (defining its task as determining whether district court correctly implemented § 1319(g)(6)(A)(ii)).

228. For a further discussion of *Arkansas Wildlife Federation*, see *supra* notes 103-13 and accompanying text.

229. *Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewerage Dist.*, 382 F.3d 743, 756 (7th Cir. 2004) (commenting on how to understand when action commences under CWA).

ceeding which must be comparable to the CWA, not the manner in which an action is commenced.²³⁰

Further, the majority's focus on whether the DHEC's activities constituted an "action" — as opposed to "the commencement of an action" — does not strengthen its conclusions.²³¹ As the dissent noted, the DHEC's activities could reasonably satisfy the majority's ordinary meaning definition.²³² Further, the Eighth Circuit in *Arkansas Wildlife Federation* specifically suggested that the sort of actions the DHEC undertook would constitute commencement of action for the purposes of the diligent prosecution bar.²³³ While *Friends of Milwaukee's Rivers* held that an action commences "when notice and public participation protections become available to the public[.]" the dissent highlights that South Carolina statutes allow for the public to participate before an enforcement order impacts a violator.²³⁴

B. Centering the Citizen Suit's Proper Role

Notably, the majority did not discuss the citizen suit's supplemental role in enforcing the CWA at any point in its decision.²³⁵ This is significant because numerous cases analyzing the diligent prosecution bar focus on the citizen suit's intended supplemental role.²³⁶ The majority could have held differently if it considered

230. See *id.* (distinguishing between inquiries regarding commencement of action and comparability of state regulatory provisions).

231. For a further discussion of the dissent's assertion that DHEC's activities constituted an "action" under the majority's definition, see *supra* notes 189-202 and accompanying text.

232. For the majority's application of the test to the facts of the case, see *supra* notes 172-77 and accompanying text.

233. See *Ark. Wildlife Fed'n v. ICI Americas, Inc.*, 29 F.3d 376, 380 (8th Cir. 1994) (characterizing consent order as alternative to Notice when commencing CWA action).

234. *Friends of Milwaukee's Rivers*, 382 F.3d at 756 (holding when action commences); but see *Naturaland Tr.*, 41 F.4th at 356 (Quattlebaum, J., dissenting). The dissent compared South Carolina's provisions to the EPA's to highlight that EPA does not mandate public notice of a complaint until thirty days after filing. See *Naturaland Tr.*, 41 F.4th at 362 (Quattlebaum, J., dissenting) (noting that filing administrative complaint is EPA's assessment of civil penalties). EPA's regulations suggest that the CWA requirements are satisfied if there is public notice and opportunity for public participation *at some point* in the regulatory process. *Id.* (arguing that EPA regulations are not relevant to CWA comparability analysis).

235. See *generally Naturaland Tr.*, 41 F.4th at 348-50 (ignoring supplemental nature of citizen suits); but see *Ark. Wildlife Fed'n*, 29 F.3d at 380 (determining holding with notion that citizen suits should be interstitial and not intrusive).

236. See, e.g., *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found. Inc.*, 484 U.S. 49, 60 (1987) (centering supplemental nature of citizen-suits in analysis); *Ark. Wildlife Fed'n*, 29 F.3d at 380 (keeping supplemental role of citizen suits as theme of analysis).

Congress's intent for citizens to bring federal suit only when a government agency fails to properly bring its own suit under the CWA.²³⁷

Precedent from other federal appeals courts supports the contention that citizen suits should only move forward when a government agency completely refuses to act.²³⁸ For example, the court in *Scituate* explicitly stated that a diligent prosecution bar analysis should focus on whether a citizen suit would be duplicative of a state enforcement effort.²³⁹ Additionally, in *Friends of Milwaukee's Rivers*, a key factor in the appeals court's decision to allow the citizen suit was that the state court declined to enforce the state's proposed consent order at the time of the citizen suit.²⁴⁰ This lack of enforcement effort justified the citizen group's decision to bring suit.²⁴¹

Unlike the state court in *Friends of Milwaukee's Rivers*, the South Carolina DHEC was actively working on appropriate remedies to stop the violation of environmental regulations.²⁴² In addition to sending the Notice, the DHEC was actively investigating the violations and formulating a consent order — complete with penalties — to stop Arabella Farm's violations.²⁴³ In light of these factual considerations, it is clear that the DHEC was enforcing an environmental action.²⁴⁴ The majority erred by failing to consider these facts in conjunction with the intended nature of the CWA.²⁴⁵

237. See *Gwaltney of Smithfield, Ltd.*, 484 U.S. at 60 (referencing CWA legislative history in support of assertion that citizen suits are supplemental).

238. See generally *Ohio Valley Env't Coal. v. Fola Coal Co.*, 845 F.3d 133, 145 (4th Cir. 2017) (noting overall purpose of citizen suits).

239. See *N. & S. Rivers Watershed Ass'n v. Town of Scituate*, 949 F.2d 552, 556 (1st Cir. 1991) (highlighting inquiry for diligent prosecution bar).

240. For discussion of the facts and analysis in *Friends of Milwaukee's Rivers*, see *supra* notes 114-28 and accompanying text.

241. See *Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewerage Dist.*, 382 F.3d 743, 753-54 (7th Cir. 2004) (reasoning why diligent prosecution bar did not preclude suit).

242. For a discussion of the DHEC's enforcement efforts, see *supra* notes 39-47 and accompanying text.

243. See *Naturaland Tr.*, 41 F.4th at 344-46 (describing DHEC's interactions with Arabella Farm).

244. See *id.* at 357 (Quattlebaum, J., dissenting) (arguing that DHEC's actions constituted commencement of diligent prosecution).

245. See *id.* at 365 (Quattlebaum, J., dissenting) (concluding that majority holding is inconsistent with CWA). For a further discussion and critique of the majority's analysis, see *supra* notes 218-44 and accompanying text.

VI. POST-RACE ANALYSIS: IMPACT OF THE CASE

The majority holding in *Naturaland Trust* could have significant impacts on environmental regulation in the Fourth Circuit given its focus on the form of a state's regulatory action and willingness to permit citizen suits despite active state enforcement efforts.²⁴⁶ Precedent will now allow citizen suits to usurp state agencies as the primary CWA enforcers.²⁴⁷ This places the Fourth Circuit's judicial doctrine significantly at odds with other federal circuits and invites practical problems for state agencies that are trying to enforce environmental regulations within the Fourth Circuit.²⁴⁸

The majority's analysis makes the Fourth Circuit an outlier amongst the circuit courts which have already ruled on when an action under the diligent prosecution bar commences.²⁴⁹ The Fourth Circuit's analysis makes it more sympathetic to citizen suits, thus inviting more citizens to bring suit.²⁵⁰ If the Fourth Circuit permits citizen suits when state agencies are already addressing the violations in question, there is a danger that citizen suits will become the primary means of environmental enforcement.²⁵¹ Doing so would undermine the CWA's emphasis on cooperative federalism and the citizen suit's role as a supplementary enforcement mechanism.²⁵²

Moreover, elevating citizen suits to a primary role in environmental enforcement would have numerous practical implications on the regulatory efforts of state agencies within the Fourth Cir-

246. For a discussion on the majority's analysis of whether DHEC activities constituted an "action" for the purposes of the diligent prosecution bar, see *supra* notes 165-71 and accompanying text. For a description of enforcement efforts DHEC took against Arabella Farm, see *supra* notes 44-47 and accompanying text.

247. For a discussion of how the majority holding disregards traditional role of citizen suits, see *supra* notes 235-45 and accompanying text. See also *Naturaland Tr.*, 41 F.4th at 368 (Quattlebaum, J., dissenting) (suggesting that broadening role of citizen suits disrupts traditional balance of cooperative federalism).

248. See *Piney Run Pres. Ass'n v. Cnty. Comm'rs of Carroll Cnty.*, 523 F.3d 453, 459 (4th Cir. 2008) (recognizing importance of deferring to state actions to enable state discretion in best enforcing CWA).

249. For a discussion of how the majority opinion deviates from usual diligent prosecution analysis, see *supra* notes 224-34 and accompanying text.

250. For a discussion of how the majority's decision to not account for the supplemental role of citizen suits impacted *Naturaland Trust's* result, see *supra* notes 235-45 and accompanying text.

251. See *Piney Run Pres. Ass'n*, 523 F.3d at 459-60 (considering consequences of failure to defer to state agencies when enforcing environmental regulations).

252. See *id.* at 456 (discussing that citizen suits are secondary enforcement mechanisms).

cuit.²⁵³ First, elevating citizen suits beyond a supplementary role undermines a state's discretion in enforcement efforts.²⁵⁴ The nature of state proceedings allows states to incentivize violators to take actions that are not legally required in exchange for the state foregoing certain administrative proceedings or penalties.²⁵⁵ Violators, however, are less willing to comply with state agencies if they know that citizen groups can still initiate a citizen suit against them.²⁵⁶

Additionally, allowing citizen suits to proceed when the state is already addressing an environmental violation can lead to governmental waste and do more harm than good.²⁵⁷ Citizen suits inevitably consume state judicial resources.²⁵⁸ If a state agency is already remediating an environmental violation, a citizen suit concerning the same violation will lead to the state incurring extra judicial expense with no real environmental gain.²⁵⁹

Naturaland Trust is not a cut-and-dry application of law to facts.²⁶⁰ It contemplates cooperative federalism and what makes a statute comparable to the CWA.²⁶¹ By deviating from normal analytical frameworks and failing to meaningfully engage with the consequences of elevating citizen suits from a supplemental role, the majority established a dangerous precedent which could result in curtailing a state's ability to enforce environmental regulations and wasting state resources.²⁶²

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253. See *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 60-61 (1987) (noting potential problems from elevating citizen suits).

254. See *id.* at 60 (discussing danger of elevating citizen suits when CWA violations are not ongoing).

255. See *id.* at 61 (posing hypothetical scenario where citizen suits have primary enforcement role).

256. See *id.* (exploring hypothetical scenario).

257. See *N. & S. Rivers Watershed Ass'n, Inc. v. Town of Scituate*, 949 F.2d 552, 556 (1st Cir. 1991), *abrogated in part by* *Blackstone Headwaters Coal. v. Gallo Builders, Inc.*, 32 F.4th 99, 101 (1st Cir. 2022) (contemplating effects of “[d]uplicative enforcement actions”).

258. See *id.* (noting citizen suits take toll on state resources).

259. See *id.* (arguing against duplicative enforcement actions).

260. For a full discussion of the majority's opinion, see *supra* notes 156-81 and accompanying text.

261. For further discussion of how the case implicates broader principles, see *supra* notes 235-45 and accompanying text.

262. For a full discussion of impacts of the majority holding, see *supra* notes 246-61 and accompanying text.

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