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DISAPPEARING ACTS: HOW *PARENS PATRIAE* MAKES
PRIVATE ENVIRONMENTAL SUITS VANISH
IN THE BLINK OF AN EYE

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Citizen suit provisions are powerful tools in environmental litigation. Essentially, they enable private “citizens [to act] as private attorneys general,”¹ litigating on behalf of themselves and the general public against those who violate environmental law. These provisions allow citizens to bring actions under certain environmental statutes. For example, the Clean Air Act (“CAA”)² permits citizen-suits for injunctive relief and civil penalties.³ These penalties may include monetary damages of up to \$32,500 per day of violation.⁴ Under the CAA, “any person may” file suit alleging violations of the CAA’s emissions standards or orders relating to emissions standards against any other person.⁵ After the plaintiff has brought suit, however, the plaintiff’s suit may be dismissed if the government negotiates a settlement with the offender.⁶ When this happens, the government becomes “*parens patriae*” and, consequently, *res judicata* or collateral estoppel can bar the citizen-suit.⁷

Parens patriae provides the government with standing to sue on behalf of its citizens,⁸ which takes priority over any suit brought privately under a citizen suit provision even when the individual has already initiated the private suit.⁹ This Comment will examine the reasons for this policy as well as the implications of barring private suits brought under citizen suit provisions. The first section describes a recent Louisiana decision analyzing *parens patriae* and determining which method of application best serves all interests involved. The second section discusses the implications of that holding and its precedential value for other decisions based on environmental statutes. The decision examined below makes no major

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¹ Hudson River Fishermen’s Ass’n v. County of Westchester, 686 F. Supp. 1044, 1052 (S.D.N.Y. 1988).

² 42 U.S.C. §§ 7401-7671q (2008).

³ 42 U.S.C. § 7604(a) (2008).

⁴ St. Bernard Citizens for Envtl. Quality, Inc. v. Chalmette Ref., L.L.C., 500 F. Supp. 2d 592, 597 (E.D. La. 2007).

⁵ *Id.*

⁶ See, e.g., *id.* at 600-08.

⁷ *Id.*

⁸ L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 600-01 (1982).

⁹ See generally, St. Bernard Citizens for Envtl. Quality, Inc., 500 F. Supp. 2d 592 (E.D. La. 2007).

changes to the application of *parens patriae* in environmental suits. The opinion's value comes from its analysis of the present doctrine and the questions that the opinion creates for the future.

I. DESCRIPTION OF THE CASE

A. *Procedural Background*

On February 12, 2004, St. Bernard Citizens for Environmental Quality Inc. ("St. Bernard") began a long saga of litigation as it sought remedies for violations of the CAA.¹⁰ St. Bernard is a non-profit corporation organized to deal with various environmental issues in Louisiana and the St. Bernard Parish.¹¹ The group brought suit under the citizen suit provision of the CAA and under the Emergency Planning and Community Right to Know Act.¹² In its complaint, plaintiff alleged that Chalmette Refining, L.L.C. ("Chalmette") "violated and continues to violate (1) hourly permit emission limits for various harmful pollutants, (2) flare performance standards and monitoring requirements, (3) benzene emission limits for its storage tanks, (4) State reporting requirements for 'unauthorized discharges' of pollutants and (5) EPCRA reporting requirements."¹³

St. Bernard filed for partial summary judgment on the issues of Chalmette's liability for "34 violations of its emission permits" and St. Bernard's standing to sue as its members suffered an injury traceable to Chalmette's activities.¹⁴ "[T]he Court granted [St. Bernard's] first motion for partial summary judgment" on February 3, 2005.¹⁵ Two months later, the plaintiffs filed a second motion for partial summary judgment concerning 2,629 other alleged violations.¹⁶ After plaintiffs filed their motion, however, Chalmette "entered an Administrative Consent Order with the [Louisiana Department of Environmental Quality ("LDEQ")]."¹⁷

The Consent Order required Chalmette to "submit updated [CAA] permit applications" and "operate its emission sources in compliance with the interim emission limitations and monitoring and reporting requirements" until LDEQ took a final action regarding the updated

¹⁰ St. Bernard Citizens for Envntl. Quality, Inc. v. Chalmette Ref., L.L.C., 500 F. Supp. 2d 592, 595 (E.D. La. 2007).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ St. Bernard Citizens for Envntl. Quality, Inc. v. Chalmette Ref., L.L.C., 500 F. Supp. 2d 592, 595 (E.D. La. 2007)..

¹⁷ *Id.* at 596

applications.¹⁸ In October of that year, the court granted the second motion of partial summary judgment but did not award injunctive relief due to Hurricane Katrina.¹⁹ The United States District Court for the Eastern District of Louisiana found that the damage Katrina wrought could change the legal and equitable considerations for determining whether injunctive relief was appropriate and ordered additional briefing.²⁰ St. Bernard and Chalmette stipulated that Chalmette would keep its emissions under the permit limits and report violations promptly to the court.²¹ At the request of both parties, the court stayed further litigation until January 2007.²²

At the conclusion of the stay, St. Bernard filed its third motion for partial summary judgment, citing fifty new violations of the Clean Air Act.²³ Between St. Bernard's second and third motions for partial summary judgment, however, the Environmental Protection Agency ("EPA") and LDEQ agreed to consent decrees with Chalmette.²⁴ Federal and state governments have some concurrent authority in attaining the goals of the CAA.²⁵ The EPA is charged with enforcing the CAA and developing national ambient air quality standards ("NAAQS").²⁶ State agencies like LDEQ fit into the national scheme by creating a plan to ensure that state ambient air reaches those standards.²⁷ Citing its consent decrees with the EPA and LDEQ, Chalmette moved for summary judgment claiming that res judicata and collateral estoppel bar St. Bernard's new and any future claims.²⁸

B. *The Consent Decrees*

St. Bernard cited fifty violations in its third motion for summary judgment including the release of 29,304 pounds of sulfur dioxide and 33,832 pounds of "volatile organic compounds."²⁹ Chalmette conceded to the violations but claimed that it was not liable to St. Bernard because the consent decree between Chalmette, the EPA, and the LDEQ covered all of

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *St. Bernard Citizens for Env'tl. Quality, Inc. v. Chalmette Ref., L.L.C.*, 399 F. Supp. 2d 726, 737 (E.D. La. 2005).

²¹ *St. Bernard Citizens for Env'tl. Quality, Inc. v. Chalmette Ref., L.L.C.*, 500 F. Supp. 2d 592, 596 (E.D. La. 2007).

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *See id.* at 597.

²⁶ *St. Bernard Citizens for Env'tl. Quality, Inc. v. Chalmette Ref., L.L.C.*, 500 F. Supp. 2d 592, 597 (E.D. La. 2007).

²⁷ *Id.*

²⁸ *Id.* at 596.

²⁹ *Id.* at 598-99.

the violations.³⁰ If the court accepted Chalmette's view, then the plaintiff's action would be barred by *res judicata*.³¹ St. Bernard knew of the decree prior to its third motion.³² It had met with the EPA before the EPA drafted the consent decree and submitted comments on the decree to the EPA, the LDEQ, Chalmette and the court.³³ Although the EPA reviewed all of these materials from St. Bernard, it chose not to revise the consent decree.³⁴

Among other things, the EPA consent decree required Chalmette to comply with the New Source Performance Standards, apply for Title V permits, reduce discharges of gases and particulate matter, and comply with federal regulations governing benzene emissions.³⁵ These requirements functioned essentially as injunctive relief against future pollution and violations of the CAA. The consent decree also included monetary provisions such as mandatory payments to various environmental projects and penalty amounts for future violations.³⁶ Chalmette made a settlement with the LDEQ that essentially mirrored the EPA consent decree, adding only that Chalmette donate equipment valued at \$800,000 to the LDEQ.³⁷

In response to St. Bernard's motion for summary judgment, Chalmette argued that these extremely comprehensive agreements "cover all incidents and alleged [Clean Air Act] violations that form the basis of Plaintiffs' claims" and moved for summary judgment.³⁸ St. Bernard countered that Chalmette had not complied with the agreements and produced evidence of ten post-consent decree violations.³⁹ These arguments presented the following issues to the District Court: 1) do *res judicata* and collateral estoppel apply to citizen suits under the Clean Air Act, and 2) if so, had Chalmette demonstrated the elements in this case?⁴⁰

C. *Res judicata: Parens Patriae and Privity*

St. Bernard claimed that *res judicata* did not apply to citizen suits under the CAA because the statutory text does not preclude citizen suits and that the mootness doctrine did not apply under these particular circumstances, because relief from those doctrines were the only ways to

³⁰ *Id.* at 599-600.

³¹ *Id.*

³² *See* St. Bernard Citizens for Env'tl. Quality, Inc. v. Chalmette Ref., L.L.C., 500 F. Supp. 2d 592, 600 (E.D. La. 2007).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ St. Bernard Citizens for Env'tl. Quality, Inc. v. Chalmette Ref., L.L.C., 500 F. Supp. 2d 592, 601 (E.D. La. 2007).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *See id.*

bar citizen-suits under the CAA.⁴¹ The court agreed that the CAA does not have a statutory preclusion bar to citizen suits.⁴² Furthermore, although “citizen suits to require compliance are rendered moot only after a showing that it was absolutely clear that violations ‘could not reasonably be expected to recur,’”⁴³ the district court found four circuits that applied res judicata in CAA cases regardless of the mootness issue.⁴⁴ The court held that the common law doctrine of res judicata applies to citizen-suit cases under the CAA.⁴⁵

The rule of res judicata covers the preclusive doctrines of both res judicata and collateral estoppel.⁴⁶ Here, the court found it unnecessary to examine collateral estoppel in light of its res judicata holding.⁴⁷ To use res judicata, a party must demonstrate four elements:

- (1) [T]he parties are identical or in privity; (2) the judgment in the prior action was rendered by a court of competent jurisdiction; (3) the prior action was concluded by a final judgment on the merits; and (4) the same claim or cause of action was involved in both actions.⁴⁸

Through the first element, *parens patriae* made its debut in Fifth Circuit environmental law. Chalmette argued that the doctrine of *parens patriae* created privity between St. Bernard and the EPA.⁴⁹

Parens patriae provides a state with the standing to sue on behalf of its citizens.⁵⁰ It literally means “parent of the country.”⁵¹ *Parens patriae* comes from the “royal prerogative,” an English common law doctrine that allowed the state to take care of a person who could not care of himself or his property due to a mental defect.⁵² The American doctrine of *parens patriae* has evolved beyond these roots. Now its application requires the state to assert a quasi-sovereign interest apart from the interests of private

⁴¹ See *id.* at 601-02.

⁴² See *St. Bernard Citizens for Envtl. Quality, Inc. v. Chalmette Ref., L.L.C.*, 500 F. Supp. 2d 592, 602 (E.D. La. 2007).

⁴³ *Id.* at 602 (citing *Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 193 (2000)).

⁴⁴ *Id.*

⁴⁵ See *id.* at 603.

⁴⁶ *Test Masters Educ. Servs., Inc. v. Singh*, 428 F.3d 559, 571 (5th Cir. 2005).

⁴⁷ *St. Bernard Citizens for Envtl. Quality, Inc. v. Chalmette Ref., L.L.C.*, 500 F. Supp. 2d 592, 608 (E.D. La. 2007).

⁴⁸ *Id.* at 603.

⁴⁹ *Id.*

⁵⁰ *City of New York v. Beretta U.S.A. Corp.*, 315 F. Supp. 2d 256, 265 (E.D.N.Y. 2004) (citing *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982)).

⁵¹ *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 600 (1982) (citing BLACK’S LAW DICTIONARY 1003 (5th ed. 1979)).

⁵² *Id.* (citations omitted).

parties.⁵³ Sovereign interests traditionally arise when the state exercises power over individuals within the state and gains recognition as a sovereign by other sovereigns.⁵⁴ These interests include the “interests that the State has in the well-being of its populace.”⁵⁵

To assert *parens patriae* the state must express a quasi-sovereign interest that is not merely nominal.⁵⁶ States have quasi-sovereign interests in “the health and well-being—both physical and economic—of its residents in general.”⁵⁷ This makes *parens patriae* well-suited for application in environmental law, as harm to the environment can clearly affect the general well-being of the State’s citizens. There is no clear, systematic set of rules for the doctrine’s application,⁵⁸ but the Supreme Court has given guidelines as to when it applies:

[a]lthough more must be alleged than injury to an identifiable group of individual residents, the indirect effects of the injury must be considered as well as in determining whether the State has alleged injury to a sufficiently substantial segment of its population. *One helpful indication in determining whether an alleged injury to the health and welfare of its citizens suffices to give the State standing to sue as parens patriae is whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers.*⁵⁹

The emphasized text bears directly on Chalmette’s argument, as the State has addressed the injury in this case through enacting the CAA. *Parens patriae* creates privity between the individual whose interest the State is representing and “an official or agency invested by law with the authority to represent the person’s interests.”⁶⁰ The individual is not bound in privity, however, if the representing party does not act for the individual with “due diligence and reasonable prudence.”⁶¹ Generally courts presume

⁵³ *Id.* at 607.

⁵⁴ *See id.* at 601.

⁵⁵ *Id.* at 602.

⁵⁶ *Afred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982).

⁵⁷ *Id.*

⁵⁸ *See id.*

⁵⁹ *Id.* (emphasis added).

⁶⁰ *See Friends of Milwaukee’s Rivers v. Milwaukee Metro. Sewerage Dist.*, 382 F.3d 743, 758-59 (7th Cir. 2004) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 41(1)(d) (1982)).

⁶¹ *Id.* at 759 (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 42(1)(e) (1982)).

diligence,⁶² and the district court based its examination of preclusion standards on the strength of this presumption.⁶³

The court noted that a consent decree between a defendant and the state representing its citizens through *parens patriae* binds those citizens' rights because they are "privies for *res judicata* purposes."⁶⁴ After deciding that there could be privity through *parens patriae*, the court had to determine when a consent decree precludes a citizen suit.⁶⁵ A survey of neighboring circuits identified three different standards courts use to determine the relationship between consent decrees and *res judicata*.⁶⁶

D. *Options for the Court: When does Parens Patriae Apply and Cause Preclusion?*

This issue was one of first impression in the Fifth Circuit; therefore the district court looked to standards developed in other circuits.⁶⁷ The Eighth, Seventh, and Second Circuits had established standards for determining when a consent decree would bar an action.⁶⁸ Those courts had used the standards in relation to the Clean Water Act (CWA),⁶⁹ but these standards were still relevant to the district court's ultimate determination.⁷⁰

The Eighth Circuit held that the mere existence of a consent decree between a state or federal government and the defendant bars the plaintiff's action.⁷¹ This standard ignores the effectiveness or potential effectiveness of the consent decree in bringing an end to the statutory violation.⁷² The Eighth Circuit reasoned that the EPA "is charged with enforcing the CWA on behalf of all citizens," and once the EPA acts, there is nothing left for the private citizen to do.⁷³ This standard allows for frequent findings of *res judicata* as it bars the plaintiff's claim whenever the State has acted. The Eighth Circuit standard relies on a presumption of state diligence because

⁶² *Id.* at 760.

⁶³ *St. Bernard Citizens for Env'tl. Quality, Inc. v. Chalmette Ref., L.L.C.*, 500 F. Supp. 2d 592, 603-06 (E.D. La. 2007).

⁶⁴ *Id.* at 604 (quoting *City of New York v. Beretta U.S.A. Corp.*, 315 F. Supp. 2d 256, 265 (E.D.N.Y. 2004)).

⁶⁵ *Id.*

⁶⁶ *See id.*

⁶⁷ *St. Bernard Citizens for Env'tl. Quality, Inc. v. Chalmette Ref., L.L.C.*, 500 F. Supp. 2d 592, 604 (E.D. La. 2007).

⁶⁸ *Id.* at 604-05.

⁶⁹ *Id.*

⁷⁰ *Id.* at 605.

⁷¹ *Id.* at 604.

⁷² *See St. Bernard Citizens for Env'tl. Quality, Inc. v. Chalmette Ref., L.L.C.*, 500 F. Supp. 2d 592, 604 (E.D. La. 2007).

⁷³ *Id.* (quoting *United States Env'tl. Prot. Agency v. City of Green Forest, Ark.*, 921 F.2d 1394, 1404 (8th Cir. 1990)).

of the “preeminent role” that the state agency has in enforcing statutory violations.⁷⁴

The Second Circuit test is at the opposite end of the spectrum, making findings of *res judicata* infrequent.⁷⁵ This standard states that preclusion occurs when the basis for the citizen suit no longer exists.⁷⁶ This arises when the consent decree or other government action has actually stopped the violations of the statute “without any likelihood of recurrence.”⁷⁷ The Second Circuit court held that, despite the existence of a consent decree, *res judicata* did not bar a suit where it seemed likely that a defendant would continue to violate the CWA.⁷⁸ While appropriate where there is evidence that the state has failed, this view is the exact opposite of the general presumption of state diligence, decreasing its precedential value to the *St. Bernard* court.

The Seventh Circuit’s standard, the diligent prosecution test, provides a middle ground.⁷⁹ Based on CWA language, this approach focuses on the consent decree’s ability to require the defendant’s compliance rather than the existence of actual compliance.⁸⁰ The diligent prosecution standard takes more than “mere acceptance at face value of the potentially self-serving statements” of the State and the defendant and instead looks at “whether [the consent decree] is capable of requiring compliance with the [Act] and is in good faith calculated to do so.”⁸¹ The State does not need “perfect foresight” but must make a diligent attempt at ceasing the violations.⁸² This standard recognizes the presumption of state diligence but reduces the weight of the presumption by finding that blind acceptance of a consent decree is not enough.⁸³

E. *The Court’s Holding: Diligent Prosecution is the Best Standard*

The *St. Bernard* court analyzed the three possible tests and adopted the diligent prosecution standard.⁸⁴ The court found that this approach struck “a reasonable balance” between the Eighth Circuit’s lenient test and

⁷⁴ *Id.* (quoting *Green Forest*, 921 F.2d at 1404).

⁷⁵ *See id.* at 605.

⁷⁶ *Id.* (quoting *Atlantic States Legal Found., Inc. v. Eastman Kodak Co.*, 933 F.2d 124, 127 (2d Cir. 1991)).

⁷⁷ *St. Bernard Citizens for Envtl. Quality, Inc. v. Chalmette Ref., L.L.C.*, 500 F. Supp. 2d 592, 605 (E.D. La. 2007) (quoting *Atlantic States*, 933 F.2d at 127).

⁷⁸ *See id.* (citing *Atlantic States*, 933 F.2d at 128).

⁷⁹ *See id.* at 604 (citing *Friends of Milwaukee’s Rivers v. Milwaukee Metro. Sewerage Dist.*, 382 F.3d 743, 759 (7th Cir. 2004)).

⁸⁰ *See id.* (citing *Milwaukee’s Rivers*, 382 F.3d at 759).

⁸¹ *St. Bernard Citizens for Envtl. Quality, Inc. v. Chalmette Ref., L.L.C.*, 500 F. Supp. 2d 592, 604 (E.D. La. 2007) (citing *Milwaukee’s Rivers*, 382 F.3d at 759-760).

⁸² *Id.* at 604-605 (citing *Milwaukee’s Rivers*, 382 F.3d at 759).

⁸³ *See id.* at 604 (citing *Milwaukee’s Rivers*, 382 F.3d at 760).

⁸⁴ *Id.* at 604-06.

the Second Circuit's stricter "elimination of all violations" test.⁸⁵ In addition, the court concluded that the Seventh Circuit test was more true to the purpose of a citizen suit provision because it allows a pre-government action citizen suit to remain effective where the government's action may not force a defendant's compliance.⁸⁶ Applying the standard, the district court held that the consent decree constituted a diligent prosecution because it contained provisions that dealt directly with the defendant's violations and could require compliance.⁸⁷ *St. Bernard* even conceded that the consent decree would probably be effective.⁸⁸ Furthermore, evidence showed that the consent decree already had a positive effect as the number of Chalmette's violations decreased from thirty-seven per month before the decree to a total of ten after the decree.⁸⁹

Holding that the diligently prosecuted consent decree established privity, the *St. Bernard* court found that *res judicata* applied.⁹⁰ The facts satisfied the four elements of *res judicata*, allowing the court to hold that *St. Bernard*'s citizen suit was precluded and making it unnecessary to consider collateral estoppel.⁹¹ *St. Bernard* did win some relief; the court granted in part the organization's motion for partial summary judgment because the consent decree did not cover two incidents in the plaintiff's complaint.⁹² The district court found Chalmette liable for these violations.⁹³

II. IMPLICATIONS OF THE HOLDING

A. *St. Bernard Potentially Increases the Applicability of the Diligent Prosecution Standard*

In *St. Bernard*, the district court adopted the Seventh Circuit's diligent prosecution standard that found its basis in language of the CWA.⁹⁴ The relevant CWA provisions provide that a citizen suit may not be brought when the state "has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require

⁸⁵ *Id.* at 606.

⁸⁶ *St. Bernard Citizens for Env'tl. Quality, Inc. v. Chalmette Ref., L.L.C.*, 500 F. Supp. 2d 592, 606 (E.D. La. 2007).

⁸⁷ *Id.*

⁸⁸ *See id.*

⁸⁹ *Id.* at 607.

⁹⁰ *Id.* at 608 (finding that plaintiff did not argue the courts involved did not have jurisdiction to enter the consent decree, the consent decree is a final judgment on the merits, and that plaintiffs did not argue that the consent decree covered a cause of action distinct from their own).

⁹¹ *St. Bernard Citizens for Env'tl. Quality, Inc. v. Chalmette Ref., L.L.C.*, 500 F. Supp. 2d 592, 608 (E.D. La. 2007).

⁹² *Id.* at 610.

⁹³ *Id.*

⁹⁴ *Id.* at 605-06.

compliance with the standard, limitation, or order”⁹⁵ When reading *St. Bernard*, one does not find this language.⁹⁶

The court’s omission of this language does not mean that the court did not or could not rely on it. The CAA provision provides an additional reason to adopt the diligent prosecution standard.⁹⁷ As this language further justifies adopting the CWA-based approach, it is unclear why the court did not explicitly cite this language.

The court’s adoption of the diligent prosecution standard implies that the diligent prosecution standard should be applied wherever this language exists. This has the potential for making the test widely applicable. The statutory language “diligently prosecuting a civil action” also appears in citizen suit provisions of United States Code titles covering toxic substances control,⁹⁸ national forests,⁹⁹ mining,¹⁰⁰ and noise control,¹⁰¹ to name a few. If it makes sense to use the standard with the CAA, there is no reason why the test cannot apply in actions based on these statutes. The district court’s adoption of this standard strongly suggests that the standard should function under these statutes.

B. *Parens Patriae Allows the State to Intercede Even After Plaintiff has Commenced Suit*

St. Bernard does not affect the ability of the government to address violations of environmental law in the face of citizen suits. In each case the *St. Bernard* court cited as creating a preclusion standard, the State became involved after the filing of a citizen suit.¹⁰² Citizen suit provisions should not be read to discourage governments from entering into consent decrees regarding the same subject matter of the citizen suit plaintiff’s complaint.¹⁰³ The Second Circuit stated that allowing citizen suits to preclude government action could result in “underenforcement” of the statute, as a citizen suit’s purpose is to catch violations not prosecuted by the State.¹⁰⁴ Underenforcement could result because citizen suits address legal interests that are narrower than those of the State. Citizen suits “may neither be

⁹⁵ 33 U.S.C.A. § 1365(b)(1)(B) (2008).

⁹⁶ See *St. Bernard Citizens for Envtl. Quality, Inc. v. Chalmette Ref., L.L.C.*, 500 F. Supp. 2d 592 (E.D. La. 2007).

⁹⁷ See 42 U.S.C.A. § 7604(b)(1)(B) (2008).

⁹⁸ 15 U.S.C.A. § 2619(b)(1)(B) (2008).

⁹⁹ 16 U.S.C.A. § 544m(b)(3)(A)(ii) (2008).

¹⁰⁰ 30 U.S.C.A. § 1270(b)(1)(B) (2008).

¹⁰¹ 42 U.S.C.A. § 4911(b)(1)(B) (2008).

¹⁰² *St. Bernard Citizens for Envtl. Quality, Inc. v. Chalmette Ref., L.L.C.*, 500 F. Supp. 2d 592, 604-06 (E.D. La. 2007) (citations omitted).

¹⁰³ *Atlantic States Legal Found., Inc. v. Eastman Kodak Co.*, 933 F.2d 124, 127 (2d Cir. 1991).

¹⁰⁴ *Id.*

addressed wholly to past violations nor seek to recover fines and penalties that the government has elected to forego.”¹⁰⁵ A citizen suit must “supplement, not supplant” state enforcement.¹⁰⁶ *St. Bernard* does not change the status quo.

C. *Continued Violations by the Defendant after the Consent Decree*

The diligent prosecution standard is an effective preclusion test because it does not allow the violator any easy outs, as the Eighth Circuit test might. If a decree has no teeth it does not qualify as a diligent prosecution. The Seventh Circuit addressed concerns about post-consent decree violations, stating that “[i]f the State fails to diligently prosecute post-[consent decree] violations, [private actors] may prod it into action.”¹⁰⁷ This “prodding” occurs when the private actor files notice of intent to bring a citizen suit.¹⁰⁸ Even if the private action fails to motivate state action, the violator still must face the subsequent citizen suit,¹⁰⁹ as long as the private plaintiff does not seek damages the State has chosen to forego.¹¹⁰ The diligent prosecution standard does not let the violator escape liability, and it ensures compliance with the statute through a consent decree or citizen suit litigation.

D. *The Effect of Parens Patriae on a Plaintiff’s Remedy*

The district court’s finding of res judicata precluded *St. Bernard* from pursuing a remedy for the majority of its allegations.¹¹¹ Plaintiffs were permitted to move forward, however, on two claims of CAA violations which were not covered by the Consent Decree.¹¹² Any civil penalties won by *St. Bernard* will be “deposited in a special fund in the United States Treasury.”¹¹³ The damage amounts deposited in the Treasury Department fund are used to “finance air compliance and enforcement activities.”¹¹⁴ This furthers the purpose of the CAA by working to prevent harmful emissions.

¹⁰⁵ *Id.* (citing *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60-61 (1987)).

¹⁰⁶ *Id.* (citing *Gwaltney*, 484 U.S. at 59-60).

¹⁰⁷ *Friends of Milwaukee’s Rivers v. Milwaukee Metro. Sewerage Dist.*, 382 F.3d 743, 763 (7th Cir. 2004).

¹⁰⁸ *See id.* at 748, 763.

¹⁰⁹ *See St. Bernard Citizens for Env’tl. Quality, Inc. v. Chalmette Ref., L.L.C.*, 500 F. Supp. 2d 592, 610 (E.D. La. 2007).

¹¹⁰ *See Atlantic States Legal Found., Inc. v. Eastman Kodak Co.*, 933 F.2d 124, 127 (2d Cir. 1991) (citing *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60-61 (1987)).

¹¹¹ *St. Bernard Citizens for Env’tl. Quality, Inc.*, 500 F. Supp. 2d at 608.

¹¹² *Id.* at 610.

¹¹³ 42 U.S.C.A. § 7604(g)(1) (2008).

¹¹⁴ 42 U.S.C.A. § 7604(g)(1) (2008).

The court's decision did take one thing away from *St. Bernard*. In its motion for partial summary judgment, the plaintiff asked the court to award attorney's fees under the CAA.¹¹⁵ It is unclear from the court's opinion whether or not *St. Bernard* received attorney's fees on its partially successful motion for summary judgment.¹¹⁶ Future cases involving citizen suit provisions may address this issue. One logical reason for denying attorney's fees is that, where the motion for summary judgment is denied because of *res judicata*, there should be no award of fees because the plaintiff did not succeed "on the merits."¹¹⁷ Conversely, where the court grants the motion in part, the plaintiff's suit remains valid under the statute for all claims not barred by *res judicata*. Arguably, the plaintiff should receive the full award the statute entitles him for those claims that are not precluded.

III. CONCLUSION

In *St. Bernard* the district court established a test to determine when government action precludes a plaintiff's citizen suit under the Clean Air Act.¹¹⁸ The court wisely chose a middle-ground approach rather than adopting a standard that would almost always necessitate preclusion or would allow nearly all citizen suits to progress. The diligent prosecution standard allows a citizen suit to continue only where the government's action is not capable of bringing about compliance with the statute and is not designed to do so.¹¹⁹ Adoption of the diligent prosecution standard for violations of the CAA implies that the standard should be used in other statutes. The standard is based on language in the CAA and CWA declaring citizen suits barred where the government is diligently prosecuting a civil action.¹²⁰ This language appears in many other statutes.¹²¹ Therefore, it would seem that the diligent prosecution standard should be applied to these cases as well.

St. Bernard did not change the preclusion game by allowing suits that had already commenced to preclude government action. Courts construing these statutes have found that the government is the enforcer of them and that private suits preventing government action would lead to

¹¹⁵ *St. Bernard Citizens for Environ. Quality, Inc. v. Chalmette Ref., L.L.C.*, 500 F. Supp. 2d 592, 595 (E.D. La. 2007).

¹¹⁶ *See id.* 610.

¹¹⁷ *See*, ROBERT L. ROSSI, 1 ATTORNEYS' FEES § 10:39 (3d ed.) (2007).

¹¹⁸ *St. Bernard Citizens for Environ. Quality, Inc.*, 500 F. Supp. 2d at 605-06.

¹¹⁹ *Id.*

¹²⁰ *See* 42 U.S.C.A. § 7604(b)(1)(B) (2008); 33 U.S.C.A. § 1365(b)(1).

¹²¹ 15 U.S.C.A. § 2619(b)(1)(B) (2008); 16 U.S.C.A. § 544m(b)(3)(A)(ii) (2008); 30 U.S.C.A. § 1270(b)(1)(B) (2008); 42 U.S.C.A. § 4911(b)(1)(B) (2008).

under-enforcement of the statutes.¹²² The diligent prosecution standard works well because, if there is no compliance, there is no preclusion. Therefore, a plaintiff is free to bring suit if the consent decree fails.

¹²² Atlantic States Legal Found., Inc. v. Eastman Kodak Co., 933 F.2d 124, 127 (2d Cir. 1991)

