Lowering the Bar: The Sixth Circuit Embraces the Ninth Circuit's Narrow Interpretation of Section 1319(g)(6) of the Clean Water Act in Rudolph Jones, Jr., Susan Jones, Tandy Jones Gilliland v. City of Lakeland, Tennessee

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LOWERING THE BAR: THE SIXTH CIRCUIT EMBRACES THE NINTH CIRCUIT’S NARROW INTERPRETATION OF SECTION 1319(g)(6) OF THE CLEAN WATER ACT IN RUDOLPH JONES, JR.; SUSAN JONES; TANDY JONES GILLILAND v. CITY OF LAKELAND, TENNESSEE

I. INTRODUCTION

In 1972, Congress enacted the Federal Water Pollution Control Amendments, a series of regulations designed to curb water pollution throughout the United States.¹ These amendments, commonly referred to as the Clean Water Act (hereinafter “CWA”), altered the manner in which the federal government sought to control the increasing problem that water pollution posed to the environment.² The CWA differed from prior attempts by Congress to control water pollution in that CWA was the first water pollution control law to permit private citizens to bring civil actions against alleged polluters.³ Congress considered citizen suits an effective


2. See Mark S. Fisch, The Judiciary Begins to Erect Another Dam Against Citizen Suits Under the Clean Water Act, 22 STETSON L. REV. 209, 211 (1992) (discussing prior failures by Congress to achieve federal pollution abatement goals). In 1948 Congress created the Federal Water Pollution Control Act. See id. The Act was created in response to increasing levels of pollution following World War II. See id. The 1948 Act failed because of both “weakness[ ] in the Act itself and because of insufficient state enforcement.” See id. at 211-12. Due to the failure of the Act to accomplish the goals set out by Congress, Congress amended the Act with the FWPCA in 1972, thereby creating the Federal Clean Water Act. See id. at 212.

3. See Maples, supra note 1, at 195 (pointing out that Congress modeled CWA’s citizen suit provision after 1970 Clean Air Act’s citizen suit provision); see also Frank M. Howard, Citizens for a Better Environment v. Union Oil Company of California: Keeping Citizen Suits Alive in the Face of Inadequate State Government Enforcement, 27 GOLDEN GATE U.L. REV. 43, 45 (1997) (stating that CWA’s citizen suit provision is based largely on Clean Air Act of 1970s citizen suit provision, which enables citizens to bring suit against illegal polluters). “This provision gives the district courts jurisdiction to enforce effluent limitations or standards, to enforce orders regarding such limitations or standards, to order the EPA Administrator to carry out a non-discretionary act or duty, and to assess appropriate civil penalties for violating the CWA.” Id. Any fines or private penalties levied against polluters are paid into the United States treasury rather than to the private citizen. See id. These citizen suits may proceed only after sixty days have passed since the plaintiff has given notice of the violations to the alleged violator, the state where the violations are occurring, and the EPA Administrator. See id. “A citizen suit is also pre-

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method of motivating state and local agencies to more seriously enforce environmental regulations, as well as a means of broadening the scope of CWA's enforcement without constant utilization of the government's limited resources. Under the original amendments, if the State or Administrator of the Environmental Protection Agency (hereinafter “EPA”) was diligently prosecuting a court action against an alleged violator of CWA, a private citizen was not permitted to collaterally attack the alleged violator with another suit. In 1987, amendments were enacted that expanded the bar on citizen suits to preclude suits in circumstances where a state agency was diligently prosecuting an administrative penalty action against an alleged violator under a state law comparable to section 1319(g) of CWA. After the passage of the 1987 amendments, an agency needed only to diligently prosecute an administrative penalty action rather than a court action to bar a citizen suit.

4. See Fisch, supra note 2, at 212-13 (noting that federal government's failed attempts to control water pollution prior to 1972 resulted in passage of CWA). "It was precisely the failure of the federal government prior to 1970 to accomplish major water pollution abatement goals through state action that ultimately resulted in the passage of the 1972 law with its major emphasis on federal standard setting and federal enforcement action." 1 Frank P. Grad, Treatise on Environmental Law § 3.03(1)(a), at 72 (1991); see also Robert D. Snook, Environmental Citizens suits and Judicial Interpretation: First Time Tragedy, Second Time Farce, 20 W. New Eng. L. Rev. 311, 316 (1998) (noting that citizen suits are inexpensive alternative to government enforcement).

5. See 33 U.S.C. § 1365(b)(1)(B) (setting forth circumstances in which court action precludes citizen suits). Section 1365(b)(1)(B) provides: "No action may be commenced . . . if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States." Id.; see also Fisch, supra note 2, at 213 (explaining effect of original amendments).

6. See 33 U.S.C. § 1319(g)(6)(A)(ii) (setting forth circumstances in which administrative penalty action precludes citizen suits). Section 1319(g)(6)(A)(ii) provides in pertinent part: "[A]ny violation with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection [1319(g)] . . . shall not be the subject of civil penalty action." Id. Section 1319(g)(6) also expanded the scope of preclusion to encompass situations in which EPA is diligently prosecuting an action or where either the state or EPA has issued a final order not subject to judicial review. See 33 U.S.C. § 1319(g)(6)(A)(i), (iii); see also Fisch, supra note 2, at 213-14 (explaining effect of 1987 amendment).

7. See 33 U.S.C. § 1319(g)(6)(A)(ii) (stating that Administrator or state need only prosecute action rather than prosecute civil or criminal court action). For the pertinent text of the 1987 amendment illustrating this alteration, see supra note 6. See also Fisch, supra note 2, at 214 (noting that court action no longer necessary after 1987 Amendments). See also Patrick S. Cawley, The Diminished Need For Citizen Suits To Enforce The Clean Water Act, 25 J. LEGIS. 181, 183 (explaining that § 1319 of CWA empowered EPA and state agencies to assess penalties on CWA violators).
Since the 1987 amendments, courts have grappled with the intended scope of CWA citizen suits, and they have settled on contrasting views with respect to the circumstances in which a private citizen is entitled to bring a private suit. The primary division between the contrasting views advanced by the various circuits stems from the differing interpretations given by the courts to the terms contained in 33 U.S.C. § 1319(g)(6), which precludes citizen suits if and when certain criteria are met. This Note focuses specifically on § 1319(g)(6)(A)(ii), which provides that any violation “with respect to which a state has commenced and is diligently prosecuting an action under a state law comparable to this subsection

8. See Barry S. Neuman and Jeffrey A. Knight, When Are Clean Water Act Citizen Suits Precluded by Government Enforcement?, 30 ENVTL. L. REP. 10111 (2000) (discussing numerous issues courts have grappled with relating to when citizen suits are precluded by government enforcement). The Neuman and Knight piece clearly illustrates that the treatment of a number of issues under CWA by differing circuits has proved far from uniform. See id. at 10111.

9. See 33 U.S.C. § 1319(g)(6) (setting forth circumstances in which citizen enforcement action is precluded under CWA). Section 1319(g)(6) provides:

(A) Limitation on actions under other sections
Action taken by the Administrator or the Secretary, as the case may be, under this subsection shall not affect or limit the Administrator's or Secretary's authority to enforce any provision of this chapter; except that any violation -
(i) with respect to which the Administrator or the Secretary has commenced and is diligently prosecuting an action under this subsection,
(ii) with respect to which a state has commenced and is diligently prosecuting an action under a State law comparable to this subsection, or
(iii) for which the Administrator, the Secretary, or the State has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under this subsection, or such comparable State law, as the case may be,
shall not be the subject of a civil penalty action under subsection (d) of this section or section 1321(b) of this title or section 1365 of this title.

(B) Applicability of limitation with respect to citizen suits
The limitations contained in subparagraph (A) on civil penalty actions under section 1365 of this title shall not apply with respect to any violation for which -
(i) a civil action under section 1365(a)(1) of this title has been filed prior to commencement of an action under this subsection, or
(ii) notice of an alleged violation of section 1365(a)(1) of this title has been given in accordance with section 1365(b)(1)(A) of this title prior to the commencement of the action under this subsection and an action under section 1365(a)(1) of this title with respect to such alleged violation is filed before the 120th day after the date on which such notice is given.

Id. (emphasis added).
[§ 1319(g)] . . . shall not be the subject of a civil penalty action.”

It is not difficult to imagine that the notions of “diligent prosecution” and “comparable state law” have evoked a great deal of debate among the courts, as well as legal scholars, over what Congress intended these terms to encompass. In analyzing the treatment of these issues, several scholars have distinguished the differing interpretations advanced by the circuits that have examined these provisions by characterizing them as either broad or narrow interpretations. In the midst of a circuit split on the intended meaning of these terms, the Court of Appeals for the Sixth Circuit chose to rehear the case of Rudolph Jones, Jr. v. City of Lakeland, Tennessee12 (hereinafter “Jones II”) and to draw its own conclusions as to what Congress meant by the terms “diligent prosecution” and “comparable state law.”

Part II of this Note will set forth the facts of Jones II. Part III will discuss the background of Jones II and the varying interpretations of § 1319(g) (6) of CWA as advanced by other circuits. Part IV will present an analysis of both the majority and dissenting opinions of Jones II and Part V will endorse the dissent’s broad interpretive analysis of § 1319(g) (6), while critiquing the majority’s narrow interpretation. Part VI will conclude this Note by discussing this undesirable impact.

II. FACTS

In 1996, plaintiffs Rudolph Jones, Jr., Susan Jones and Tandy Jones Gilliland (hereinafter “Plaintiffs”), three Tennessee citizens, filed suit against the City of Lakeland, Tennessee (hereinafter “City”), to enforce provisions of the Clean Water Act.13 In their


11. See Cawley, supra note 7, at 184-89 (characterizing differing interpretations arrived at by circuits as broad and narrow); see also Neuman and Knight, supra note 8, at 10111 (categorizing circuits’ interpretations as either broad or narrow); Leonard O. Townsend, Hey You, Get Off [Off] My Cloud: An Analysis of Citizen Suit Preclusion Under the Clean Water Act, 11 FORDHAM ENVTL. L.J. 75, 102-18 (1999) (dividing interpretations of § 1319(g) (6) advanced by circuits into broad or narrow interpretations); Heather L. Clauson, How Far Should the Bar on Citizen Suits Extend Under § 309 of the Clean Water Act?, 27 ENVTL. L. 967, 979 (1997) (recognizing broad interpretation of § 1319(g) (6) as well as narrow interpretation).

12. See Rudolph Jones, Jr.; Susan Jones; Tandy Jones Gilliland v. City of Lake- land, Tennessee, 224 F.3d 520 (6th Cir. 2000) (Hereinafter “Jones II”) (indicating that case was reheard en banc).

13. See id. at 520. Plaintiffs were landowners along Oliver Creek, a waterway that crossed their property within the City of Lakeland, Tennessee. See id. Plaintiffs sought relief from the City for dumping into this waterway in violation of
complaint, Plaintiffs alleged that the City was discharging noxious toxins and other hazardous waste water into Tennessee waterways in violation of its National Pollutant Discharge Elimination System (hereinafter "NPDES") permit.14 Plaintiffs had anxiously looked on while the Tennessee Department of Environment and Conservation (hereinafter "TDEC") issued four compliance orders to the City over the course of approximately ten years.15 In their complaint, Plaintiffs contended that TDEC adopted an internal administrative policy not to aggressively enforce the provisions of the Tennessee Water Quality Control Act (hereinafter "TWQCA"), and engaged in superficial enforcement activity over the ten-year pe-

CWA. See id. CWA, as the Plaintiffs' were trying to enforce it, was enacted for the primary purpose of restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters. See 33 U.S.C. § 1251(a). Section 1311(a) of CWA establishes that the discharge of any pollutant by any person shall be illegal, except if the discharge is in compliance with the law. See 33 U.S.C. § 1311(a). Section 1311 also establishes a timetable for achievement of CWA's objectives and it states that the limitations established pursuant to the act shall be applied to all point sources of discharge of pollutants. See 33 U.S.C. § 1311(b) and (c). Section 1312(a) allows the Administrator to establish pollution limitations which can reasonably be expected to contribute to the attainment or maintenance of a level of water quality which shall assure protection of public health, public water supplies, agricultural and industrial use and protection of a balanced population of fish and wildlife. See 33 U.S.C. § 1312(a).

14. See Jones II, 224 F.3d at 520 (setting forth claims made by Plaintiffs). In their complaint, Plaintiffs alleged that the City violated CWA and the Tennessee Water Quality Control Act by discharging impermissible amounts of noxious toxins and other hazardous waste water into Oliver Creek. See Rudolph Jones, Jr.; Susan Jones; Tandy Jones Gilliland v. City of Lakeland, 175 F.3d 410, at n. 2 (Krupansky, J., dissenting)(1999) (hereinafter "Jones I"). Plaintiffs petitioned for injunctive relief and civil penalties in the hopes of ending the discharge of wastes and pollutants into the waters and soil, in violation of NPDES permits. See Jones I, 175 F.3d at 412. "The city held a NPDES permit authorizing it to discharge waste from its stabilization lagoon into Oliver Creek at a rate not to exceed 62,000 gallons a day." See id. The City had obtained this permit from Lakeland Development Corporation, the previous permit holder, which, during the time it held the permit, was cited on more than one occasion by the Tennessee Department of Environment and Conservation for violating the permit's provisions regarding the authorized amounts of discharge. See id.

15. See Jones I, 175 F.3d at 412 (describing orders levied on City by TDEC). Like its predecessor, the City had been cited on two occasions by TDEC for exceeding the limits of the NPDES permit. See id. On November 22, 1994, the City and TDEC entered into their third agreed order in which the City pledged to eliminate all discharge from the waste stabilization lagoon into Oliver Creek by March 1, 1996. See id. The City committed to building a new basin to achieve this goal. See id. Due to unforeseen problems, the construction of the basin was not completed on time, and the March 1 deadline passed with the City still illegally discharging materials into Oliver Creek. See id. Nearly six months after the third deadline passed, TDEC issued a fourth order requiring the City to cease discharge by July 1, 1997, and they fined the City $4000 with the possibility of additional fines totaling $26,000. See id. On September 30, 1996, Plaintiffs filed this action. See id.
period.\textsuperscript{16} Specifically, the complaint alleged that TDEC’s prosecution was not diligent because it issued countless compliance deadline extensions, condoned and permitted the discharge of existing volumes of waste by the City, issued never-enforced violation notices and imposed token monetary penalties.\textsuperscript{17}

Upon a motion by the City, the district court for the Western District of Tennessee dismissed the Plaintiffs’ complaint pursuant to 33 U.S.C. § 1365(b), concluding that the court lacked subject matter jurisdiction over the suit.\textsuperscript{18} According to the district court, the Plaintiffs’ suit was precluded because TDEC was diligently prosecuting an action in court against the City under a state law comparable to CWA.\textsuperscript{19} On appeal, the Sixth Circuit Court of Appeals held that: (1) TDEC was diligently prosecuting an administrative action against the city; (2) the actions taken by TDEC did not constitute “action in court;” and (3) Plaintiffs’ action was barred under § 1319(g) of CWA.\textsuperscript{20}

On a rehearing en banc, the Jones II court held that the Plaintiffs’ action was not precluded because they were never given the opportunity to participate in the decision-making process.\textsuperscript{21} The majority claimed that the Plaintiffs were continuously subject to the discretion of TDEC and thus frozen out of the enforcement process.\textsuperscript{22} The majority further believed that the Plaintiffs’ action

\textsuperscript{16} See Jones I, 175 F.2d at n.2 (Krupansky, J., dissenting) (setting forth complaints advanced by Plaintiffs and inspecting whether TDEC was diligently prosecuting the City).

\textsuperscript{17} See id. (examining plaintiffs claims under motion for summary judgment standard). The dissenters in Jones I contended that had the district court recognized and examined the well-pled allegations of the Plaintiffs’, it could not have supported its conclusion that TDEC’s continued enforcement represented diligent prosecution. See id.

\textsuperscript{18} See Jones I, 175 F.3d at 412 (noting that district court for Western District of Tennessee granted City of Lakeland’s motion to dismiss for lack of subject matter jurisdiction). The district court’s holding that it lacked subject matter jurisdiction under § 1365(b) was based on its belief that TDEC constituted a court of the United States and that TDEC was diligently prosecuting an action against the City. See id. For the text of 1365(b), see supra note 5.

\textsuperscript{19} See Jones I, 175 F.3d at 412. (referring to district court’s holding that TDEC was diligently prosecuting civil action against City and that Plaintiffs failed to show that TDEC was not court of United States).

\textsuperscript{20} See id. at 410. The Court of Appeals was not convinced by the district court’s assertion that Plaintiffs’ suit was precluded under § 1365(b) itself, but rather that the suit was barred under § 1319(g)(6)(A)(ii) of CWA. See id. at 413-18.

\textsuperscript{21} See Jones II, 224 F.3d at 524 (expressing view that Plaintiffs were not given meaningful opportunity to participate in administrative decision-making process).

\textsuperscript{22} See id. (stating that Plaintiffs’ suit is not precluded because TDEC did not allow Plaintiffs to participate in decision-making process). The court does not cite to a specific example of when Plaintiffs were prevented from participating in the
could proceed because the Tennessee Water Quality Control Act and related Tennessee statutes were not comparable to either 33 U.S.C. § 1365(a)(1)(B) and/or 33 U.S.C. § 1319(g)(6). The dissent claimed that the majority construed section 1319(g)(6) too narrowly and that a proper and broader interpretation of that provision did in fact preclude the citizen suit.

III. BACKGROUND

The intended scope of § 1319(g)(6) of the Clean Water Act is an issue that has been analyzed by a number of environmental commentators as well as a small number of federal circuits. Courts called upon to determine the intended scope of section 1319(g)(6) of CWA often begin their analysis by examining the Supreme Court's landmark decision in Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation (hereinafter "Gwaltney").

enforcing of the limitations set by the NPDES permit; but the court does cite factors such as the lack of public notice for hearings and the absence of requirement that the State extend third-parties an opportunity to join controversial issues seeking resolution. See id. at 523-24.

23. See id. at 524 (stating that TWQCA and CWA are not comparable within meaning of § 1319(g)(6) or § 1365(b)(1)(B) of CWA).

24. See id. at 525-530 (Norris, J., dissenting) (disagreeing with majority's interpretation of section 1319(g)(6) of CWA). For a discussion of the dissent's analysis, see infra notes 99-123 and accompanying text.

25. See Maples, supra note 1, at 195 (advocating reformation of diligent prosecution bar to ensure effective citizen role in achieving goals of CWA); see also North and South Rivers Watershed Association, Inc. v. Town of Scituate, 949 F.2d 552, 555-57 (1st Cir. 1991) (advocating broad interpretation of section 1319(g)(6)'s diligent prosecution and comparability requirements); Washington Public Interest Research Group v. Pendleton Woolen Mills, 11 F.3d 883, 885-87 (9th Cir. 1993) (utilizing narrow interpretation of section 1319(g)(6)'s diligent prosecution requirement); Arkansas Wildlife Federation v. ICI Americas, Inc. 29 F.3d 376, 380-81 (8th Cir. 1994) (using broad interpretation of section 1319(g)(6)'s comparability requirement); Citizens for a Better Environment - California v. Union Oil Company of California, 83 F.3d 1111, 1117-18 (9th Cir. 1996) (employing narrow interpretation of section 1319(g)(6)'s comparability requirement); Neuman and Knight, supra note 8, at 10111 (exploring differing interpretations set forth by circuits with respect to when citizen suits are precluded); Howard, supra note 3, at 64 (advocating use of plain meaning of CWA's administrative penalty bar on citizen suits in order to maintain true purpose and effectiveness of citizen suit provision); Cawley, supra note 7, at 190-91 (advocating First and Eighth Circuits' broad interpretation of section 1319(g)(6)'s ban on citizen suits); Fisch, supra note 2, at 235 (referring to First Circuits's decision to interpret bar on citizen suits broadly as bad decision); Clauson, supra note 11, at 989 (proposing that Congress define precisely what it means by diligent prosecution and comparable state law). For a discussion of Scituate, see infra notes 37-45 and accompanying text. For a discussion of Pendleton, see infra notes 47-59 and accompanying text. For a discussion of Arkansas Wildlife, see infra notes 61-71 and accompanying text. For a discussion of UNOCAL, see infra notes 72-82 and accompanying text.

In *Gwaltney*, the Supreme Court held that section 505(a) of CWA does not provide federal jurisdiction over citizen suits for completely past violations of CWA. More importantly, the *Gwaltney* court set forth the standard by which citizen enforcement suits have been, and continue to be, judged. In examining the role that Congress intended citizen enforcement actions to play within the context of CWA as a whole, the Supreme Court declared that "the bar on citizen suits when governmental enforcement action is under way suggests that the citizen suit is meant to supplement rather than to supplant governmental action." The *Gwaltney* court referred to a Senate Committee Report which noted that citizen suits were proper only when the agencies charged with enforcing CWA failed to adequately do so; and Congress intended the large majority of enforcement actions to be initiated by the state. Though the Supreme Court did not specifically comment or allude to section 1319(g)(6) of CWA in *Gwaltney*, courts subsequently called upon to determine the intended scope of this provision have often looked first toward the general notions articulated by the Court in that decision. 

the holder of a NPDES permit, alleging that the permittee had "violated and would continue to violate" the limits of pollution permitted by its permit. See id. at 54.

27. See id. (setting forth Court’s holding). The plaintiffs, the Chesapeake Bay Foundation and the Natural Resources Defense Council, filed a citizen suit in June 1984. See id. at 54. The defendant’s last recorded violation of the NPDES permit occurred on May 15, 1984. See id. The plaintiffs alleged in their complaint that the defendant “had violated and would continue to violate” its permit. See id. The Supreme Court held that section 505(a) of CWA does not confer federal jurisdiction over citizen suits for wholly past violations of the CWA. See id. at 63.

28. See id. at 60 (contending that citizen suits could have potential to undermine enforcement actions brought by State).

29. Id. This declaration has consistently been cited by commentators, as well as courts, in attempting to determine the appropriateness of a citizen suit under the Clean Water Act. This declaration suggests that citizen suits are secondary method of enforcing CWA preceded by the methods utilized by the primary government agency. See id. at 60-61. For a discussion of courts that have cited this declaration, see infra note 31 and accompanying text.


31. See Scituate, 949 F.2d at 555 (citing *Gwaltney* and proposing that when it appears that governmental action under either Federal or comparable State Clean Water Act begins and is diligently prosecuted, need for citizen suit vanishes); see also *Arkansas Wildlife*, 29 F.3d at 380 (citing *Gwaltney* as standing for proposition that Congress intended citizen suits to play supplemental, rather than intrusive role); *Pendleton*, 11 F.3d at 886 (noting that *Gwaltney* hypothetically stated that EPA’s discretion would be hampered if citizens could file penalty suits months or years after EPA had decided to forego penalties).
Specifically, since \textit{Gwaltney}, the First and Ninth Circuits seem to take polar interpretations of the \textit{Gwaltney} court's findings, views regarding when an action bars a citizen suit under CWA section 1319(g)(6). With respect to diligent prosecution, legal scholars often expressed the view that the First Circuit interprets the administrative penalty bar broadly so that any government action taken against illegal polluters constitutes diligent prosecution; while the Ninth Circuit interprets the bar narrowly so that only government actions involving administrative penalties constitute diligent prosecution. In plain terms, the Ninth Circuit's interpretation of § 1319(g)(6) does not consider the issuance of an administrative order without a penalty an action constituting diligent prosecution, and thus an order alone would not be sufficient to preclude a citizen suit. The First and Ninth Circuits have also applied similar analyses to the comparability requirement of § 1319(g)(6). The First Circuit concluded that comparability is met if the general scheme and goals of the state statutory scheme are similar to that of CWA, and the Ninth Circuit held that comparability is met only if the specific state law independently provides private citizens with all of the opportunities provided for under CWA.

The First Circuit was the first to examine the intended scope of citizen enforcement actions under section 1319(g)(6) of CWA in

32. Compare Scituate, 949 F.2d at 555-57 (advocating broad interpretation of diligent prosecution and comparability requirements of § 1319(g)(6)); \textit{with Pendleton}, 11 F.3d at 885-87 (advocating narrow interpretation of diligent prosecution requirement of § 1319(g)(6)), and \textit{UNOCAL}, 83 F.3d at 1117-18 (advocating narrow interpretation of comparability requirement of § 1319(g)(6)). \textit{See generally} Neuman and Knight, supra note 8, at 10111 (setting forth broad-narrow split between First and Ninth Circuits).

33. \textit{See} Neuman and Knight, supra note 8, at 10111 (proposing that First Circuit interprets diligent prosecution requirement broadly, while Ninth Circuit interprets it narrowly); \textit{see also} Clauson, supra note 11, at 979-82 (relying on two schools of thought with respect to diligent prosecution).

34. \textit{See} Pendleton, 11 F.3d at 883 (stating that if Congress had intended to preclude citizen suits in face of administrative compliance orders, it could have easily done so, as it had done previously in other environmental statutes). The \textit{Pendleton} court felt that the plain words of the statutes indicated that a citizen suit was precluded only when EPA or the state prosecuted an administrative penalty action, not a compliance order. \textit{See id.}

35. Compare Scituate, 949 F.2d at 556 (stating that "[i]t is enough that Massachusetts statutory scheme . . . contains penalty assessment provisions comparable to the Federal CWA, that the state is authorized to assess those penalties, and that the overall scheme of two acts is aimed at correcting same violations, thereby achieving same goals"); \textit{with UNOCAL}, 83 F.3d at 1118 (concluding that comparability requirement of § 1319(g)(6)(A) demands that penalty at issue be assessed under specific provision of state law that is comparable to section 1319(g) in order to preclude citizen suit).

36. \textit{See id.}
North and South Rivers Watershed Association, Inc. v. Town of Scituate (hereinafter "Scituate").37 After observing that CWA precluded a citizen suit where the "state has commenced and is diligently prosecuting an action under a state law comparable to ... [section 1319(g)(6) of CWA]," the First Circuit held that a state was proceeding under comparable law if three criteria were met.38 The first element necessary to warrant a finding of comparability, as articulated by the Scituate court, was that the statutory scheme under which the state was proceeding had to contain a penalty provision comparable to the penalty provision contained in CWA.39 The second requirement advanced by the Scituate court was that the state be authorized to assess penalties on the alleged violators.40 Third and finally, the court required that the state statutory scheme and CWA be focused on correcting the same violations.41

In looking at what actions were necessary to support a finding of diligent prosecution, the First Circuit in Scituate held that the state did not have to actually use the penalty of its state law scheme for a citizen suit to be barred.42 This holding effectively kept open the possibility of a state agency issuing a compliance order to a violator without having to be concerned about a collateral or subse-

37. See Scituate, 949 F.2d at 552. In Scituate, the Massachusetts Department of Environmental Protection (hereinafter "MDEP") issued an administrative order to the town of Scituate alleging that the town was discharging sewage treatment into a waterway without a NPDES permit. See id. at 553. MDEP ordered Scituate to: (1) immediately prohibit any new connections to it's sewer system; (2) take the necessary steps to plan, develop and construct new wastewater treatment facilities; and (3) begin extensive upgrading of the facility subject to MDEP's approval. See id. at 553-54. MDEP was authorized to assess civil penalties of $25,000 a day against violators of the State Act, penalties which were very similar to the penalty provisions of CWA. See id. at 524. The state elected not to assess penalties against the town at the time of issuing its order, but reserved the right to do so at a later date. See id. After the order, and while Scituate was attempting to work along with MDEP to remedy the situation, North and South Rivers Watershed Association brought suit in district court charging the town with violation of the Federal CWA. See id.

38. See id. at 552 (listing three criteria that must be met in order to warrant finding of comparability).

39. See id. (setting forth requirement that state scheme contain penalty provisions comparable to CWA penalty provisions in order to warrant finding of comparability).

40. See id. (Naming element that state agency be authorized to assess penalties against violators of CWA in order to warrant finding of comparability).

41. See id. (setting forth third criteria to warrant finding of comparability and holding that comparability requirement was satisfied because three criteria were met); see also Howard, supra note 3, at 51 (citing to First Circuit's determination of comparability in Scituate).

42. See Scituate, 949 F.2d at 556 (contending that state's decision not to utilize penalty provisions does not alter outcome); see also Howard, supra note 3 (stating that Scituate court held that state did not have to actually use penalty provisions of state law scheme).
sequent citizen suit. The *Scituate* court seemed justified in light of the *Gwallney* court’s suggestion that a citizen suit, instituted after the supervising agency decided to forego civil penalties, could potentially hinder the state agency’s effectiveness in achieving compliance. Based on these determinations, the *Scituate* court concluded that the citizen suit in question was precluded.

Juxtaposing the First Circuit’s views, the Ninth Circuit’s decisions in *Washington Public Interest Research Group v. Pendleton Woolen Mills* (hereinafter “*Pendleton*”) and *Citizens For a Better Environment - California v. Union Oil Company of California* (hereinafter “UNOCAL”), are in direct contrast to the First Circuit’s *Scituate* decision. In *Pendleton*, EPA issued a compliance order to the defendant, Pendleton Woolen Mills, for violating its NPDES permit. Over the course of several years, and while working with EPA to remedy the problem, the defendant made significant progress towards achieving compliance, but evidence of continued violations ultimately prompted *Washington Public Interest Research Group* to file a private suit. Because the Ninth Circuit, in *Pendleton*, firmly believed that the prosecution of an administrative penalty action was necessary to preclude a citizen suit, it allowed the plaintiffs’ to go forward. The *Pendleton* court contended that section 1319(g)(6) did

43. See *Scituate*, 949 F.2d at 556 (holding that state agency did not have to issue penalty to alleged polluter in order to preclude citizen enforcement action).

44. See *Gwallney*, 484 U.S. at 61 (contending that citizen enforcement action filed after EPA chose to forgo civil penalties would curtail EPA’s discretion to enforce CWA).

45. See *Scituate*, 949 F.2d at 558 (affirming Appellee’s motion for summary judgment and dismissing citizen enforcement action).

46. For a discussion of *Pendleton*, see infra notes 47-59 and accompanying text. For a discussion of UNOCAL, see infra notes 72-82 and accompanying text.

47. See *Pendleton*, 11 F.3d at 883. Pendleton operated a textile mill in Washougal, Washington, at which it cleaned, spun, wove, and dyed wool. See id. at 884. These operations created wastewater containing oil, grease, chromium, zinc, and other pollutants. See id. In August of 1988, the EPA issued a compliance order asserting that Pendleton was in violation of its NPDES permit. See id. The order required Pendleton to prepare a report describing the causes of the violations and to identify the actions necessary to bring it into compliance. See id. at 884-85. The order further required Pendleton to make the necessary improvements. See id. at 885.

48. See id. at 885. Though Pendleton made an attempt at complying with the original order, an amended compliance order set the target date for improvements as October 31, 1990. See id. The order included a threat of a $25,000 fine per day if Pendleton failed to adhere to the terms. See id. In December of 1990, Washington Public Interest Research Group notified EPA and Pendleton of its intent to bring suit against Pendleton for violating its NPDES permit. See id. More than the required 60 days thereafter, the plaintiffs filed a complaint seeking declaratory and injunctive relief as well as civil penalties. See id.

49. See id., at 886 (stating that plain reading of 1319(g)(6) requires prosecution of administrative penalty action in order to preclude citizen suit).
not preclude citizen suits in instances where a mere compliance order was levied, because compliance orders were imposed under 1319(a) of CWA.\textsuperscript{50} Thus, the Ninth Circuit in \textit{Pendleton} effectively held that a citizen suit could be precluded under section 1319(g)(6) of CWA if, and only if, the violator had been the recipient of an administrative penalty levied under \textsection 1319(g) of CWA.\textsuperscript{51}

The effect of the Ninth Circuit's \textit{Pendleton} requirement arguably contradicted the perspectives and inferences that could be drawn from the \textit{Gwaltney} decision.\textsuperscript{52} The \textit{Gwaltney} court hypothesized a scenario where the Administrator agreed not to assess or otherwise seek civil penalties on the condition that the violator "take an extreme corrective action".\textsuperscript{53} After laying out this hypothetical, the \textit{Gwaltney} court explained that a subsequent citizen suit would considerably curtail the Administrator's discretion to enforce CWA.\textsuperscript{54} Thus, it is arguable at the very least that the \textit{Gwaltney} court understood that a citizen suit could, and in fact would, be precluded even in instances in which EPA or a state agency chose to forego administrative penalties and only issued a compliance order.\textsuperscript{55}

The \textit{Pendleton} court nonetheless pointed to the plain language of section 1319(g)(6)(A)(ii), which stated that citizen suits were barred only when EPA (or a state) was prosecuting an action under \textit{this subsection}, subsection 1319(g), entitled "Administrative Penalties".\textsuperscript{56} The \textit{Pendleton} court further argued that there was no legisla-
tive history demonstrating that Congress intended to extend the bar on citizen suits to anything other than an administrative penalty action.\textsuperscript{57} Additionally, the Ninth Circuit in \textit{Pendleton} expressly stated that it did not agree with the \textit{Scituate} court’s reasoning that a citizen suit was barred even when a state was prosecuting a compliance action and not a penalty action.\textsuperscript{58} In the Ninth Circuit’s view, therefore, even if the state’s statutory scheme contained a penalty provision, CWA section 1319(g)(6) required that the agency take action pursuant to that particular provision to preclude a citizen suit.\textsuperscript{59}

The Ninth Circuit would more closely examine the comparability requirement of § 1319(g)(6) three years later in \textit{UNOCAL}.\textsuperscript{60} However, before the Ninth Circuit was able to re-examine and refine its outlook on the intended scope of section 1319(g)(6) in \textit{UNOCAL}, the Eighth Circuit had the opportunity to comment on the issues of “diligent prosecution” and “comparable state law” in \textit{Arkansas Wildlife Federation v. ICI Americas} (hereinafter “\textit{Arkansas Wildlife}”).\textsuperscript{61} The facts of \textit{Arkansas Wildlife} indicated that the Arkansas Department of Pollution Control and Ecology (hereinafter ADPC & E) entered into a consent order with ICI Americas after notices of violations and the imposition of fines failed to prod ICI Americas into complying with its NPDES permit.\textsuperscript{62} After giving no-

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\textsuperscript{57} See id. (stating that there was no evidence that Congress intended preclusion to apply in instances in which there was no administrative penalty action).

\textsuperscript{58} See id. (criticizing \textit{Scituate} court’s analysis). The Ninth Circuit stated: Relying upon the desirability of preserving the enforcement authority’s discretion to choose enforcement methods, \textit{Scituate} [sic] held that a citizen suit is barred even when a state is not prosecuting a penalty action, but only a compliance action. Unlike the district court, we are not persuaded by the First Circuit’s reasoning in our analysis of section 1319(g)(6)(A).

\textsuperscript{59} See id. (claiming that government must take action pursuant to penalty provision comparable to section 1319(g) of CWA, dealing with administrative penalties, to preclude citizen suit). For a discussion of the \textit{Pendleton} court’s reasoning, see \textit{supra} notes 57-58 and accompanying text.

\textsuperscript{60} For a discussion of \textit{UNOCAL}, see \textit{infra} notes 72-82 and accompanying text.

\textsuperscript{61} See \textit{Arkansas Wildlife}, 29 F.3d at 376-83. ICI operated a herbicide manufacturing plant in North Little Rock, Arkansas. See id. at 377. ICI had received a NPDES permit for wastewater discharge from Arkansas Department of Pollution Control and Ecology (hereinafter “ADPC & E”). See id.

\textsuperscript{62} See id. ADPC & E sent notices to ICI during a period of over two years because ICI was violating the pollutant discharge limits mandated under its NPDES permit. See id. at 377. At a subsequent meeting, ADPC & E and ICI agreed to enter into a Consent Administrative Order (hereinafter “CAO”). See id. at 378.
tice to ADPC & E and waiting the required sixty days, the plaintiff, Arkansas Wildlife Federation, sought damages, declaratory relief and an injunction in a citizen suit that alleged continuing permit violations. In examining whether the citizen suit was permitted to move forward, the Arkansas Wildlife court considered the First Circuit's analysis in *Scituate*, and the Supreme Court's *Gwaltney* court's proclamation that citizen suits were intended to play a supplemental rather than intrusive role.

In reviewing *Scituate*, the Eighth Circuit explained that a finding by the court that the overall regulatory scheme affords significant citizen participation is enough to warrant a finding of comparability, even if the state law does not contain precisely the same notice and comment provisions as CWA. The *Arkansas Wildlife* court further contended that a state's enforcement scheme should be presumed comparable unless the facts of the case demonstrate otherwise.

Specifically, the *Arkansas Wildlife* court was concerned with whether the state enforcement scheme provided a citizen a mean-

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The CAO required ICI to pay a $1000 fine, to take action to rectify the problems, and to come into compliance with the NPDES permit within thirty days. See id. After a number of extensions and $500 penalties, the ADPC & E set the date of October 31, 1993 as the day that ICI had to come into compliance. See id. This date was the same date that ICI's NPDES permit was to expire. See id. In the meantime, in July of 1991, after the original CAO was issued but before any corrections or amendments were issued, Arkansas Wildlife Federation (hereinafter "AWF") gave ICI notice of its intent to file a citizen suit under CWA. See id.

63. See id. at 388. In October of 1991, AWF filed its complaint alleging ICI's ongoing violation of CWA and seeking civil penalties, declaratory relief, injunctive relief, and the costs of litigation. See id. After discovery, ICI filed a motion for summary judgment on the grounds that AWF's suit was jurisdictionally barred under 33 U.S.C. § 1319(g)(6)(A)(ii) and (iii). See id. "[T]he district court granted ICI's motion for summary judgment" and held that AWF's action was jurisdictionally barred under 33 U.S.C. § 1319(g)(6)(A)(ii). See id. at 378-79.

64. See id. at 381. For a discussion of the *Scituate* court's reasoning, see supra notes 36-44 and accompanying text. For a discussion of the standard set forth by the *Gwaltney* court, see supra note 29 and accompanying text.

65. *Arkansas Wildlife* 29 F.3d at 382 (analyzing and agreeing with *Scituate* court's reasoning). The Eighth Circuit stated that it agreed "with the reasoning in *Scituate* that the comparability requirement may be satisfied so long as the state law contains penalty provisions which the state is authorized to enforce, has the same overall enforcement goals as the Federal CWA, provides interested citizens a meaningful opportunity to participate at significant stages of the decision-making process, and adequately safeguards their legitimate substantive interest." See id.

66. See id. at 381 (arguing that there should be presumption of comparability when comparing state law to CWA). AWF had argued that the Arkansas statute was, not comparable to the CWA because it only provided *ex post facto* citizen's right to intervene, with no public notice at any time, and no opportunity to comment while the consent order was being proposed. See id. In response ICI argued that the term "comparable" means that the state law need only be sufficiently similar to federal law, not identical. See id.
meaningful opportunity to participate in the administrative enforcement process.\(^67\) In applying this reasoning to the facts of the case, the Eighth Circuit felt that the citizen suit at issue was precluded because the plaintiffs had actual notice of the issuance of the consent order and had the ability to intervene in the state administrative process by such mechanisms as submitting comments, requesting an adjudicatory hearing, or by being made a party to the relevant proceedings.\(^68\) Thus, the Eighth Circuit in *Arkansas Wildlife* found that the plaintiffs had not been denied a meaningful opportunity to participate.\(^69\) The court further noted that Arkansas Wildlife Federation could have intervened with timely petition at any stage of the enforcement proceeding upon a showing that it could have been adversely affected by the outcome of the proceeding.\(^70\) Based on these determinations, the *Arkansas Wildlife* court held that the plaintiff’s suit was barred by § 1319(g)(6) of CWA.\(^71\)

The subsequent decision in *UNOCAL* by the Ninth Circuit rejected the First and Eighth Circuits’ broad interpretation of section 1319(g)(6)’s comparability requirement.\(^72\) In that case, Union Oil of California (hereinafter “Union Oil”) and the California Regional Water Quality Control Board reached a settlement whereby the Board allotted UNOCAL five more years to comply with the selenium limits proscribed in its NPDES permit in exchange for a $2 million payment to the state.\(^73\) The settlement mandated that

\(^{67}\) *Id.* at 381 (stating that key finding is whether state scheme allows for significant citizen participation).

\(^{68}\) *See id.* at 382 (explaining manner in which court viewed AWF’s situation).

\(^{69}\) *See id.* In sharply rejecting the AWF’s view of the record, the Eighth Circuit declared:

Notably, on the facts of the present case, AWF had actual notice of ADPC & E’s issuance of the CAO when it inspected ADPC & E’s files five months before this lawsuit was filed. AWF could have intervened in the administrative process but instead chose to collaterally attack the enforcement action through this federal lawsuit. We have no reason to believe that AWF would have been denied meaningful participation in the administrative process had it intervened.

*Id.*

\(^{70}\) *See Arkansas Wildlife*, 29 F.3d at 381 (stating that regulations provide that any person has right to intervene upon showing that he may be adversely affected by filing petition).

\(^{71}\) *See id.* (dismissing AWF’s action because it was precluded under § 1319(g)(6) of CWA).

\(^{72}\) *See UNOCAL*, 83 F.3d at 1111 (holding that Regional Water Quality Control Board’s settlement with Union Oil Company of California (hereinafter “Union Oil”) was issued under state law provision merely related to state law provision comparable to § 1319(g) of CWA and thus did not trigger CWA’s ban on citizen suits).

\(^{73}\) *See id.* at 1114-15. The principal elements of the settlement agreement were that Union Oil and the other refiners dismissed their state court lawsuit, paid
Union Oil research and begin to implement appropriate control technologies so as to achieve future compliance. The Ninth Circuit affirmed the district court’s denial of Union Oil’s motion to dismiss the complaint, and rejected UNOCAL’s claims that the payment made as settlement constituted a penalty. The UNOCAL court was not persuaded that the California Regional Water Quality Control Board’s settlement with Union Oil constituted an action which amounted to diligent prosecution. This contention arguably contradicted the view advanced in Gwaltney, where the Supreme Court stated that citizen suits instituted months or years after the Administrator of EPA or state chose to forego civil penalties, would considerably curtail these agencies ability and discretion to enforce CWA.

Additionally, the UNOCAL court held that the state’s action was not commenced under a state law comparable to CWA. Although the penalty provisions in the California Water Act were comparable to CWA’s penalty section, (section 1319(g)), the Ninth Circuit in UNOCAL contended that the payment made as settlement by Union Oil was not levied pursuant to those provisions. In direct contrast

the state a total of $2 million ($780,00 of which was contributed by Union Oil), and the Regional Board issued a cease and desist order which relieved Union Oil from meeting the final selenium limit for five years. See id.

74. See id. at 1114. Specifically the cease and desist order required the dischargers to implement a removal technology or an alternate control strategy, which was capable of achieving compliance with the NPDES permits by July 31, 1998. See id.

75. See id. at 1111. The district court held that: (1) the settlement payment by UNOCAL to the Regional Water Quality Control Board to avoid a state enforcement action was not a “penalty” within the meaning of CWA; (2) the board’s settlement was issued under authority of a state law provision merely related to a state law provision comparable to section 1319(g) of CWA and thus did not trigger the CWA’s ban on citizen suits; (3) the failure to exhaust administrative remedies to challenge the board’s cease-and-desist order did not preclude a citizen suit to challenge the alleged violation of CWA; and (4) the board’s cease-and-desist order was merely an exercise of the state’s prosecutorial discretion rather than the modification of terms of the NPDES permit so as to preclude a citizen suit. See id.

76. See id. at 1116 (stating that settlement was made to avoid “penalty” and thus could not be considered penalty for purposes of § 1319(g) of CWA).

77. See Gwaltney, 484 U.S. at 61 (setting forth hypothetical situation in which citizen brought suit after EPA chose to forego penalties, and stating that Congress could not have intended this result).

78. See UNOCAL, 83 F.3d at 1118. The Ninth Circuit concluded that the requirement in § 1319(g)(6)(A)(iii) that any penalty be “assessed under this subsection, or such comparable State law” before it precludes citizen suits meant that the penalty at issue must have been assessed under that provision of state law that is comparable to § 1519(g). See id.

79. See id., 83 F.3d at 1116-117. The court agreed with the district court’s conclusion that the $2 million payment, of which Union Oil’s payment was a part, was not a penalty but “was simply settling the refineries state court lawsuits.” See id.
to *Scituate* and *Arkansas Wildlife*, the Ninth Circuit in UNOCAL contended that "the comparability assessment is conducted by examining the state statutory enforcement provision [under which the state acted], not the state statutory enforcement scheme as a whole."80 Thus, the Ninth Circuit effectively held that in order to preclude a citizen suit there must be a penalty assessed under the specific state law provision that is comparable to section 1319(g).81 The UNOCAL court based its holding on the belief that the plainest reading of the statutory language led to this interpretation, that this interpretation would more effectively guarantee public participation, and that the *Scituate* holding led to an anomalous conclusion.82

The split among the circuits was thus well established before the Sixth Circuit chose to rehear *Jones II*. An endorsement of the broad interpretation of section 1319(g)(6) would surely have tipped the scales in favor of such an interpretation, as only the Ninth Circuit would remain to support the narrow interpretation. An endorsement of the narrow interpretation, however, led to a further divide among the circuits, pitting the First and Eighth Circuits' broad interpretation of section 1319(g)(6) directly against the Sixth and Ninth Circuits' narrow interpretation.

### IV. NARRATIVE ANALYSIS

#### A. The Majority

The majority in *Jones II* began its analysis by noting that the plaintiffs, as landowners along the waterway being polluted, have standing to commence the enforcement action against the City.83

The court also referred to the district court's note that the CDO refers to a "payment" and not penalty, and that the "CDO clearly stated that it was issued pursuant to the Regional Board's authority under California Water Code § 13301, governing cease and desist orders." See id. Because the Regional Board "expressly declined to invoke it's [California Water Code] § 13385 authority" to impose a civil penalty, the court concluded that the "penalty" was not assessed under a comparable state law. See id. at 1117.

80. Id. at 1117 (concluding that state must act under state statutory enforcement provision that is comparable to section 1319(g) of CWA in order to preclude citizen suit).

81. See id. (noting that this interpretation was in direct contrast to First Circuit's interpretation advanced in *Scituate*). For a discussion of *Scituate*, see supra notes 36-44 and accompanying text.

82. See UNOCAL, 83 F.3d at 1117 (stating three reasons upon which Ninth Circuit based its holding).

83. See *Jones II*, 224 F.3d at 518. The action was initiated by Rudolph Jones, Jr., Susan Jones, and Tandy Jones Gilliland (hereinafter "Plaintiffs"), as landowners along Oliver Creek. See id. at 520. Oliver Creek is a natural waterway that crosses Plaintiffs' property within the City of Lakeland, Tennessee. See id. at 520. The
After setting forth the arguments of the Plaintiffs and the City, the Sixth Circuit proceeded to examine and critique the analysis of the district court. In its critique, the Jones II majority characterized the district court's analysis as having gone astray by "misinterpret[ing] applicable law" as well as "misconceiv[ing] legal precedent." The Jones II court then declared that the district court's finding that TDEC constituted a court of the United States within the context of 33 U.S.C. § 1365(b) was an error requiring reversal. In addressing this issue, the Jones II majority pointed to the Second Circuit's decision in Friends of the Earth v. Consolidated Rail Corp. as a decision properly conducted under section 1365 of CWA, and declared that the plain language of 33 U.S.C. § 1365(a) indicates that a citizen suit is precluded only when an enforcement action is diligently prosecuted in an actual court. Consequently, the majority concluded that Plaintiffs' citizen suit could not be precluded by 33 U.S.C. § 1365 because neither the State's Water Qual-

"plaintiffs sought redress against the City for the City's ongoing practice of discharging contaminated sewage, sludge, and other toxic, noxious, and hazardous substances into Oliver Creek, in amount exceeding those permitted by the NPDES permit issued to it" by TDEC, in violation of CWA. See id.

84. See id. Plaintiffs "charge[d] that the City's ongoing practice of discharging waste into Oliver Creek was seriously imperiling human health and wildlife in, about, and along the waterway." See id. Plaintiffs further charged that this violated the Federal Clean Water Act. See id. The City claimed that the court did not have jurisdiction because the requirements of section 1319(g) were satisfied. See id. Plaintiffs countered by claiming that TDEC had merely issued, but not effectively enforced, a series of compliance orders while concurrently permitting the City to continue polluting. See id. Furthermore, the TDEC's enforcement strategies did not constitute "diligent prosecution" according to Plaintiffs. See id.

85. See id. at 521. The Jones II majority felt that the district court had viewed the case in the correct manner factually, but had incorrectly applied the applicable law. See id. "Having correctly postured the case, the district court's analysis went astray in arriving at its disposition by misinterpreting applicable law and misconceiving legal precedent." Id.

86. See id. (contending that trial court committed error because TDEC is state administrative agency, not court of United States).

87. See id., at 522 (contending that only court action bars citizen suit under section 1365 of CWA). See generally, Friends of the Earth v. Consolidated Rail Corporation, 768 F.2d 57 (2nd Cir. 1985) (addressing citizen suit provision under § 1365(b) of Clean Water Act). In Friends, the Second Circuit consolidated two appeals for opinion because they arose from similar facts and presented a common legal question: whether an enforcement action by the New York State Department of Environmental Conservation against Consolidated Rail corporation that culminated in consent orders precluded the institution of a citizen suit under the CWA. See id. at 58. Based upon the belief that CWA citizen suit provision plainly referred to an "action in a court of the United States, or a State," and upon the feeling that it would be inappropriate to expand this language to include administrative enforcement actions, the Second Circuit held that the citizen suit was not precluded. See id. at 62. However, the Friends decision was made prior to the passage of the 1987 amendments to CWA, and thus has no bearing on the Jones II court's analysis under § 1319(g)(6) of CWA. See id. at 57.
ity Control Board, nor TDEC rise to the level of a state or federal court.\textsuperscript{88}

Had the majority found that TDEC did constitute a court, it would still have to determine whether TDEC was diligently prosecuting an action and whether the state law was comparable to the Federal CWA as required by section 1365.\textsuperscript{89} However, because no court was involved here, the \textit{Jones II} majority was not required to address these issues.\textsuperscript{90} The \textit{Jones II} court characterized the district court's contention that TDEC was a court as mistaken and "clearly erroneous," and consequently reversed the district court's decision.\textsuperscript{91}

Because 33 U.S.C. § 1365(a) specifies that a citizen may bring a civil action except as provided in § 1365(b) and § 1319(g)(6) of CWA, the \textit{Jones II} court next proceeded to determine whether § 1319(g)(6) precluded Plaintiffs' action.\textsuperscript{92} After recognizing that

\textsuperscript{88} See \textit{Jones II}, 224 F.3d at 522 (stating Plaintiffs' citizen suit is not precluded because neither state's Water Quality Control Board, nor TDEC, constitute court of United States). In addition, the \textit{Jones II} court concluded that TDEC's administrative enforcement action over a ten-year period was inadequate to address Plaintiff's concerns. See \textit{id.}. The \textit{Jones II} majority then pointed to five factors which it believed illustrated that the TDEC's actions did not constitute diligent prosecution. See \textit{id.}. For a discussion of these five factors, see infra note 90 and accompanying text.

\textsuperscript{89} See 33 U.S.C. 1365(b) (setting forth circumstances in which court action brought by EPA or state precludes citizen suit).

\textsuperscript{90} See \textit{Jones II}, 224 F.3d at 522 (ending examination of Plaintiff's citizen suit under section 1365(b) because TDEC did not constitute court of United States).

\textsuperscript{91} See \textit{id.}. In addition to finding that neither the Water Quality Control Board, nor TDEC, constituted a court, the \textit{Jones II} majority pointed to five factors which it believed illustrated the lack of diligent prosecution on the part of TDEC. See \textit{id.}. According to the majority, TDEC:

"(1) permitted the City to discharge impermissible volumes of contaminated waste into Oliver Creek on an ongoing basis thereby creating significant risks to human health and wildlife in, about, and along the waterway; (2) permitted the City, by Order, to increase the impermissible volume of contaminated raw waste water discharge by allowing the city to continue to make connections and/or line extensions to it's wastewater collection system; (3) waived countless NPDES violation notices; (4) extended and waived the compliance deadlines of three, possibly four, of it's consent orders; and 5) imposed nominal token penalties in lieu of punitive compliance incentive penalties of $10,000 per day authorized by the Clean Water Act."

\textit{id.} at 522-23. The \textit{Jones II} majority felt that all of these things together contradicted a level of "diligent prosecution" demanded by 33 U.S.C. § 1365(g). See \textit{id.} at 523.

\textsuperscript{92} See \textit{id.} (continuing analysis of § 1319(g)(6) by examining diligent prosecution requirement). Section 1319(g)(6) is relevant because section 1365(a) of CWA provides in pertinent part: "Except as provided in subsection (b) of this section and section 1319(g)(6) . . . any citizen may commence a civil action on his own behalf." See 33 U.S.C. § 1365(a).
TWQCA and CWA were similar in several respects, the Sixth Circuit in *Jones II* articulated that the primary factor that must be examined in determining comparability is whether adversely affected citizens have a meaningful opportunity to participate in the enforcement process.\(^93\)

The *Jones II* majority began its comparability analysis by asserting that an examination of TWQCA indicated that it did not require notice of hearings nor did it require the state to extend third parties an opportunity to "initiate or join mandatory controversial issues seeking a just resolution". This contention was also advanced by the dissent in *Jones I*.\(^94\) The *Jones II* court declared that the Tennessee Open Meetings Act did not mandate procedures for public participation in an ongoing enforcement prosecution under the TWQCA before TDEC or before the Water Quality Control Board, and thus could not be considered comparable to CWA.\(^95\) The *Jones II* court pointed out that the only opportunity for Plaintiffs to involve themselves in the enforcement action against the City would be a forty-five day period in which they would be permitted to intervene once a consent judgment was entered between TDEC and the City, and the judgement was filed with the chancery court.\(^96\) Based on the fact that in the ten years during which TDEC had been prosecuting the action against the City not one of the four orders were filed with the chancery court, the Sixth Circuit in *Jones II* declared that Plaintiffs and other similarly affected citizens were effectively frozen out of the enforcement process by TDEC.\(^97\) Building on this

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93. See id., 224 F.3d at 523 (referring to need to determine whether citizens are afforded meaningful opportunity to participate).

94. See id. (claiming that TWQCA does not require opportunity to initiate or join controversial issues).

95. See *Jones II* at 523-24. The *Jones II* majority suggested that TDEC used the protection of CWA's diligent prosecution requirement as a means to declare citizen or public participation as duplicative or frivolous in order to preserve its unilateral discretionary authority. See id. at 524. The *Jones II* majority noted that the result of this would be to freeze similarly situated citizens out of commencing an action or intervening in an ongoing state enforcement action. See id.

96. See id. at 524. The Tennessee Code provides that a court shall withhold final judgment for forty-five days after a consent judgment entered between TDEC and an offending party is filed with the chancery court, so that adversely affected parties may intervene. See Tenn. Code. Ann. § 69-3-115(e)(2) (providing citizens opportunity to intervene in enforcement action).

97. See *Jones II*, 224 F.3d at 524 (rejecting notion that Plaintiffs were given meaningful opportunity to participate). The Ninth Circuit declared:

It is apparent from Tennessee public records attached to the complaint . . . [that] NOT ONE OF THE FOUR ORDERS ISSUED BY THE TDEC AND/OR Water Quality Control Board, relied upon by the district court in arriving at its decision, were filed with the chancery court by the State or any of its agencies during the ten or more years of this ongoing en-
analysis, the *Jones II* court concluded that the methods of intervention available to Plaintiffs were inadequate to protect their legitimate interests as mandated by CWA and consequently held that Plaintiffs' suit could move forward.  

B. The Dissent

Writing for the dissent, Circuit Judge Alan Norris began by noting that while he agreed with the majority's analysis of the suit under § 1365 of CWA, he would nevertheless affirm the district court's decision to bar Plaintiffs' suit under § 1319(g)(6) of CWA. After setting forth the text of § 1319(g)(6), Judge Norris pointed out that because the district court mistakenly relied upon § 1365(b) and did not examine § 1319(g)(6), the dissent would be forced to do so. The divergence from the *Jones II* majority opinion on section 1319(g)(6) demarcates the point at which the analysis of the majority and dissent went in different directions.

In particular, the *Jones II* dissent set out to determine: (1) whether TDEC was diligently prosecuting an action against the City, and (2) whether TDEC was prosecuting that action under a state law comparable to § 1319(g) of CWA. According to the *Jones II*

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Although the plaintiffs and other similarly affected citizens are, at the discretion of the TDEC, denied access to both the court and to a meaningful opportunity to participate at significant stages of the administrative decision-making process.

*Id.* (emphasis added).

98. See *id.* (concluding Plaintiffs have been denied rightful access to courts). Based on this conclusion the *Jones II* majority holds that the Plaintiffs' complaint states a claim under which relief may be granted and remands the case for further proceedings. See *id.*

99. See *Jones II*, 224 F.3d at 525 (Norris, J., dissenting) (pointing out that while dissenting judges agree with *Jones II* majority that § 1365 does not bar the Plaintiffs' suit, dissent disagrees with majority's analysis under § 1319(g)(6) of CWA).

100. See *id.* The fact that the district court erroneously relied upon § 1365 is clear. See *id.* Section 1365 clearly indicates that a citizen suit is only precluded when an action is taken in court. See 33 U.S.C. § 1365(g). The district court analyzed the facts of *Jones II* under § 1365(b) only, and it ceased its examination when it found that § 1365(b) precluded the citizen suit. See *Jones II*, 224 F.3d at 525. Because § 1365(b) did not in fact preclude the citizen suit, and because the district court did not continue its analysis to explore section 1319(g)(6), Judge Norris felt the dissenters were obligated to take that subsequent step. See *id.*

101. See *Jones II*, 224 F.3d at 522 (ceasing examination of citizen suit under section 1365(b) and proceeding with analysis under 1319(g)(6)).

102. See *id.*, at 525 (Norris, J., dissenting) (referring to need to examine diligent prosecution and comparability requirements). These are the relevant considerations under section 1319(g)(6)(A)(ii). See 33 U.S.C. § 1319(g)(6)(A)(ii). To preclude a citizen suit, § 1319(g)(6) requires that the Administrator or state "diligently prosecute an action under a comparable State law." 33 U.S.C. § 1319(g)(6)(A)(ii). Thus it is proper to determine first if the action is being dil-
dissent, it was important to note that § 1319(g)(6) did not require that enforcement be undertaken in a court, rather it precluded citizen suits that would be “duplicative of an ‘administrative penalty action.” 103 The Jones II dissent then proceeded with an analysis of the diligent prosecution requirement. 104

Judge Norris began his critique of the majority’s interpretation of section 1319(g)(6)’s diligent prosecution requirement by claiming that the Plaintiffs’ primary argument was not that TDEC was doing nothing, rather, that the City’s continued dumping into Oliver Creek made clear that TDEC’s prosecution could not be diligent. 105 In sharply rejecting Plaintiffs’ view of the record, the Jones II dissent pointed out that not only did the City make numerous attempts to comply with the orders issued by TDEC, but that an enforcing agency must be accorded substantial deference when attempting to achieve compliance by violators of CWA. 106 This approach aligns itself with the notions advanced in Gwaltney where the Court questioned the utility of a citizen suit months or years after an agency chose to forego civil penalties in an effort to enable the violator to contribute more resources towards compliance. 107

The Jones II dissent argued that when Congress used the term “diligently prosecuting”, it did not intend for the term to require an unmerciful attack on the violator, a method of enforcement that Plaintiffs seemed to advocate. 108 The dissent in Jones II concluded its analysis of the diligently prosecuting requirement by claiming that TDEC was attempting to remedy the very same problems the
gently prosecuted; and second, whether the law that the action is being prosecuted under is comparable to section 1319(g) of CWA. See id.

103. See Jones II, 224 F.3d at 525 (Norris, J., dissenting) (citing UNOCAL and Pendleton as standing for proposition that § 1319(g)(6) precludes citizen suits that would be “duplicative of administrative penalty action”).

104. See id. (proceeding with diligent prosecution analysis under § 1319(g)(6) of CWA).

105. See id. It is clear that the TDEC took some action. For a discussion of the actions taken by TDEC, see supra note 15 and accompanying text. Judge Norris portrays Plaintiffs as being unhappy with the progress that TDEC has made with respect to the City’s illegal dumping. See id. Norris characterizes Plaintiffs’ view of the situation as a series of ineffective administrative orders entered into by TDEC and the City. See id.

106. See id., at 525-26 (Norris, J., dissenting) (disagreeing with Plaintiffs’ view of record and contending that TDEC must be accorded latitude to deal with situations preventing violators from achieving compliance).

107. See Gwaltney, 484 U.S. at 61 (stating that citizen action taken subsequent to EPA’s decision to forego civil penalties would curtail EPA’s discretion to enforce CWA).

108. See Jones II, 224 F.3d at 526 (Norris, J., dissenting) (stating that Plaintiffs’ outlook on diligent prosecution was not what Congress intended).
plaintiffs desired to remedy, and consequently the dissent could not find an absence of diligent prosecution. 109

The Jones II dissent began its analysis of the comparability requirement of § 1319(g)(6) by pointing to the canon of the Clean Water Act’s citizen enforcement provision as coined in Gwaltney: citizen suits are “meant to supplement rather than to supplant governmental action.” 110 After citing the Scituate court’s reasoning, the dissent in Jones II declared that the use of an exacting test for comparability when comparing § 1319(g) with a state counterpart would be inappropriate in light of the secondary nature of citizen suits and the deference afforded state agencies by Congress and other courts. 111 The Jones II dissent then proceeded to analyze the comparability of section 1319(g) and TWQCA under a more reasonable standard. 112

The Jones II dissent first pointed out that the primary goals, as well as the administrative penalties, of TWQCA and CWA were significantly similar in that both provisions sought to reduce water pollution, rectify past pollution, and prevent future violations. 113 Judge Norris also pointed out that TWQCA authorized TDEC to levy monetary penalties that very much resembled those authorized under CWA. 114 He then discussed the Arkansas Wildlife decision, in

109. See id. The Jones II dissent felt that although TDEC had not been entirely effective in obtaining compliance by the City, TDEC was nonetheless attempting to remedy the same problems that the plaintiffs sought to remedy. See id. Because of the duplicative nature of Plaintiffs’ suit, the Jones II dissent believed that the suit should be precluded. See id.

110. See id. (citing “fundamental principle” advanced in Gwaltney). Citizen suits are intended to “supplement rather than to supplant governmental action.” Gwaltney, 484 U.S. at 60. For a discussion of Gwaltney, see supra notes 26-31 and accompanying text.

111. See Jones II, 224 F.3d at 526 (Norris, J., dissenting). Judge Norris believes that the restrictions on citizen suits found in § 1365(b) and § 1319(g)(6) are intended to prevent the filing of citizen actions that would be duplicative of ongoing state or federal agency action. See id. He believes that the statutes also prevent federal courts from imposing inconsistent obligations upon an offending party as a result of multiple independent actions by citizens, state agencies, and/or federal agencies. See id. Judge Norris concluded that the Tennessee Water Quality Control Act and § 1319(g) cannot be correctly compared without applying these principles. See id.

112. See id. (beginning comparability analysis under section 1319(g)(6) of CWA).

113. See id. The dissenting opinion points out that both § 1319(g) and TWQCA seek to abate existing water pollution, reclaim polluted waters, prevent future pollution, and plan for the future use of water resources. See id. Moreover, the penalty provisions of both the TWQCA and CWA are “remarkably similar.” See id.

114. See id. (claiming that penalties TDEC is authorized to levy are similar to penalties available under section 1319(g) of CWA).
which the Eighth Circuit articulated the view that an overall state regulatory scheme that provides for significant citizen participation could be deemed comparable even without public notice and comment provisions, such as those found in the federal CWA.115 Based on these factors, the Jones II dissent more closely examined the TWQCA enforcement process.

In reviewing the enforcement element, Judge Norris set forth the manner in which he believed a citizen in the place of the Plaintiffs would have a meaningful opportunity to participate in the enforcement process under TWQCA.116 He specifically mentioned the available complaint process and the existence of a forty-five day period for Plaintiffs to intervene upon the filing of an order with the chancery court.117 The dissenting opinion authored by Judge Norris did not dispute that Plaintiffs’ right to intervene was not triggered in the present case, because the record made clear that a final order was not filed with the chancery court.118 Nonetheless, the Jones II dissent contended that the factual circumstances of the case were not relevant to the determination of whether TWQCA and CWA were comparable.119 Instead, the Jones II dissent claimed

115. See id. at 526-27 (quoting analysis advanced by Arkansas Wildlife court). For a discussion of Arkansas Wildlife, see supra notes 61-71 and accompanying text. Citing Arkansas Wildlife, Judge Norris stated:

The comparability requirement may be satisfied so long as the state law contains penalty provisions which the state is authorized to enforce, has the same overall enforcement goals as the federal CWA, provides interested citizens a meaningful opportunity to participate at significant stages of the decision-making process, and adequately safeguards their legitimate substantive interests.

Jones II, 224 F.3d at 527 (Norris, J., dissenting). Judge Norris points out that he agrees that these are the relevant considerations in evaluating the comparability of CWA and a state clean water law. See id.

116. See Jones II, 224 F.3d at 527 (Norris, J., dissenting). The Jones II dissent points out that any person may file a signed complaint against anyone allegedly violating the provisions of TWQCA, and that TDEC must then act upon the complaint unless it finds the complaint too duplicative or frivolous. See id. Furthermore, a complainant may appeal TDEC’s failure to act, or the resulting determination by TDEC, to act to the Water Quality Control Board. See id. Additionally, when any order or assessment by TDEC becomes final, even though an administrative action by TDEC is ongoing, Tennessee law allows forty-five days within which any citizen may intervene, after making an appropriate showing, before the chancery court enters final judgment on the assessment. See id. Likewise, interested parties may intervene in hearings before the Board upon making the requisite showing. See id.

117. See id. (pointing out that citizen has opportunity to file complaint and to intervene after order is filed with chancery court).

118. See id. (noting that final order had not been filed with chancery court and thus Plaintiffs’ right to intervene was not triggered in this instance).

119. See id. (contending that factual circumstances are irrelevant to determination of comparability).
that comparability was determined solely by looking at the two acts and determining: 1. whether they provide for similar opportunities to intervene and 2. whether they have similar notice provisions.\footnote{120}

Noting that the meetings in this case dealt primarily with administrative orders, the dissent pointed out that the Tennessee Open Meetings Act required that the public be given notice of such meetings.\footnote{121} Judge Norris then determined that all of these factors together - the same goals, similar administrative penalty provisions, a meaningful opportunity to participate, and public notice - were enough to warrant a finding of comparability.\footnote{122} Consequently, the Jones II dissent found that TDEC was diligently prosecuting an action under a comparable state law and claimed that the Plaintiffs' citizen suit should be barred in this instance.\footnote{123}

**V. Critical Analysis**

**A. An Overview**

The Jones II majority's finding that TDEC's administrative orders and fines did not constitute diligent prosecution seems to be unnecessarily rigid. As the Jones II dissent points out, section 1319(g)(6) precludes a citizen suit that is duplicative of an adminis-

\begin{itemize}
  \item \footnote{120} See id. (setting forth manner in which dissent believed comparability should be determined).
  \item \footnote{121} See Jones II, 224 F.3d at 527 (Norris, J., dissenting). According to the dissent: "Tennessee's Open Meetings Act requires that the public be given notice of regular and special meetings, which would include orders and assessments." Id. (citing Tenn. Code Ann. § 8-44-103 (1993), which provides for public notice of regular and special meetings of the Board, and § 69-3-105(f),(i) (Supp. 1999) which sets forth the Board mandate and authority for hearing appeals of orders, assessments, and permit revocations or modifications).
  \item \footnote{122} See Jones II, 224 F.3d at 527 (Norris, J., dissenting). Judge Norris points out that when reviewing the statutes to see if they are comparable, the factual circumstances of the case are irrelevant to such a determination. See id. The question of comparability, he argues, addresses only whether the state and federal statutes are sufficiently similar. See id. Judge Norris states that to the extent that the four orders were final, it might have been an error for those orders not to have been filed in chancery court. See id. However, he feels that this error does not render TWQCA incomparable to CWA. See id. In summary, Judge Norris concluded that:
  \begin{itemize}
    \item The overall scheme of the two acts is aimed at correcting the same violations, thereby achieving the same goals, and therefore, because plaintiffs seek to remedy a situation already in the process of being remedied by the TDEC, I would hold that the TWQCA is comparable to 33 U.S.C.A. § 1319(g) of the Clean Water Act.
  \end{itemize}
  \item \footnote{123} See id. at 530 (claiming that requirements of section 1319(g)(6) were met in this instance and that citizen suit should be precluded).
\end{itemize}
trative penalty action. Initially, it is important to note that when Congress created § 1319(g), agencies no longer needed courts to enforce their compliance orders but could issue binding compliance orders with the threat of future penalties. Because these compliance orders were able to accomplish the same objectives that historically could only be accomplished through the utilization of court proceedings, agencies effectively were given discretion as to the circumstances in which they would threaten to impose or actually impose fines on the violator. Hence, section 1319(g)(6) was created without the phrase "in a court" and instead spoke only of an administrative action. "If the agencies accept the greater power and discretion afforded them under § 1319(g), then a broader range of their enforcement conduct achieves the goals of the CWA, thereby precluding citizen suits." This method of enforcement seems in line with the analysis of Gwaltney, where the Court inferred that an administrative agency should be given discretion as to when to forgo civil penalties without having to contend with the threat of a subsequent citizen enforcement action.

Realistically, providing agencies with discretionary authority is the most reasonable solution. When a government agency steps in and attempts to work with a polluter to promote the "restoration and maintenance or chemical, physical and biological integrity of

124. See id. at 525 (articulating importance of noting that § 1319(g)(6) does not require that enforcement be undertaken in court). Citing UNOCAL and Pendleton, the dissenters stated that section 1319(g)(6)(A)(ii) precludes citizen suits that would be "duplicative of an administrative penalty action." See id.; see also UNOCAL, 83 F.3d at 1115 (quoting analysis advanced in Pendleton, 11 F.3d at 885).

125. See Cawley, supra note 7, at 183 (stating that whereas before 1987 amendment agencies had to choose between issuing compliance order with no certain consequences for polluter and pursuing costly and time-consuming action for damages or injunctions in court, environment agencies can now issue "type of compliance order with teeth").

126. See id. (claiming that agencies now have ability to assess administrative penalties that they formerly would have needed to pursue in court, and they can now issue compliance orders proscribing future penalties for failure to correct prohibited conduct).

127. See 33 U.S.C. § 1319(g)(6) (referring to prosecuting "action" rather than prosecuting "court action").

128. Cawley, supra note 7, at 192 (claiming that goals of CWA are achieved by wide range of agency's enforcement conduct if agency accepts greater power and discretion).

129. See Gwaltney, 484 U.S. at 61 (claiming that Congress could not have intended that citizen would be able to file suit against alleged violator after EPA chose to forgo civil penalties).

130. See 33 U.S.C. § 1251 (setting forth goals of CWA). See also, Cawley supra note 7, at 191 (claiming that broader interpretation of diligently prosecuting requirement remains faithful to CWA's main goal of restoring and maintaining clean water).
[the] Nation’s waters,” the primary purpose of CWA is served.\textsuperscript{131} An agency is more able to take the needs of the violator and the surrounding community into consideration, and thus is more capable then the private citizen or a court to implement the most appropriate tactics in a given situation.\textsuperscript{132} This approach is especially useful because it leaves the power and discretion in the hands of the agency, which has monitored and communicated with the violator before and during the pollution, rather than in the hands of the inexperienced citizen, who often has relatively little or no prior experience with the violator.\textsuperscript{133}

As previously stated, leaving discretionary authority in the hands of agencies seems more in line with the inferences that can be drawn from \textit{Gwaltney}.\textsuperscript{134} Allowing a private citizen to attack a violator of CWA after an agency chose to forgo penalties simply does not seem reasonable.\textsuperscript{135} By allowing these types of lawsuits to proceed, courts will effectively be discouraging dischargers from cooperating with orders issued by the supervising agencies because there will be no way for the violator to know if they will be subsequently sued by a citizen.\textsuperscript{136} Additionally, citizen suits instituted in the face of an agency action to remedy a particular problem have the potential to disrupt and hinder the methods of attack already planned out and instituted by the agency.\textsuperscript{137} For the foregoing reasons, a substantial amount of deference should be accorded an agency when it has already undertaken the task of working towards a solution.

B. Diligent Prosecution

The \textit{Jones II} majority’s narrow reading of § 1319(g)(6) with respect to diligent prosecution is troublesome because it strips agencies of any discretion they have with respect to instituting penalties

\begin{itemize}
  \item \textsuperscript{131} See id.
  \item \textsuperscript{132} See Cawley, supra note 7, at 192 (contending that government agency is in better position to devise plan for combating pollution than private citizen).
  \item \textsuperscript{133} See id. (inferring that this compromise approach is more reasonable).
  \item \textsuperscript{134} See Gwaltney 484 U.S. at 61 (proposing that EPA and state enforcement authorities have discretion to enforce CWA, and that this discretion would be curtailed if citizens could file suit after EPA or state chose to forgo civil penalties).
  \item \textsuperscript{135} See id. (claiming that Congress could not have intended this result).
  \item \textsuperscript{136} See Clauson, supra note 11 at 989 (claiming that this result is inequitable and discourages dischargers from cooperating with state agencies).
  \item \textsuperscript{137} See Cawley, supra note 7, at 192 (claiming that Ninth Circuit’s interpretation is mistaken because it allows citizen suits to disrupt calculated enforcement strategies of state agency).
\end{itemize}
against a polluter. By requiring that an actual penalty be levied against the polluter, rather than just an order, the Jones II majority ignores the fact that an agency is in a far better position than a citizen or even a court to determine what actions need to be taken under the given circumstances. As pointed out in Gwaltney, it is certainly possible that an agency may, in its best judgment, decide to forego civil penalties in the hopes of effectuating quicker compliance by the violator. A subsequent citizen enforcement action should not be permitted to undermine or otherwise interfere with this discretion.

Congress at least arguably delegated authority and discretion to local agencies because these agencies were more likely to have the best understanding of the needs of the violator and the surrounding community. Thus, it is recommended that if it is clear that the agency is making some progress toward achieving the goals of restoring and maintaining the chemical, physical, and biological integrity of the nation’s waters, that the agency’s plan of attack should be followed and the citizen suit be precluded.

C. Comparability

The Jones II majority’s similarly narrow reading of § 1319(g)(6)’s comparability requirement is also troublesome because it establishes a standard of comparability that borders on a perfect match. As argued by the Arkansas Wildlife court and by the dissent in Jones II, if the overall regulatory scheme affords signifi-

138. See Jones II, 224 F.3d at 522 (claiming that TDEC’s enforcement could not be considered diligent).

139. See Jones II, 224 F.3d at 527 (Norris, J., dissenting) (noting that district court recognized that enforcing agency must be accorded latitude to respond to circumstances that delay remedial projects and warrant reassessment of compliance target dates). The majority made no mention of this consideration in determining whether the agency was diligently prosecuting an action. See Jones II, 224 F.3d at 522-523.

140. See Gwaltney, 484 U.S. at 61 (inferring that state agencies have discretion to determine when to forgo civil penalties).

141. See 33 U.S.C. § 1253 (delegating authority to enforce environmental regulation to state and local agencies).

142. See 33 U.S.C. § 1251 (setting forth purpose of Federal Clean Water Act); see also, Cawley, supra note 7, at 192 (claiming that according to Supreme Court’s explanation, “citizens harmed by water pollution must trust Federal and State agencies to combat problem, but when government attempts to combat pollution prove to be truly dilatory, citizens may begin action”).

143. See Jones II, 224 F.3d at 523 (claiming that Tennessee Opens Meeting Act and forty-five day period to intervene after final judgment is filed with chancery court are insufficient to warrant finding of comparability). See also, Jones II, 224 F.3d at 526 (Norris, J., dissenting) (arguing that interpretation of comparable that requires one-for-one equivalency would be inappropriate).
ican citizen participation, even if the state law does not contain the exact same public notice and comment provisions as those found in CWA, the state law should be deemed comparable. The record indicates that the primary goals of TWQCA and CWA are nearly identical, and the administrative penalty sections are remarkably similar. The *Jones II* majority takes issue with what it questionably characterizes as TWQCA's unmeaningful opportunity for participation and non-existent public notice requirements.

With respect to the public notice requirements, it is questionable how the majority can claim that the notice requirements are not met simply because they are not provided for in TWQCA. As noted by Judge Norris in his dissent, the Tennessee Open Meetings Act requires that the public be given notice of regular and special meetings, which would include meetings on orders and assessments, the type of meetings that took place in this case. Thus the Plaintiffs would have been on notice that a meeting was taking place at which an order may have been imposed.

Interestingly, the majority in *Jones II* changed the test from whether there is *public notice* to whether the meeting "mandates procedures for public participation in an ongoing enforcement prose-

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144. See *Arkansas Wildlife*, 29 F.3d at 381 (noting that comparability requirement may be satisfied so long as state law contains comparable penalty provisions which state is authorized to enforce, has same overall enforcement goals as CWA, and provides interested citizens meaningful opportunity to participate at significant stages of decision-making process); see also *Jones II* 224 F.3d at 526-27 (Norris, J., dissenting) (quoting analysis of *Arkansas Wildlife* and agreeing with that analysis).

145. See *Jones II*, 224 F.3d at 528 (Norris, J., dissenting) (explaining remarkable similarity between goals and penalties sections of TWQCA and Federal Clean Water Act).

146. See *Jones II*, 224 F.3d at 524 (concluding that Plaintiffs are totally at discretion of TDEC and thus denied access to both courts and to meaningful opportunity to participate at significant states of administrative decision-making process).

147. See *id.* at 523 (stating that examination of TWQCA reflects that it requires no public notice of hearings, nor does it require the state to extend third parties opportunity to initiate or join mandatory controversial issues). The majority also claimed that the Tennessee Open Meetings Act does not "mandate" public participation in an enforcement action. See *id.* at 529-24.

148. See *Jones II*, 224 F.3d at 527 (Norris, J., dissenting) (citing Tenn. Code Ann. § 8-44-103 which provides for public notice of regular and special meetings; § 69-3-104(d) which authorizes regular and special meetings of the Board; and § 69-3-105(f),(i) which sets forth the Board mandate and authority for hearing appeals of orders, assessments, and permit revocations or modifications).

149. See *id.* (noting that Tennessee Open Meetings Act required notice of meetings on orders and assessments, the type of meetings that took place in this instance).
cution.”¹⁵⁰ This test seems inappropriate in that section 1319(g) merely requires that the state provide "public notice of and reasonable opportunity to comment on the proposed . . . order."¹⁵¹ This section says nothing about mandating procedures for public participation.¹⁵²

The Jones II majority's failure to acknowledge that the public notice requirement is met merely because TWQCA does not itself provide for public notice is difficult to justify. The state law should not be found to be uncomparable simply because it does not independently provide for every single element present in CWA.¹⁵³ The Eighth Circuit's reasoning in Arkansas Wildlife seems more reasonable than the analysis employed by the majority in this instance.¹⁵⁴ When looking at whether a state law is comparable to the Clean Water Act, a court should look to all relevant state law to determine if the opportunities provided for under CWA are provided for in some manner under state law.¹⁵⁵ The Tennessee Open Meetings Act requires that notice be given of meetings on assessments and orders, and other Tennessee statutes permit citizens to intervene and comment at these meetings.¹⁵⁶ This is precisely what is required by the Jones II majority.

¹⁵⁰ See Jones II, 224 F.3d at 523-24 (reviewing Tennessee Open Meetings Act). In speaking about the Tennessee Open Meetings Act, the Jones II majority does not discuss whether it requires that public notice be given of meetings and assessments, but instead claims that the Act does not "mandate procedures for public participation in an ongoing enforcement prosecution under [] TWQCA by TDEC." See id.

¹⁵¹ See 33 U.S.C. § 1319(g) (4) (A) (setting forth public notice requirements under CWA). Section 1319(g) (4) (A) requires that: "Before issuing an order assessing a civil penalty under this subsection the Administrator or Secretary, as the case may be, shall provide public notice of and reasonable opportunity to comment on the proposed issuance of such order." 33 U.S.C. § 1319(g) (4) (A)

¹⁵² See id. (requiring public notice of and reasonable opportunity to comment on order).

¹⁵³ See Arkansas Wildlife, 29 F.3d at 381 (contending that state law does not have to contain precisely the same public notice and comment provisions of CWA). See also Cawley, supra note 7, at 193 (arguing that comparability requirement cannot dictate to States structure of their legislation and methods of enforcement).

¹⁵⁴ See Arkansas Wildlife, 29 F.3d at 381 (claiming that comparability requirement is satisfied if state law contains comparable penalty provisions which state can levy, has similar enforcement goals as CWA, and provides citizens meaningful opportunity to participate in enforcement process). For a discussion of the Arkansas Wildlife court's reasoning see supra notes 61-71 and accompanying text.

¹⁵⁵ See Jones II, 224 F.3d at 528 (Norris, J., dissenting) (reiterating that state law need not contain precisely same public notice and comment provisions as those found in Clean Water Act); see also Arkansas Wildlife, 29 F.3d at 381 (arguing that overall regulatory scheme that provides for significant citizen participation is enough for comparability).

¹⁵⁶ See Jones II, 224 F.3d at 528 (Norris, J., dissenting) (citing Tennessee Open Meetings Act as providing for public notice of regular and special meetings
quired under section 1319(g) of CWA, and thus the Tennessee state law scheme should be considered comparable in this respect.\textsuperscript{157}

The dissent in \textit{Jones II} also sets forth the manner in which a citizen may participate in an enforcement action once an agency has assumed control of the situation.\textsuperscript{158} Regardless of what must happen for a citizen to be able to intervene, it cannot be denied that TWQCA and related Tennessee statutes provide for that opportunity.\textsuperscript{159} The \textit{Jones II} majority itself concedes that this opportunity exists, but nonetheless refuses to find comparability because the plaintiffs' opportunity to intervene was not triggered in this particular instance.\textsuperscript{160} Because this opportunity undeniably exists, the TWQCA must be considered comparable to CWA in this respect as well.\textsuperscript{161} The factual circumstances of the case are completely irrelevant to this determination.\textsuperscript{162}

As the dissent correctly notes, at no point does the \textit{Jones II} majority opinion point to opportunities provided under CWA that are not comparably provided under Tennessee law.\textsuperscript{163} Without any such findings, the \textit{Jones II} majority has no reason to presume that Tennessee state law is not comparable to CWA, especially consider-

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\bibitem{157} See 33 U.S.C. § 1319(g)(4)(A) (requiring public notice of and reasonable opportunity to comment on proposed order).

\bibitem{158} See \textit{Jones II}, 224 F.3d at 528 (Norris, J., dissenting) (explaining existence of forty-five day period to intervene once final order is filed with chancery court). For a discussion of the manner in which a citizen has a meaningful opportunity to participate under the TWQCA and related Tennessee statutes, see \textit{supra} notes 116-17 and accompanying text.

\bibitem{159} See TENN. CODE ANN. § 69-3-115(e)(2) (providing opportunity for citizen to institute or intervene in enforcement action).

\bibitem{160} See \textit{Jones II}, 224 F.3d at 524 (pointing out that plaintiff has forty-five day period to intervene when consent judgment is entered and filed with chancery court).

\bibitem{161} See 33 U.S.C. § 1319(g)(4)(C) (requiring that if no hearing is held before issuance of order, any person who previously commented at meeting may petition within thirty days of order to set aside order and to provide hearing on penalty). The forty-five day period to intervene available under Tennessee statutory law is basically the same procedure available under CWA. See TENN. CODE ANN. § 69-3-115(e)(2).

\bibitem{162} See \textit{Jones II}, 224 F.3d at 528 (Norris, J., dissenting) (stating that factual circumstances of case have nothing to do with determination of comparability). \textit{See Arkansas Wildlife}, 29 F.3d at 381 (stating that comparability test is whether state law contains penalty provisions which state may levy, has same overall enforcement goals as CWA, and provides meaningful opportunity to participate). The \textit{Arkansas Wildlife} court makes absolutely no mention of the facts of the particular case. \textit{See id.}

\bibitem{163} See \textit{Jones II}, 224 F.3d at 528 (Norris, J., dissenting) (claiming that majority has taken issue with specific actions of case rather than addressing whether statutes themselves are sufficiently similar).

\end{thebibliography}
ing the findings that the goals and penalties of the two acts are nearly identical.\textsuperscript{164} If the overall scheme of the two acts in question is aimed at correcting the same violations, thereby achieving the same goals, the acts should be presumed to be comparable.\textsuperscript{165} Certainly as in this case, where there is no evidence to suggest that an opportunity provided for under the CWA is not provided for under state law in some manner, it would be unreasonable to presume a lack of comparability.\textsuperscript{166}

D. A Summary

When faced with a citizen suit under the Clean Water Act, courts should give deference to agencies that have begun to work with a polluter to correct the situation by precluding citizen enforcement actions unless it is clear that the agency is making no progress towards the goals of restoring and maintaining the chemical, physical and biological integrity of the nation's waters.\textsuperscript{167} When determining if a state law is comparable to the Clean Water Act, courts should presume comparability if there is evidence that the opportunities provided for under CWA are provided for under state law in some manner and if the agency is permitted to assess penalties similar to those available under CWA.\textsuperscript{168}

VI. Impact

The Jones II decision is likely to have a resounding impact. In effect, the Sixth Circuit has evened the playing field among the circuits by embracing the Ninth circuit's narrow interpretation of § 1319(g)(6) in opposition to the First and Eighth Circuits' broad

\textsuperscript{164} See id. (claiming that majority has no basis for finding lack of comparability when it has not pointed to opportunities provided for under CWA that are not similarly provided for under TWQCA and related Tennessee statutes).

\textsuperscript{165} Compare Arkansas Wildlife, 29 F.3d at 381 (stating that state law need not contain precisely same public notice and comment provisions as CWA), with Sciuteate, 949 F.2d at 556 (claiming that comparability is determined by examining whether the state is authorized to assess penalties comparable to CWA, and that the state law and CWA are aimed at correcting same violations and achieving same goals).

\textsuperscript{166} See Jones II, 224 F.3d at 527 (Norris, J., dissenting) (contending that majority did not point out any opportunities provided for under CWA that were not similarly provided under Tennessee law).

\textsuperscript{167} For a discussion of the circuit split, and more specifically the approaches taken by the First and Eighth Circuits, see supra notes 25-83 and accompanying text.

\textsuperscript{168} See id.
interpretation.\textsuperscript{169} The obvious effect of reading the terms "diligently prosecuting" and "comparable state law" narrowly will be that more citizen suits will be permitted to proceed in spite of a government agency’s efforts to compel compliance by a polluter.\textsuperscript{170} This is undesirable for three reasons.

First, costly private actions may hinder environmental agencies by reducing the willingness of violators to cooperate with the government.\textsuperscript{171} A violator collaterally attacked by a private citizen suit while attempting to comply with an agency order would almost certainly have to divert resources from any attempts to comply with its permit in order to devote resources towards defending itself.\textsuperscript{172} A broader interpretation of \textsection 1319(g)(6) prevents excessive and duplicative punishment of polluters and remains faithful to CWA’s main goal of restoring and maintaining clean water.\textsuperscript{173} As long as an agency’s effort is furthering the “restoration and maintenance or the chemical, physical and biological integrity of [the] Nation’s water,” the purposes of CWA are served.\textsuperscript{174}

Second, private citizen suits will have the effect of disrupting the strategies employed by the state agency to effectuate compliance.\textsuperscript{175} As previously discussed, the agency, which has monitored

\textsuperscript{169} See Jones II, 224 F.3d at 523-24 (advocating narrow interpretation of \textsection 1319(g)(6) in agreement with Ninth Circuit and in opposition to First and Eighth Circuits). For a discussion of the circuit split prior to the Sixth Circuit’s decision in Jones II, see supra notes 32-81 and accompanying text.

\textsuperscript{170} Compare Jones II, 224 F.3d at 524 (permitting citizen suit to go forward based on narrow interpretation of section 1319(g)(6); Pendleton, 11 F.3d at 886-87 (permitting citizen suit to go forward based on narrow interpretation of diligent prosecution requirement), with Scituate, 949 F.2d at 558 (precluding citizen suit based on broad interpretation of diligent prosecution and comparability requirements); Arkansas Wildlife, 29 F.3d at 382 (precluding citizen enforcement action based on broad interpretation of 1319(g)’s comparability requirement).

\textsuperscript{171} See Cawley, supra note 7, at 190 (claiming that broad interpretation of section 1319(g)(6) acknowledges fact that private actions may have effect on willingness of violator to cooperate with government agency); see also Clauson, supra note 11, at 989 (claiming that allowing violators to be sued by citizens when working along with state agencies will discourage dischargers from cooperating with agencies).

\textsuperscript{172} See Cawley, supra note 7, at 190-91 (contending that collateral action by citizen may force polluter to divert resources towards defending itself).

\textsuperscript{173} See id. (noting that if government is working to curtail water pollution, purposes of CWA are served and citizen suits are unnecessary). See Clauson, supra note 11, at 989 (inferring that broader interpretation of section 1319 prevents discharges from being placed in double jeopardy).

\textsuperscript{174} See 33 U.S.C. \textsection 1251 (setting forth goals of federal CWA).

\textsuperscript{175} See Cawley, supra note 7, at 192 (characterizing Ninth Circuit’s decision to allow citizen suits to disrupt calculated enforcement strategies as mistake). See Clauson, supra note 11, at 989 (arguing that it would be odd for Congress to have intended that citizens may sue violator while EPA or state is working with violator).
and communicated with the violator before the pollution, and which has been authorized by Congress to conduct water pollution supervision, is in a far better position to create and implement strategies than the citizen, who has relatively little or no prior experience with the violator. This presumption is further supported by the Gwaltney Court’s observation that a citizen suit instituted subsequent to an agency’s decision to forgo civil penalties could severely curtail an agency’s discretion to enforce CWA. In sum, an agency is far more able to address the needs of the violator and the surrounding community when implementing a plan of action seeking to effectuate compliance. For this reason, these agencies very much deserve deference when it comes to the methods utilized to achieve compliance.

Finally, citizen suits may seriously interfere with effective government regulatory action because the initiation of such a suit cuts off the possibility of an agency enforcement action, which are the principal mechanisms available to regulators in achieving compliance by polluters. Citizen suits have the potential to force a government agency to utilize its limited public resources in addressing potentially trivial matters which may prove to be of limited importance in protecting the environment as a whole.

With two circuits now embracing the narrow interpretation of § 1319(g)(6), and two embracing the broad interpretation, it is clear that either the Congress or the Supreme Court must step in to clarify exactly what the terms “diligent prosecution” and “comparable state law” were meant to encompass the CWA preclusion of citizen suits is to be applied uniformly. It will be interesting to see if either of these institutions will take up this issue anytime in the near future.

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176. See Cawley, supra note 7, at 192 (pointing out that private citizens are relatively inexperienced in dealing with polluters).

177. See Gwaltney, 484 U.S. at 61 (proposing that citizen suit instituted after agency chose to forgo penalties would curtail agencies discretion to enforce CWA).

178. See Cawley, supra note 7, at 192 (claiming that best solution is compromise approach whereby agency is granted discretionary authority to enforce environmental regulations).

179. See Snook, supra note 4, at 313 (claiming that various private groups use citizen suits in manner which seriously interferes with government regulatory action).

180. See id. (contending that citizen suits have potential to waste government resources by forcing agency to address matters of little importance).