Adequate Agency Action? How Procedural Trends in Environmental Citizen Suit Litigation Prompt a Reconsideration of Deference and Presumptions of Diligence

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In 2016, the Third Circuit affirmed the dismissal of a nonprofit group's environmental citizen suit because it found that a government agency was already diligently prosecuting the defendant. The decision provided an important procedural precedent because it changed the standard by which agency prosecution is reviewed during a motion to dismiss. The case highlights the public health and safety concerns created when government enforcement fails to induce industry to comply with pollution laws. It also highlights the obstacles that citizen suits must overcome when attempting to fill the gaps with private enforcement efforts. This Note examines the Third Circuit's procedural ruling, and argues that courts should end the practice of presuming the diligence of agency enforcement during a motion to dismiss; instead, courts should make nonbiased, context-specific reviews of the adequacy of agency enforcement. This process will ensure that citizen suits are able to fulfill their role of stepping in when agency enforcement fails to protect public health and safety.

DOI: https://dx.doi.org/10.15779/Z38FF3M00R

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INTRODUCTION

"Complete deference to agency enforcement strategy, adopted and implemented internally and beyond public control, requires a degree of faith in bureaucratic energy and effectiveness that would be alien to common experience."[1]

Environmental citizen suits have been viewed with both admiration and hostility. On the one hand, they provide the vigilant monitoring needed to prevent environmental regulations from being thwarted by inadequate enforcement.[2] Each citizen suit is an opportunity for public oversight and participation in the regulatory process. On the other hand, critics argue that officious citizen enforcers have a tendency to push for penalties that are too harsh, and may undermine an agency's own enforcement efforts.[3] Citizen

1. Gardeski v. Colonial Sand & Stone Co., 501 F. Supp. 1159, 1168 (S.D.N.Y. 1980).

2. Matthew D. Zinn, *Policing Environmental Regulatory Enforcement: Cooperation, Capture, and Citizen Suits*, 21 STAN. ENVTL. L.J. 81, 84 (2002).

3. *Id.*

enforcement may even have the potential to discourage firms from investing in productive cooperation with agency regulators.[4]

Environmental statutes entrust courts with the duty of balancing between an unnecessarily intermeddling citizen suit and one that can correct failures in the regulatory process. At the center of this Note is a recent case in which the Third Circuit was tasked with determining whether to let a citizen suit proceed in the face of ongoing agency enforcement efforts. The case highlights the obstacles that exist for local communities that organize to bring citizen suits.

In 2014, Group Against Smog and Pollution (GASP), a nonprofit environmental organization with a focus on air quality in the Pittsburgh area, filed a complaint in federal court against Shenango, Inc., the operator of a coke manufacturing and by-products recovery facility located in Allegheny County, Pennsylvania.[5] The suit, *Group Against Smog and Pollution v. Shenango*, sought relief for the communities neighboring the Shenango plant, which had long suffered from exposure to poor air quality.[6]

Despite improvements over previous years, the American Lung Association's 2014 annual air quality report gave Allegheny County an F grade, and its director of environmental health said that it was still not close to receiving a passing grade.[7] The county failed to meet Clean Air Act (CAA) standards for ground-level ozone, and it numbered among the 3 percent of U.S. counties that have failed to meet multi-year standards for fine particulate pollution.[8] In particular, the residential communities downwind of the Shenango plant were considered an ongoing "hot spot" of poor air quality.[9]

The Shenango plant's history of air pollution violations dated back over three decades, and created a conflicted relationship with neighboring residents.[10] On the one hand, the plant employed nearly 200 workers, brought revenue to the area, and annually produced approximately 380,000 tons of coke

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4. *Id.*

5. Grp. Against Smog & Pollution v. Shenango Inc., 810 F.3d 116, 119–20 (3d Cir. 2016).

6. *See* Grp. Against Smog & Pollution v. Shenango Inc., No. 14-595, 2015 U.S. Dist. LEXIS 38526 (W.D. Pa. Mar. 26, 2015); Don Hopey, *Avalon Supplants Clairton for Dirtiest Air: Highest Average Annual Airborne Particle Concentrations in County*, PITTSBURGH POST-GAZETTE (Nov. 22, 2011, 12:00 AM), http://www.post-gazette.com/neighborhoods-north/2011/11/22/Avalon-supplants-Clairton-for-dirtiest-air/stories/201111220195 [hereinafter *Avalon*].

7. Don Hopey, *Pittsburgh Region Still Gets Poor Marks for Air Pollution*, PITTSBURGH POST-GAZETTE (Apr. 29, 2014, 11:25 PM), http://www.post-gazette.com/news/health/2014/04/30/Air-pollution-Pittsburgh-American-Lung-Association/stories/201404300135.

8. *Allegheny County's Health: An Interview with Dr. Karen Hacker*, CMTY. FORUM (The Pittsburgh Found., Pittsburgh, PA) Fall 2014, at 1, 6, https://pittsburghfoundation.org/sites/default/. . ./FORUM%20Fall%202014%20Fall.pdf.

9. David Templeton & Don Hopey, *Post-Gazette Series Sparks Debate About Air Pollution*, PITTSBURGH POST-GAZETTE (Apr. 22, 2011, 8:00 AM), http://www.post-gazette.com/environment/2011/04/22/Post-Gazette-series-sparks-debate-about-air-pollution/stories/201104220202.

10. Don Hopey, *Bellevue Businesses Push for Shenango Coke Plant to Meet Air Standards or Close*, PITTSBURGH POST-GAZETTE (Mar. 21, 2014, 12:05 AM), http://www.postgazette.com/local/west/2014/03/20/Businesses-push-for-Shenango-cokes-to-meet-air-standards-or-close/stories/201403200272 [hereinafter *Bellevue*].

products[11]—an important component in the steel manufacturing industry. On the other hand, the coke plant emitted toxic industrial byproducts on residential communities, causing serious health concerns for area residents and their families.[12] The Western Pennsylvania director for Clean Water Action, which monitored the Shenango Plant, called its history "unconscionable," and noted that 30 percent of school children in one community downwind of the plant suffered from asthma.[13] High cancer rates downwind of the plant have also been attributed to its toxic emissions.[14] The president of a local business association called the poor air quality both "a business and health issue," because the pollution made it difficult to attract new businesses to the area.[15]

Federal and local government agency action resulted in consent decrees with Shenango in 1980, 1993, 2000, 2005, and 2012.[16] Despite paying millions of dollars in fines and being required to reduce illegal emissions from its coke ovens,[17] the plant failed to reliably comply with the law. GASP's suit came on the heels of a 2012 consent decree, which, as a result of a settlement with Shenango, assessed a $1.75 million penalty and again required measures to reduce emissions.[18] Despite the settlement, the plant continued to exceed emissions standards, and was found to be in violation of county air quality standards on 330 days in a 432-day period ending in late 2013.[19] Local residents were frustrated as one settlement after another failed to bring the plant into compliance with the law.[20]

A provision of the CAA allows citizens to sue a polluter to enforce the Act if the government is not already "diligently prosecuting" the same violations.[21] On February 6, 2014, following the requirements of the citizen suit provision, GASP delivered sixty days' notice to Shenango of its intent to sue.[22] In the notice, GASP cited Shenango's repeated violations of five different CAA limitations.[23] On April 7, 2014, fifty-nine days after notice was delivered, the Allegheny County Health Department (ACHD) filed a complaint against Shenango in state court for violations of the CAA. On the same day, ACHD and Shenango presented a settlement agreement, which was signed by the court, and resulted in a consent order and agreement between the parties.[24]

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11. *See Avalon*, *supra* note 6.
12. *Id.*
13. *Id.*
14. Templeton & Hopey, *supra* note 9.
15. *Bellevue*, *supra* note 10.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. 42 U.S.C. § 7604(b)(1)(B) (2012).
22. Complaint at 7, Grp. Against Smog and Pollution v. Shenango Inc., 810 F.3d 116 (3d Cir. 2016) (No. 15-2041).
23. *Id.*
24. *Id.*

GASP determined that although the consent order and agreement addressed some of the five categories of violations it sought to enforce, it did not address all of them, and ultimately was not enough to compel Shenango to cease violating emissions limitations.[25] As a result, GASP proceeded with its suit against Shenango by filing a complaint in federal court on May 8, 2014.[26]

GASP's case did not make it past the pleading stage. The district court did not reach the merits of the claim, but rather held that it did not have the authority to hear the claim because of a lack of subject-matter jurisdiction.[27] The court's reasoning for this decision was based on its finding that ACHD was already "diligently prosecuting" an action against Shenango.[28] When GASP appealed, the Third Circuit affirmed the district court's decision, albeit on other grounds.[29]

Shenango's long history of noncompliance illustrates the limitations of the CAA in protecting communities from the harmful effects of air pollution. Frequently, government enforcement of the CAA does not result in compliance with emissions standards, and citizen suits are not always capable of navigating past the statutory restrictions placed on them. However, judicial interpretations of citizen suit provisions have constructed additional barriers, which make it difficult for citizen suits to proceed.[30]

In *GASP*, both the district court and the Third Circuit evaluated whether the ACHD's enforcement actions were *diligent*, because the CAA bars a citizen suit from proceeding only if an agency is already "diligently prosecuting" an action. However, both courts inserted a deferential standard into this evaluation by presuming ACHD's diligence, rather than conducting a nonbiased review of the agency's efforts to bring Shenango into compliance. This Note will examine the merit of using a deferential standard and how it fits—or does not fit—within recent procedural trends in citizen suit cases, and compare the deference standard to that used in other areas of law.

Part I discusses the history of the CAA's citizen suit provision and the device within the provision that restricts citizen suits when agencies are already diligently prosecuting an alleged violator. Part II examines the diligent prosecution bar within the context of the Federal Rules of Civil Procedure, and

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25. *Id.*

26. *Id.*

27. Grp. Against Smog & Pollution v. Shenango Inc., No. 14-595, 2015 U.S. Dist. LEXIS 38526, at *17 (W.D. Pa. Mar. 26, 2015).

28. *Id.* at *10.

29. Grp. Against Smog & Pollution v. Shenango Inc., 810 F.3d 116, 119, 128 (3d Cir. 2016). While the district court dismissed GASP's case for lack of subject-matter jurisdiction, the Third Circuit affirmed the dismissal for failure to state a claim. *Id.* at 119–20. This distinction will be discussed at length in Parts II–IV.

30. *See* Jeffrey G. Miller, *Theme and Variations in Statutory Preclusions Against Successive Environmental Enforcement Actions by EPA and Citizens: Part One: Statutory Bars in Citizen Suit Provisions*, 28 HARV. ENVTL. L. REV. 401, 407–08 (2004).

argues that the presumption of an agency's diligence is not appropriate in light of the Third Circuit's procedural holding in *GASP*.

Part III discusses the background of the *GASP* case and the ways in which the district and circuit courts' analyses differed. It argues that the district court's use of a presumption of diligence is incompatible with the circuit court's procedural ruling, yet the circuit court failed to make a substantive change in the diligent prosecution analysis to correct for the procedural change.

Part IV further discusses the presumption as applied to the diligent prosecution analysis. It tracks the origins of the presumption and sheds light on the apparent indistinguishability between a "presumption" of diligence and that same presumption clothed in the language of "deference." It examines the trend of the courts generally moving towards the Third Circuit's procedural ruling in *GASP*, and urges courts to reject a deferential standard when deciding a motion to dismiss based on the diligent prosecution bar.

Part V provides an example of how courts have rejected a similar presumption used in the context of employment law in favor of an independent context-specific scrutiny of a complaint. It shows how an alternative model for analysis, although more time-intensive for courts, is sometimes necessary for proper adjudication of a plaintiff's claim.

Lastly, Part VI discusses the advantages and disadvantages of a deference standard beyond the context of a motion to dismiss, and cautions against treating all citizen suits equally when examining the merits of a deferential standard.

I. CITIZEN SUITS AND THE DILIGENT PROSECUTION BAR

When Congress enacted a wave of environmental statutes in the 1970s, it did so to remedy both inadequate pollution control laws and their ineffective implementation and enforcement.[31] In response to growing public awareness of and concern for the environment, a bipartisan coalition in Congress enacted comprehensive environmental legislation with vigorous enforcement as a priority.[32] Given the breadth of jurisdictions regulated by the new law, exclusive federal enforcement of the measures was neither practical nor achievable.[33] Accordingly, the major federal environmental statutes provide uniform, minimum national standards with the states deputized, to a greater or lesser degree, to enforce the laws.[34] However, past experience left Congress

31. *See id.* at 407–08; *see, e.g.*, William L. Andreen, *The Evolution of Water Pollution Control in the United States—State, Local, and Federal Efforts, 1789–1972, Part I*, 22 STAN. ENVTL. L. J. 145, 194–99 (2003) (describing state and local government's failure to implement and enforce water pollution control legislation leading up to the Clean Water Act of 1972).

32. *See* Miller, *supra* note 30, at 407–08.

33. David Hodas, Symposium, *Environmental Federalism: Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority is Shared by the United States, the States, and their Citizens?*, 54 MD. L. REV. 1552, 1571 (1995).

34. *Id.*

with little confidence that federal and state authorities would be capable of achieving the optimal level of compliance with the new laws. To ensure a more robust enforcement regime, Congress created an innovative addition that includes members of the interested public in the framework: the citizen suit.[35] The result was the creation of a three-part enforcement framework involving the federal government, the states, and private citizens.

The first citizen suit provision appeared in the 1970 CAA and became the model for citizen suit provisions incorporated into almost every major federal environmental statute.[36] The CAA's citizen suit provision authorizes any person to bring a civil action against an alleged violator of the Act's emissions standards or limitations.[37] Citizen suits "tap into private citizens' interest, knowledge, and resources" to achieve higher levels of compliance than state and federal government alone could accomplish.[38]

Although empowering citizen plaintiffs provides for more enforcement options, Congress recognized that it could also interfere with government enforcement if it allowed successive enforcement actions against polluters for the same violations.[39] In order to limit the instances of duplication and conflict that might result, it developed a multi-part preclusion device, known as the "diligent prosecution bar."[40] The device ensures "that a defendant not be subjected simultaneously to multiple suits, and potentially conflicting court orders, to enforce the same statutory standard."[41] The CAA's diligent prosecution bar requires three elements: (1) a notice of violation, (2) a delay between the notice and commencement of the citizen suit, and (3) a bar on the suit if a government enforcer is already *diligently prosecuting* an action in court.[42] While the diligent prosecution bar raises several important issues, this

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35. *See* Miller, *supra* note 30, at 408.

36. 42 U.S.C. § 7604 (2012) (Clean Air Act's citizen suit provision); In addition to the Clean Air Act, almost all major federal environmental statutes contain similar citizen suit provisions, including the following pollution control statutes: Clean Water Act, 33 U.S.C. §§ 1250–1387 (2012); Resource Conservation & Recovery Act, 42 U.S.C. §§ 6901–6992(k) (2012); Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§9601–9675 (2012); Toxic Substances Control Act, 15 U.S.C. §§ 2601–2692 (2012); Safe Drinking Water Act, 42 U.S.C. §§ 300(f)–300(j) (2012); Marine Protection, Research, and Sanctuaries Act, 33 U.S.C. §§ 1401–1405 (2012); Emergency Planning and Community Right to Know Act, 42 U.S.C. §§ 11001–11050 (2012).

37. 42 U.S.C. § 7604(a)(1).

38. HOLLY DOREMUS, ALBERT LIN & RONALD ROSENBERG, ENVIRONMENTAL POLICY LAW 894–906 (6th ed. 2012).

39. Miller, *supra* note 30, at 407.

40. *Id.* at 492–93.

41. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 890 F. Supp. 470, 485 (D.S.C. 1995).

42. Miller, *supra* note 30, at 409; The CAA's diligent prosecution bar provides:

> No action may be commenced . . . (A) prior to 60 days after the plaintiff has given notice of the violation (i) to the Administrator, (ii) to the State . . . , and (iii) to any alleged violator . . . and to the "alleged violator . . . or (B) if the Administrator or State has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any person may intervene as a matter of right.

Note narrowly focuses on what constitutes a *diligent* prosecution and the standards courts should use to determine diligence.

The Third Circuit decision in *GASP* provides an analysis of the diligent prosecution bar during the pleading stage, which illustrates the conflict that arises when a presumption of diligence is needlessly injected into that analysis. This conflict becomes more apparent in light of the Third Circuit's procedural holding in *GASP*.

II. DILIGENT PROSECUTION AND THE FEDERAL RULES OF CIVIL PROCEDURE

The primary procedural issue decided by the Third Circuit in *GASP* was whether the diligent prosecution bar was a claims-processing rule or a jurisdictional bar.[43] This distinction matters because as a claims-processing rule, a motion to dismiss is analyzed under Federal Rule of Civil Procedure 12(b)(6), which provides a more favorable standard for citizen groups trying to bring actions against polluters than the standard for subject-matter jurisdiction, analyzed under Federal Rule of Civil Procedure 12(b)(1). In *GASP*, the Third Circuit rejected the district court's determination that the diligent prosecution bar was jurisdictional and instead held that it was a claims-processing rule; thus, it reviewed GASP's claim under Rule 12(b)(6).[44] The following subpart provides an overview of the federal pleading rules and their relevance to *GASP*.

A. The Federal Rules of Civil Procedure: Pleadings

The Federal Rules of Civil Procedure's pleading rules typify two basic values: procedural simplicity and facilitation of a speedy resolution of the litigation on the merits.[45] Rule 8(a)(2) requires that a plaintiff's complaint contain a "short and plain statement of the claim showing that the pleader is entitled to relief."[46] Thus, the function of a plaintiff's complaint is to inform the defendant and the court of the nature of his or her claims and of the relief sought.[47] Rule 8 is not intended to reach the merits of a plaintiff's claim, but rather provides a simplified notice pleading standard which "relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims."[48]

A defendant may attack the sufficiency of a plaintiff's complaint by asserting a motion to dismiss under Federal Rule of Civil Procedure 12(b).[49] Rule 12(b) provides seven defenses, two of which are relevant to the *GASP*

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§ 7604(b)(1).

43. Grp. Against Smog & Pollution v. Shenango Inc., 810 F.3d 116, 121–22 (3d Cir. 2016).

44. *Id.* at 122–23.

45. 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER ET AL., FEDERAL PRACTICE & PROCEDURE § 1182 (3d ed. 2017).

46. FED. R. CIV. P. 8(a)(2).

47. *See* WRIGHT & MILLER ET AL., *supra* note 45.

48. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 585 (2007).

49. FED. R. CIV. P. 12(b).

litigation. A motion under Rule 12(b)(1) asserts that the claim lacks subject-matter jurisdiction, and a motion under Rule 12(b)(6) asserts that the plaintiff has failed to state a claim upon which relief may be granted.[50]

A court's analysis of whether to grant a defendant's motion to dismiss will differ markedly under the two rules, both procedurally and substantively. Procedurally, Rule 12(b)(1) allows either party to raise an objection that a federal court lacks subject-matter jurisdiction at any stage in the litigation.[51] Furthermore, if a court finds that it lacks subject-matter jurisdiction, it is *required* to dismiss the action on its own initiative *at any time* during the proceedings, even after trial and the entry of judgment.[52] By contrast, a Rule 12(b)(6) motion for failure to state a claim must be made before the responsive pleading, and may not be asserted for the first time at a later stage.[53] Substantively, Rule 12(b)(1) determines whether the court has the authority to hear the plaintiff's claim, and Rule 12(b)(6) determines whether a cognizable legal claim has been stated.[54]

The standards for reviewing the sufficiency of a complaint under Rule 12(b)(6) and Rule 12(b)(1) also differ substantially and have important practical implications. Rule 12(b)(6) provides a much more favorable standard for plaintiffs than does Rule 12(b)(1).[55] Under Rule 12(b)(6), the *defendant* bears the burden of showing that the plaintiff has not stated a claim; under Rule 12(b)(1), the *plaintiff* bears the burden of proving that the court has subject-matter jurisdiction.[56] The two rules also treat the complaint's factual allegations very differently.[57] Under Rule 12(b)(6), the district court is required to accept all well-pleaded facts in the complaint as true and view those facts in the light most favorable to the plaintiff.[58] However, under Rule 12(b)(1), the court is not obliged to accept the assertions in the complaint as true and may make factual findings.[59]

In the district court, Shenango moved to dismiss GASP's complaint both for lack of subject-matter jurisdiction and for failure to state a claim upon which relief may be granted, pursuant to Rules 12(b)(1) and 12(b)(6).[60] While the district court granted Shenango's motion based on a lack of subject-matter

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50. *Id.* at 12(b)(1), (6).

51. Arbaugh v. Y & H Corp., 546 U.S. 500, 506–07 (2006).

52. *Id.*

53. 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER ET AL., FEDERAL PRACTICE AND PROCEDURE § 1357 (3d ed. 2007) ("Technically . . . a post-answer Rule 12(b)(6) motion is untimely and the cases indicate that some other vehicle, such as a motion for judgment on the pleadings or for summary judgment, must be used to challenge the plaintiff's failure to state a claim for relief.").

54. 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER ET AL., FEDERAL PRACTICE AND PROCEDURE § 1350 (3d ed. 2007).

55. Hartig Drug Co. v. Senju Pharm. Co., 836 F.3d 261, 268 (3d Cir. 2016).

56. *Id.*

57. *Id.*

58. La. Envtl. Action Network v. City of Baton Rouge, 677 F.3d 737, 745 (5th Cir. 2012).

59. *Id.*

60. Grp. Against Smog & Pollution v. Shenango Inc., 810 F.3d 116, 121 (3d Cir. 2016).

jurisdiction, the Third Circuit ultimately rejected the diligent prosecution bar as a jurisdictional rule. This decision has many positive benefits for environmental plaintiffs; significantly, plaintiffs can now rest assured that resources will not be wasted as a case proceeds to trial only to have their claim dismissed at a later stage. However, the other anticipated benefit—the shift to the plaintiff-friendly standard under Rule 12(b)(6)—was negated by the *GASP* court's deference to the government's course of action when determining whether diligent prosecution existed.

III. *GASP V. SHENANGO* AND THE PRESUMPTION OF DILIGENT PROSECUTION

This Part provides additional background for the *GASP* litigation, describes how the district court and the appellate court reached their decisions, and examines their application of the diligent prosecution analysis.

A. Factual Background

In 2012, the EPA, the Pennsylvania Department of Environmental Protection (DEP), and ACHD filed an action in the U.S. District Court for the Western District of Pennsylvania against Shenango, alleging the company violated CAA standards.[61] The parties entered into a consent decree to resolve the violations, and the district court entered a final judgment on the action while retaining jurisdiction "for the purpose of modifying, construing and/or enforcing the rights and obligations" of the parties.[62]

Two years later, in 2014, GASP provided Shenango with a sixty-day notice of intent to sue based on ongoing CAA violations.[63] Within the sixty-day period, ACHD filed a new action in state court against Shenango to address the violations alleged in GASP's complaint.[64] At the same time, the parties presented the court with a consent order and agreement, intended to settle those claims.[65] The consent order and agreement affirmed the 2012 consent decree and was to be terminated upon full compliance with CAA standards.[66] Subsequently, the state court entered a final judgment, but retained authority with respect to future violations and to "seek further enforcement of [the] Agreement if Shenango fail[ed] to comply."[67] Nevertheless, GASP filed a citizen suit against Shenango shortly thereafter.[68]

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61. *Id.* at 120.
62. *Id.* at 120–21.
63. *Id.* at 121.
64. *Id.*
65. *Id.*
66. *Id.* The 2012 consent decree and 2014 consent order and agreement will hereafter collectively be referred to as the "Consent Decrees."
67. *Id.*
68. *Id.*

B. The District Court's Use of a "Heavy Presumption" of Diligence

Shenango moved to dismiss GASP's complaint for lack of subject-matter jurisdiction and for failure to state a claim upon which relief may be granted, pursuant to Rules 12(b)(1) and 12(b)(6).[69] The district court proceeded on the assumption that the diligent prosecution bar was jurisdictional, and thus conducted an analysis following the standard under Rule 12(b)(1) to determine whether the court lacked subject-matter jurisdiction.[70] The court stated that because the "issue presents a factual challenge to this Court's jurisdiction, 'the court is neither confined to the allegations in the complaint nor bound to presume their truth.'"[71] When making its jurisdictional determination, the court relied on a "heavy presumption" that ACHD's prosecution was diligent.[72]

Based on this heavy presumption of diligence, the court stated that the relevant test was whether the prosecution was "totally unsatisfactory."[73] It explained that in order to rebut the presumption of diligence, the plaintiff must present "persuasive evidence that the state has engaged in a pattern of conduct that could be considered dilatory, collusive, or otherwise in bad faith."[74] Applying this test, the court outlined various indicia of diligence, including whether the agency's action sought or required compliance, whether there was ongoing monitoring or enforcement, the possibility that the alleged violations will continue, and the severity of penalties imposed compared to the economic benefits of noncompliance.[75] The court determined that GASP's evidence of persistent ongoing violations occurring despite the government's enforcement actions was insufficient to rebut the presumption.[76] Based on its factual analysis of the complaint and the contents of the Consent Decrees, the court granted Shenango's motion to dismiss for lack of subject-matter jurisdiction.[77]

C. The Third Circuit's Use of "Great Deference" to Agency Actions

GASP appealed the district court's order, arguing that the Consent Decrees do not require compliance with the CAA.[78] In an amici brief, several environmental nonprofit organizations argued that the district court erred both

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69. *Id.*

70. *Id.*; Grp. Against Smog & Pollution v. Shenango Inc., No. 14-595, 2015 U.S. Dist. LEXIS 38526, at *5–7 (W.D. Pa. Mar. 26, 2015).

71. Grp. Against Smog & Pollution v. Shenango Inc., No. 14-595, 2015 U.S. Dist. LEXIS 38526, at *5–6 (W.D. Pa. Mar. 26, 2015).

72. *Id.* at *6 (internal citations omitted).

73. *Id.* at *6–7 (internal citations omitted).

74. *Id.* at *7 (internal citations omitted).

75. *Id.* at *10.

76. *Id.* at *11–12.

77. Grp. Against Smog & Pollution v. Shenango Inc., 810 F.3d 116, 121 (3d Cir. 2016).

78. *Id.*

in assuming that the diligent prosecution bar was jurisdictional and in relying on a "heavy presumption" of diligence.[79]

The Third Circuit first determined that the diligent prosecution bar is not jurisdictional, but is instead a claim-processing rule.[80] Accordingly, the court reviewed the complaint under Rule 12(b)(6) to determine whether the agency's actions constituted "diligent" prosecution sufficient to bar a citizen suit.[81]

The determinative factor as to the diligence of the prosecution was whether the Consent Decrees "'require[d] compliance with the standard, limitation, or order' of the Act."[82] GASP alleged that they did not require compliance. GASP referred to the complaint's factual allegations that the Shenango plant continued to violate the CAA after the 2012 consent decree went into effect, and that the 2014 consent order and agreement required no additional remedial actions from Shenango.[83] However, the court noted that "the government's prosecution is entitled to great deference," and held that the Consent Decrees addressed the violations alleged in GASP's complaint.[84] The court stated that to conclude that these agreements do not require compliance with the Act would "contradict the accepted practice of giving deference to the diligence of the agency's prosecution."[85] Thus, the court held that the Consent Decrees required compliance with the CAA and that GASP failed to state a claim, because the government diligently prosecuted all of the violations alleged by GASP.[86] It affirmed the district court's order granting Shenango's motion to dismiss.[87]

IV. THE PRESUMPTION OF DILIGENCE IN ENVIRONMENTAL CITIZEN SUITS

Many courts considering whether agency prosecution is diligent have grounded their analyses on a presumption that the state has acted diligently. Subpart A provides some insight into the origin and development of this presumption in federal courts. Subpart B describes the Third Circuit's omission of any presumption language, but notes that this produced no substantive change in the court's analysis. Subpart C explains how courts generally reject the presumption at the motion to dismiss stage of litigation. Lastly, subpart D explains how the Third Circuit's decision is part of a greater procedural trend,

79. Brief of Sierra Club et al. as Amici Curiae in Support of Plaintiffs-Appellants and in Support of Reversal at *18–19, Grp. Against Smog & Pollution v. Shenango Inc., 810 F.3d 116 (3d Cir. 2016) (No. 15-2041).

80. Grp. Against Smog & Pollution v. Shenango Inc., 810 F.3d 116, 123 (3d Cir. 2016).

81. *Id.* at 123, 130.

82. *Id.* at 130.

83. *Id.* at 130–31.

84. *Id.* at 130.

85. *Id.* at 131.

86. *Id.* at 130–32.

87. *Id.* at 132.

and stresses the importance of establishing the proper standard for reviewing the diligent prosecution bar as a claims processing rule moving forward.

A. Origins of the Presumption

In a number of federal jurisdictions, at both the trial and appellate level, support for the presumption of diligence can be traced back to a common origin. In *Connecticut Fund for the Environment v. Contract Plating Co.*, a Connecticut district court held that a "court must presume the diligence of the state's prosecution . . . absent persuasive evidence that the state has engaged in a pattern of conduct . . . that could be considered dilatory, collusive or otherwise in bad faith."[88] Although the *Connecticut Fund* court provided no explanation or support for the presumption, federal courts in a number of jurisdictions, including the district court in *GASP*, have used its conclusory assertion to support the presumption standard.[89]

In *Friends of Milwaukee's Rivers v. Milwaukee Metropolitan Sewerage District*, the Seventh Circuit, relying upon the Connecticut decision, attempted to find support for the presumption in the context of the Clean Water Act (CWA). The court "surmise[d] that this presumption is due not only to the intended role of the State as the primary enforcer of the [CWA] . . . but also to the fact that courts are not in the business of designing, constructing[,] or maintaining sewage treatment systems."[90] The *Friends of Milwaukee's Rivers* decision was based on the assumption that the diligent prosecution bar was a jurisdictional rule.[91] However, even with the presumption of diligence in place, the Seventh Circuit held that a diligence analysis "requires more than mere acceptance at face value of the potentially self-serving statements of a state agency and the violator;" it should also determine whether the agency's action "is capable of requiring compliance with the Act and is in good faith calculated to do so."[92] This illustrates how even when the presumption is used, courts differ in the degree to which they rely on the presumption to supplant a context-specific analysis of the agency's actions.

In *GASP*, both the district court and the Third Circuit relied on a presumption of diligence in their analyses of the diligent prosecution bar, although they used different language to do so. At the district court level, the court referred to the "heavy presumption" of diligence and made clear that the

88. Conn. Fund for the Env't v. Contract Plating Co., 631 F. Supp. 1291, 1293 (D. Conn. 1986).

89. *Id.* For cases citing *Connecticut Fund*, see Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewerage Dist., 382 F.3d 743, 760 (7th Cir. 2004); Grp. Against Smog & Pollution v. Shenango Inc., No. 14-595, 2015 U.S. Dist. LEXIS 38526, at *6 (W.D. Pa. Mar. 26, 2015); Borough of Upper Saddle River v. Rockland County Sewer Dist. #1, 16 F. Supp. 3d 294, 322 (S.D.N.Y. 2014); N. Cal. River Watch v. Humboldt Petroleum, Inc., No C-00-1329 VRW, 2000 U.S. Dist. LEXIS 15939, at *6 (N.D. Cal. Oct. 30, 2000).

90. *Friends of Milwaukee's Rivers*, 382 F.3d at 760 (internal citations omitted).

91. *Id.*

92. *Id.*

plaintiff bore the burden of overcoming the presumption by presenting "persuasive evidence" of nondiligence.[93] The Third Circuit rejected the district court's "presumption" language and replaced it with "great deference" to the agency's diligence.[94] However, the essential substantive standard remained the same.

This Note argues that the Third Circuit's decision to replace the presumption standard was not accidental, but rather indicated the court's acknowledgment that the presumption of diligence is not appropriate when assessing a motion to dismiss for failure to state a claim. The Third Circuit received appellate briefs from both the defendant and the plaintiff's amici, which identified this issue and presented arguments for or against it. The brief of the appellee, Shenango, stated:

> GASP's complaint fails to allege sufficient facts to show a plausible claim that would overcome the heavy presumption of diligence that courts accord to agency prosecutions. *See, e.g., Atl. States Legal Found., Inc. v. Hamelin*, 182 F. Supp.2d 235, 246 (N.D.N.Y.) (noting that the presumption applies in a Rule 12(b)(6) motion). Therefore, if the trial court had evaluated GASP's complaint under FRCP 12(b)(6), it would have reached the same result.[95]

It should be noted that this assertion is not supported by the case Shenango cites. The *Hamelin* opinion was decided on a motion for summary judgment, not a motion to dismiss.[96] Furthermore, nowhere in the *Hamelin* opinion does the court state that the presumption applies to a Rule 12(b)(6) motion.[97]

In contrast, the amicus brief filed on behalf of GASP stressed that the presumption ignores the factual inquiries required to properly assess diligence.[98] For example, it noted that calculating the economic benefit of noncompliance was necessary to determine if penalties assessed were adequate—a task which likely requires discovery. In contrast to Shenango's brief, the amicus brief argued that even if the presumption of diligence standard was appropriate, controlling case law dictates that "presumptions . . . should not be applied to motions to dismiss."[99]

Ultimately, the Third Circuit tacitly rejected the district court's "presumption" language by replacing it with "deference."[100] The Third Circuit's elimination of the presumption language used in the district court

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93. Grp. Against Smog & Pollution v. Shenango Inc., No. 14-595, 2015 U.S. Dist. LEXIS 38526, at *7 (W.D. Pa. Mar. 26, 2015) (internal citations omitted).

94. Grp. Against Smog & Pollution v. Shenango Inc., 810 F.3d 116, 130 (3d Cir. 2016) (citing Karr v. Hefner, 475 F.3d 1192, 1197–98 (10th Cir. 2007)).

95. Brief of Appellee Shenango, Inc. at *57, Grp. Against Smog & Pollution v. Shenango Inc., 810 F.3d 116 (3d Cir. 2016) (No. 15-2041).

96. Atl. States Legal Found., Inc. v. Hamelin, 182 F. Supp. 2d 235, 248–49 (N.D.N.Y. 2001).

97. *See id.*

98. Brief of Sierra Club et al., *supra* note 79, at *18.

99. *Id.*

100. Grp. Against Smog & Pollution v. Shenango Inc., 810 F.3d 116, 130–31 (3d Cir. 2016).

indicates that it was a conscious decision that recognized the incompatibility of such a presumption with the 12(b)(6) standards.

B. Distinguishing between the "Presumption" and "Deference"

In *GASP*, the Third Circuit appears to have accepted both arguments made by environmental nonprofit amici: that the diligent prosecution bar is nonjurisdictional and that government enforcement is not entitled to a heavy presumption of diligence. However, the anticipated benefit of applying the more plaintiff-friendly standard of Rule 12(b)(6) was negated by the appellate court's continued reliance on a bias in favor of the defendant's argument that diligent prosecution exists.

The Third Circuit's application of a deference standard in *GASP* produced no substantive change in analysis from that of a presumption of diligence. This is apparent in the court's continued reliance on and citation to other cases that used the presumption. For example, to support its deference standard, the court cited *Karr v. Hefner*, a Clean Water Act (CWA) case in which the court dismissed a plaintiff's claim for lack of subject-matter jurisdiction. The *Karr* court reasoned that the plaintiff bears the burden of proving nondiligence both because the "agency's diligence is presumed" and because the agency "must be given great deference" to act in the best interest of the parties.[101] The Third Circuit cited *Piney Run Preservation Association v. County Commissioners*, a Fourth Circuit decision which used both presumption and deference language interchangeably in dismissing a CWA citizen suit for lack of subject-matter jurisdiction.[102] The Third Circuit also cited the deference standard used in *North & South Rivers Watershed Association v. Scituate*,[103] a CWA case decided on a motion for summary judgment.[104]

GASP illustrates the inherent conflict in using a deference standard when reviewing a motion to dismiss under Rule (12)(b)(6). When a complaint is attacked for failure to state a claim, a court must determine if the complaint itself contains "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face."[105] GASP's complaint contained factual allegations of Shenango's continued noncompliance with the CAA to support its claim that the Consent Decrees did not require compliance. The Third Circuit found that, after a factual analysis of the content of the Consent Decrees

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101. Karr v. Hefner, 475 F.3d 1192, 1197–98 (10th Cir. 2007). The *Karr* court supported its deference to the agency's action on the plaintiff's right to intervene in the agency's action and to object to the consent decree during the thirty-day public-comment period provided by the CWA, not required under the CAA. *Id.* at 1995.

102. Grp. Against Smog & Pollution v. Shenango Inc., 810 F.3d 116, 130 (3d Cir. 2016) (citing Piney Run Pres. Ass'n v. Cty. Comm'rs, 523 F.3d 453, 459 (4th Cir. 2008)).

103. *Id.* (citing N. & S. Rivers Watershed Ass'n v. Town of Scituate, 949 F.2d 552, 557 (1st Cir. 1991)).

104. *N. & S. Rivers Watershed Ass'n*, 949 F.2d at 553, 557.

105. Ashcroft v. Iqbal, 556 U.S. 662, 677–78 (2009) (internal citations omitted).

and the allegations in the complaint, "[o]n balance, the 2012 and 2014 [Consent Decrees] demonstrate that ACHD is in the process of diligently prosecuting" the violations.[106] The court did not state whether the plaintiff bore the burden of proving nondiligence in its complaint, or whether the defendant was required to present diligent prosecution as a defense. However, the court's reliance on the complaint and attached documents suggests it assumed the plaintiff holds the burden of proving nondiligence. If the court had actually abandoned the presumption of diligence, it follows that the plaintiff's burden of providing persuasive evidence of nondiligence would have also been eliminated. However, in *GASP*, the Third Circuit still looked to the plaintiff's complaint for allegations of nondiligence, and finding the allegations unpersuasive, held that the agency's prosecution was diligent as a matter of law.[107]

As the district court relied on a presumption of diligence and required the plaintiff to provide "persuasive evidence"[108] to rebut the presumption, the Third Circuit relied on a "great deference" standard that also looked for factual support of nondiligence.[109] Cloaking the presumption of diligence in the language of "deference" does not alter the unsuitability of a standard granting bias towards the non-moving party during a motion to dismiss for failure to state a claim.

C. Courts' Rejection of Presumptions Applied to a Motion to Dismiss

There is a strong consensus among courts that presumptions are evidentiary standards that should not be applied to motions to dismiss.[110] The Supreme Court has made clear that a "flexible evidentiary standard . . . should not be transposed into a rigid pleading standard."[111] The Third Circuit has also stressed that "an evidentiary standard is not a proper measure of whether a complaint fails to state a claim."[112] Furthermore, the Supreme Court has acknowledged the conflict a presumption imposes on the rules of simplified notice pleading.[113] Rule 8(a)'s pleading standard applies to all civil actions,[114] and a "requirement of greater specificity for particular claims is a result that

106. Grp. Against Smog & Pollution v. Shenango Inc., 810 F.3d 116, 131 (3d Cir. 2016).

107. *See id.* at 130–32.

108. Grp. Against Smog & Pollution v. Shenango Inc., No. 14-595, 2015 U.S. Dist. LEXIS 38526, at *7 (W.D. Pa. Mar. 26, 2015) (internal citations omitted).

109. Grp. Against Smog & Pollution v. Shenango Inc., 810 F.3d 116, 130 (3d Cir. 2016) (internal citations omitted).

110. Swierkiewicz v. Sorema N. A., 534 U.S. 506, 510 (2002).

111. *Id.* at 512.

112. Fowler v. UPMC Shadyside, 578 F.3d 203, 213 (3d Cir. 2009) (internal citations omitted).

113. *Swierkiewicz*, 534 U.S. at 510.

114. *Id.* at 513 (noting that "Rule 9(b), for example, provides for greater particularity in all averments of fraud or mistake. This Court, however, has declined to extend such exceptions to other contexts.").

'must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.'"[115]

In light of these admonitions, a presumption of diligence should not enter into a courts' analysis of diligent prosecution during a motion to dismiss under Rule 12(b)(6). The Third Circuit's procedural ruling in *GASP* calls for a rejection of the presumption, and unfortunately, the alternative deference standard it imposed provides little clarity for solving this quandary.

D. Beyond the Third Circuit

The Third Circuit's decision in *GASP* reflects the direction the federal courts generally are heading in terms of the procedural analysis of the diligent prosecution bar. The 2006 Supreme Court case, *Arbaugh v. Y & H Corp*, stressed the important differences between jurisdictional provisions and claims-processing rules and provided guidance to lower courts on distinguishing between the two.[116] Since 2006, both the Seventh Circuit and the Fifth Circuit have applied *Arbaugh* to the diligent prosecution bar and determined that it is nonjurisdictional.[117] In *Adkins v. VIM Recycling, Inc.*, the Seventh Circuit reversed a dismissal based on the diligent prosecution bar, reasoning that the plaintiff's claim was broader than the agency's enforcement action and thus that those claims outside the scope of the agency action should be allowed to proceed.[118] In *Louisiana Environmental Action Network v. City of Baton Rouge*, the Fifth Circuit reversed a jurisdiction-based dismissal and remanded the case to the district court for an analysis consistent with Rule 12(b)(6).[119] This trend suggests it is likely that more circuits will follow in adopting the holding that the diligent prosecution bar is nonjurisdictional. As citizen suits continue to reach the courts, it will become increasingly important that special attention is paid to the standards used when evaluating agency diligence on a motion to dismiss. Following prior court decisions based on a jurisdictional standard is no longer appropriate.

In *GASP*, the Third Circuit became the third circuit to join in holding that the diligent prosecution bar was nonjurisdictional. However, it was the first to apply that holding in a factual analysis. As alluded to above, its insertion of a deferential standard has largely stripped the jurisdictional versus claims-processing distinction of its meaning in terms of a court's analysis of diligence. It is important that other courts do not follow the Third Circuit's lead, but instead expose the defendant's and the agency's agreements to independent judicial scrutiny absent a bias towards either party.

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115. *Id.* at 515.

116. *See* Arbaugh v. Y & H Corp., 546 U.S. 500 (2006).

117. Adkins v. VIM Recycling, Inc., 644 F.3d 483, 492 (7th Cir. 2011); *see* La. Envtl. Action Network v. City of Baton Rouge, 677 F.3d 737, 750 (5th Cir. 2012).

118. *Adkins*, 644 F.3d at 487.

119. *La. Envtl. Action Network*, 677 F.3d at 750.

E. ERISA and the Presumption of Prudence

Looking outside of environmental law, cases involving the Employee Retirement Income Security Act (ERISA) provide support for the rejection of presumptions within a Rule 12(b)(6) motion to dismiss. ERISA subjects plan fiduciaries to a duty of prudence.[120] ERISA often leads to claims from employee plaintiffs against fiduciary defendants, alleging that the fiduciaries acted without the prudence required by ERISA when managing the employees' retirement accounts.[121] Until recently, courts had routinely relied on a "presumption of prudence" on the part of the fiduciaries when reviewing ERISA cases.[122] Like the presumption of diligent prosecution, courts also required plaintiffs to overcome the presumption during the motion to dismiss stage.[123]

The presumption of prudence was rejected by the Sixth Circuit in *Pfeil v. State Street Bank & Trust Co.*[124] The *Pfeil* court held that the presumption of prudence "is not an additional pleading requirement and thus does not apply at the motion to dismiss stage."[125] Where the Third Circuit implicitly shifted the presumption of diligence to an indistinguishable deference standard in *GASP*, the Sixth Circuit explicitly rejected the presumption of prudence in ERISA cases.[126] It held that while it might be reasonable during a motion for summary judgment, where a plaintiff could rebut the presumption with a fully developed evidentiary record, it would be inconsistent to apply the presumption, which concerns questions of fact, at the pleading stage, where the court must accept the well-pled factual allegations of a complaint as true.[127] This rationale applies equally well to environmental citizen suits, where it is improper to require plaintiffs to prove nondiligent prosecution during the pleading stage.

In *Fifth Third Bancorp v. Dudenhoeffer*, the Supreme Court rejected the presumption of prudence in ERISA cases, and also extended the holding beyond the pleadings to state that the presumption was inappropriate at any time.[128] It reasoned that the presumption of prudence creates an almost insurmountable hurdle to plaintiffs stating their claim, and that "such a rule does not readily divide the plausible sheep from the meritless goats."[129] The Court remanded the case, with instructions to follow the correct Rule 12(b)(6) standard with a "careful, context-sensitive scrutiny of a complaint's

120. Pfeil v. State St. Bank & Tr. Co., 806 F.3d 377, 380 (6th Cir. 2015).

121. *See* EMPLOYEE BENEFITS LAW § 12.05 (Law Journal Press, 2017).

122. *Id.*

123. *Id.*

124. *Id.*

125. Pfeil v. State Street Bank & Trust Co., 671 F.3d 585, 592 (6th Cir. 2012), *abrogated by* Fifth Third Bancorp v. Dudenhoeffer, 134 S. Ct. 2459 (2014).

126. *Id.* at 592–93.

127. *Id.*

128. *Fifth Third Bancorp*, 134 S. Ct. at 2470–71.

129. *Id.*

allegations."[130] The reasoning courts have used in ERISA cases applies well in the context of environmental citizen suits. Just as a presumption of prudence frustrates an independent context-specific analysis in ERISA cases, a presumption of diligence frustrates an independent context-specific analysis in environmental citizen suit litigation. Whether a deference standard should be rejected altogether in citizen suit cases is discussed in Part VI, below.

V. THE PROS AND CONS OF A DEFERENTIAL STANDARD

Whether deference to an agency's actions in prosecuting violators of the CAA and other environmental statutes is appropriate *outside* the context of a motion to dismiss is a more complicated issue, and one that this Note will not resolve. However, this Part discusses various arguments to consider when weighing the pros and cons of a deferential standard. First, this Note advises against a one-size-fits-all standard for citizen suit cases. Subpart A will discuss how the appropriateness of a deference standard is context specific. Then, subparts B and C will discuss arguments for and against a deference standard, respectively.

VI. THE APPROPRIATENESS OF DEFERENCE IS CONTEXT SPECIFIC

As the pros and cons of deference are discussed, it is important to keep in mind the vast differences that exist between each citizen suit that comes before a court. As noted in Part I, the CAA's citizen suit provision has been duplicated in almost every major federal environmental statute. This has caused courts to adopt the habit of replicating the analysis for review of citizen suit cases interchangeably between the statutes. Although this sometimes works seamlessly, courts should use caution so that they do not disregard the provisions of each statute that make deference to the agency more or less appropriate under specific circumstances.

For example, the CWA expressly provides for public participation at various points in the enforcement proceedings.[131] However, the right to participate in enforcement actions is not expressly given in the statutory or regulatory language of the CAA, and courts have declined to find any implied right to intervene or right to public comment in the statute.[132] This difference provides some justification for giving more deference to an agency's enforcement action under the CWA than the CAA. While in a CWA case citizens have had the opportunity to participate in the agency's action and voice

130. *Id.*

131. *See* 33 U.S.C. § 1319(g)(4) (2012); *see also* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 890 F. Supp. 470, 490 (D.S.C. 1995) (relying on the public participation provision of the Clean Water Act).

132. *See* Grp. Against Smog & Pollution v. Shenango Inc., No. 14-595, 2015 U.S. Dist. LEXIS 38526, at *16 (W.D. Pa. Mar. 26, 2015) (citing Clean Air Council v. Sunoco, Inc., No. 02-1553, 2003 U.S. Dist. LEXIS 5346, at *10–11 (D. Del. Apr. 2, 2003)).

their concerns over any inadequacy of enforcement before a consent decree is entered, groups such as GASP have had no such opportunity in a CAA case, and a citizen suit may provide the only available means to participate in the judicial process.[133]

Along those same lines, the core of this Note centers on the need to consider the *timing* of a court's analysis of agency diligence. A court's analysis under a motion for summary judgment should not be the same as that under a motion to dismiss. Part IV.B of this Note illustrates an instance of the Third Circuit repeating what many other courts have done: borrowing language of analysis from a motion for summary judgment and applying it automatically to a motion to dismiss for failure to state a claim.[134] While this may be appropriate in some contexts, courts should be more cautious when doing so might result in the application of unsuitable standards of review—such as the insertion of an evidentiary presumption into the motion to dismiss analysis.

The stage of the litigation matters, too. For example, whether a prosecution is still pending in court versus whether a consent decree has been entered between the agency and the violator should also influence the merits of giving deference to the agency's prosecution—with more deference given to an unresolved action in court.

When discussing the merits of a deference standard, it is important to keep in mind that all cases are not alike, and deference may be more or less appropriate depending on context-specific factors, such as which statute is at issue and the stage of the litigation.

A. Arguments for a Deferential Standard

Citizen suits may approach enforcement more vigorously than is warranted to reach the optimal level of compliance with environmental statutes.[135] Most stakeholders would agree that environmental enforcement produces the best results when there is an optimal mix of cooperative and adversarial enforcement.[136] Citizen suits' value comes from their ability to override agency discretion when the agency chooses not to enforce or chooses enforcement that is too lenient.[137] However, Professor William Landes and Judge Richard Posner have noted that "the existence of a public monopoly of enforcement in a particular area of the law is a necessary . . . condition of

133. Courts will sometimes consider the availability of public participation as a factor when determining diligence. See *Friends of the Earth, Inc.*, 890 F. Supp. at 490.

134. *See supra* Part IV.0; Grp. Against Smog & Pollution v. Shenango Inc., 810 F.3d 116, 130 (3d Cir. 2016) (citing N. & S. Rivers Watershed Ass'n v. Town of Scituate, 949 F.2d 552, 553, 557 (1st Cir. 1991)).

135. Zinn, *supra* note 2, at 84.

136. *See id.* at 132.

137. *See id.* at 131–37.

discretionary nonenforcement."[138] The benefits of such discretionary nonenforcement are highlighted in the oft-cited example from *Gwaltney of Smithfield v. Chesapeake Bay Foundation*.[139] In the *Gwaltney* example, the court alludes to a hypothetical in which the decision not to execute certain enforcement measures may actually be prudent for all parties involved, including the environment.[140]

The hypothetical posed by the *Gwaltney* Court is one in which an agency agrees not to seek civil penalties on the condition that the violator take some extreme corrective action which will be of greater benefit to the environment in the long run, such as installing expensive technology to reduce pollution.[141] The Court says that a citizen suit's ability to step in after the fact and override this discretion by seeking penalties in court would considerably curtail the agency's discretion to make cooperative agreements that are in the public interest.[142] This example highlights the concern that citizen suits meddle in the regulatory enforcement process.

B. Arguments against a Deferential Standard.

Some argue that the idea that citizen suits interfere with and conflict with the exercise of agency discretion in the public interest appears to be largely overblown.[143] The *Gwaltney* hypothetical above, for example, appears to be a remote possibility that has not played out in citizen suit litigation.[144] Even if a court were faced with the *Gwaltney* hypothetical and declined to give the agency's action deference, the court would still likely find that the agency's action was sufficiently diligent to bar a citizen suit. Courts are not precluded from using their own judgment in an analysis of whether the agency's action was for the public good; in fact, this is exactly what a nondeferential standard asks them to do.

Although the CAA does not provide the answer as to what Congress meant by "diligent" prosecution, a report from the Senate Committee on Public Works indicates that Congress expected something more from the courts than mere deference to agency enforcement actions:

> It should be emphasized that if the agency had not initiated abatement proceedings following notice or if the citizen believed efforts initiated by the agency to be inadequate, the citizen might choose to file the action. In such case, the courts would be expected to consider the petition against the background of the agency action and could determine that such action

138. *Id.* (citing William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1, 39 (1974)).

139. Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 60–61 (1987).

140. *Id.*

141. *Id.*

142. *Id.*

143. Miller, *supra* note 30, at 480.

144. *See id.* at 489.

> would be adequate to justify suspension, dismissal, or consolidation of the citizen petition. On the other hand, if the court viewed the agency action as inadequate, it would have jurisdiction to consider the citizen action notwithstanding any pending agency action.[145]

Recognizing that a court may view "the agency action as inadequate" implies that the diligence analysis requires a discretionary judgment from the court.[146] Also, the inclusion of the citizen suit provision in environmental statutes indicates that Congress wished to curtail an agency's ability to shield a polluter from enforcement actions.

Judicial deference to agency action stems from the doctrine that an agency's discretionary decisions are not subject to judicial review.[147] However, citizen suits do not ask courts to overturn agency actions; they merely ask courts to find that an agency's enforcement was inadequate to bar their suit.[148] A comparison of the agency's actions with the defendant's conduct is the primary touchstone of a diligence analysis, and a deferential standard can interfere in a court's nonbiased review of the facts of a case.[149]

Professor Philip Hamburger argues that judges' constitutional duty is to exercise independent judgment about what the law is, and deferring to agency interpretations in the *Chevron* context violates this duty.[150] Additionally, he points out that relying on deference to government agencies creates systematic bias in favor of the government and against Americans, thus denying citizens due process of law.[151] A similar type of relinquishment of the duty to exercise independent judgment occurs when judges mechanically defer to an agency's plan of attack against an alleged violator of a federal environmental statute. However, in the diligent prosecution bar context, deference creates systematic bias in favor of polluters and against the citizen plaintiffs.

Professor Jeffrey Miller notes that the call for deference in diligence analysis typically arises out of a desire of defendants to reach results at odds with congressional intent.[152] He writes that although judges may desire to protect the government's prosecutorial discretion from interference from citizen suits, it is not the prosecutors they are protecting, but those who violate environmental laws.[153] Actually, when prosecutors are involved in the disputes between a citizen and a polluter, they normally argue in favor of citizen enforcement.[154] Courts should keep this in mind as they consider the amount of

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145. S. Rep. No. 91-1196, at 37 (1970).
146. Zinn, *supra* note 2, at 159.
147. Miller, *supra* note 30, at 482.
148. *Id.*
149. Zinn, *supra* note 2, at 160–61.
150. Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187, 1188 (2016).
151. *Id.*
152. Miller, *supra* note 30, at 478–79.
153. *Id.* at 479–80.
154. *Id.*; *See, e.g.*, Citizens for a Better Environment v. Union Oil Co., 83 F.3d 1111, 1116 (9th Cir. 1996) ("[T]he United States, as *amicus curiae*, notes that there was no formal scrutiny of the

deference, if any, to give an agency's actions in the context of the diligent prosecution bar.

CONCLUSION

Congress created the citizen suit provision in the CAA and other federal environmental statutes to promote public participation in the regulatory process, to encourage vigorous enforcement of the law, and to protect the public's health and safety.[155] In communities like those downwind of the Shenango plant, the regulatory process largely failed to achieve those objectives.

In January 2016, the Shenango plant pushed the last coke out of its ovens, ending a fifty-six-year history in Allegheny County.[156] It was neither the EPA nor the county health department that caused the plant to cease operations, but rather declining demand in the North American steel industry.[157] This provoked mixed emotions from the surrounding community, which recognized the hardship created when 173 workers lost their jobs, but also appreciated the associated reduction in toxic air pollution.[158]

As late as October 2016, ACHD was still working with Shenango to settle ongoing violations that occurred after their 2014 consent order and agreement.[159] The Allegheny County Controller released an audit in May of 2016 that indicated that "fines assessed through settlements between the county Health Department and companies such as Shenango do little to stop pollution."[160] Whether ACHD's 2014 enforcement action against Shenango was sufficiently diligent to justify barring GASP's suit is not a question this Note attempts to answer. As this Note has demonstrated, the judicial analyses of the *GASP* litigation was clouded by a deferential standard and likely required more scrutiny than was available at the motion to dismiss stage. However, the *GASP* case is an important reminder of the stakes involved when deciding whether to dismiss a citizen suit aiming to remedy violations of environmental laws.

The Third Circuit's ruling provides precedent that the diligent prosecution bar is nonjurisdictional and should be viewed under Rule 12(b)(6). Thus, future

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economic benefits to [Union Oil Company of California] of non-compliance and thus no assurance that [Union Oil Company of California] has fully disgorged the benefit it receives from violating effluent standards.").

155. *See supra* Part I.

156. Barbara Barcousky, *Shutdown of Coke Plant Draws Mixed Emotions*, CBSLOCAL.COM (Jan. 8, 2016, 11:55 AM), http://pittsburgh.cbslocal.com/2016/01/08/coke-plant-shutdown-draws-mixed-emotions/.

157. *Id.*

158. *Id.*

159. Michael Walton, *Shenango Coke Works Owner Agrees to $225k Settlement over Air Pollution*, TRIBLIVE (Oct. 25, 2016, 3:30 PM), http://triblive.com/news/allegheny/11366225-74/shenango-department-allegheny.

160. *Id.*

courts adjudicating this issue on a motion to dismiss should eliminate bias towards either party by removing a deferential standard from their diligence analysis. Outside of a motion to dismiss, courts should consider the procedural framework of each case and the complexity of the environmental statute at issue when deciding whether to insert a deferential standard into their review.
