
2016

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Recommended Citation

Jennifer Lamb, *OPA or NOPA? Restoring Cooperative Federalism in Oil Pollution Enforcement*, 65 Emory L. Rev. 841 (2016).

Available at: <https://scholarlycommons.law.emory.edu/elj/vol65/iss3/4>

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OPA OR NOPA? RESTORING COOPERATIVE FEDERALISM IN OIL POLLUTION ENFORCEMENT

ABSTRACT

Catastrophic oil spills are some of the most visible and devastating contemporary environmental disasters. Unfortunately, a loophole in the Clean Water Act has significant potential to limit the United States's ability to prosecute those who spill oil. Commonly known as the statutory preclusion provision, the provision prevents the federal government from prosecuting an action when a state acts first—even if the state has only acted administratively against a violator. Expansive interpretation of statutory preclusion by federal courts creates an emerging impediment to effective enforcement against oil pollution. The highly publicized 2013 decision of United States v. CITGO Petroleum Corp. was the first oil spill case to address the issue of statutory preclusion.

This Comment argues that the application of statutory preclusion to Oil Pollution Act cases is contrary to the original intent of the Congress in drafting the statutory preclusion provision of the Clean Water Act and subsequent Oil Pollution Act amendments. Further, applying statutory preclusion to oil pollution cases undermines effective enforcement. This Comment proposes that the Environmental Protection Agency (EPA) should take a leadership role by arguing that its interpretation of the statutory preclusion provision in its regulations should be entitled to deference under Chevron v. National Resource Defense Council. Providing Chevron deference to the EPA's prosecutorial determinations will resolve a three-way split among the federal circuits. A uniform rule will also facilitate effective relationships under cooperative federalism for the benefit of the environment.

INTRODUCTION

Whether it is 1989 or 2015, images of oil covered birds and tarred beaches from catastrophic oil spills underscore the need for improved environmental protection and enforcement.¹ Historically, catastrophe was enough to unite the U.S. Congress to work together on oil pollution reform.² After the *Exxon Valdez* spilled eleven million gallons of crude oil into the Prince William Sound on March 24, 1989, national outcry erupted over the limited ability of the federal government to respond to, and clean up, oil spills.³ U.S. citizens demanded that the federal government have the ability to prosecute and hold responsible individuals who spilled oil into waters of the United States.⁴ Congress responded by enacting comprehensive amendments to the Federal Water Pollution Control Act—or the Clean Water Act (CWA).⁵ These amendments, known as the Oil Pollution Act amendments of 1990 (OPA 1990), treated oil pollution as an inherently national issue. They provided the Environmental Protection Agency (EPA) and Coast Guard with primary and comprehensive authority to address oil spills into waters of the United States.⁶ One of the most important components of this enforcement regime is the EPA's ability to levy large criminal and civil penalties against violators.⁷

Treating oil pollution as a national issue under the CWA creates some tension with the CWA's central mandate of cooperative federalism. Under cooperative federalism, states and the federal government share the responsibility, with states playing the primary role, to restore the physical, chemical, and biological integrity of the nation's waters.⁸

¹ See, e.g., Sarah Graham, *Environmental Effects of Exxon Valdez Spill Still Being Felt*, SCI. AM. (Dec. 19, 2003), <http://www.scientificamerican.com/article/environmental-effects-of/>; Lawrence C. Smith, Jr., L. Murphy Smith & Paul A. Ashcroft, *Analysis of Environmental and Economic Damages from British Petroleum Deepwater Horizon Oil Spill*, 74 ALB. L. REV. 563, 576 (2011).

² See, e.g., 136 CONG. REC. 22288 (1990) (statement of Rep. Silvio Conte) (explaining “it took a disaster of epic proportions to push us to where we are today” in discussing the passage of OPA 1990).

³ See, e.g., Benjamin H. Grumbles & Joan M. Manley, *The Oil Pollution Act of 1990: Legislation in the Wake of a Crisis*, NAT. RESOURCES & ENV'T, Fall 1995, at 35, 35.

⁴ See *id.*; 136 CONG. REC. 22288 (1990) (statement of Rep. Silvio Conte) (describing the devastation of the *Exxon Valdez* spill).

⁵ See, e.g., 136 CONG. REC. 22288 (1990) (statement of Rep. Silvio Conte) (explaining the “comprehensive” approach of the Oil Pollution Act of 1990).

⁶ 33 U.S.C. § 1321 (2012).

⁷ *Id.* § 1319; see 136 CONG. REC. 21723–24 (1990) (statement of Sen. Joseph Lieberman) (explaining the importance of assessing significant civil penalties).

⁸ See, e.g., Order Denying Defendant's Motion to Dismiss at 5, *United States ex rel. Cal. Dep't of Fish & Game v. HVI Cat Canyon*, 76 E.R.C. 1389 (C.D. Cal. June 8, 2013) (No. CV 11-05097 DDP), 2013 WL 169877, at *2; see *United States v. CITGO Petrol. Corp.*, 723 F.3d 547, 551 (5th Cir. 2013).

Not surprisingly, state and federal tensions over proper management of oil pollution remain a pervasive issue in environmental law. In the early years, states were frustrated with slow federal progress in implementing OPA.⁹ In the immediate wake of OPA 1990, many coastal states proposed and adopted provisions to prosecute oil pollution violators themselves.¹⁰ Some states clashed with federal agencies over the details of enforcement in the immediate wake of spills.¹¹

Today, the balance between state and federal enforcement of oil pollution is managed by a single, crudely drafted 1987 Amendment to the CWA that precipitated the modern OPA provisions. Commonly known as the statutory preclusion provision,¹² the original intent of the provision was to prevent violators from paying twice for violations due to duplicative enforcement actions brought by states, citizens, and the federal government.¹³ The provision allows an administrative action by the state to preclude pursuit of a federal civil penalty against a violator, regardless of whether the federal action is brought by a citizen plaintiff or the EPA. Federal courts inappropriately applying the statutory preclusion provision when a state prosecutes first now allows violators to entirely avoid liability.¹⁴ For OPA prosecutions, removing civil penalty liability strikes at the heart of effective federal enforcement.

The increasing size and scale of recent catastrophes by repeat offenders demand that federal enforcement against OPA violators be more effective, not less. For example, the EPA collected \$25 million—the largest OPA civil penalty in history up to that point—from BP for the North Slope Alaska Spill in 2011.¹⁵ Just two years later, the 210 million gallon spill and \$1 billion civil penalty collected in the Transocean Settlement—again from BP—dwarfed the

⁹ See, e.g., *Oil Pollution Act of 1990: Joint Hearing Before the H. Subcomms. on Coast Guard & Mar. Transp. & Water Resources & Env't of the Comm. on Transp. & Infrastructure*, 106th Cong. 177 (1999) [hereinafter *Oil Pollution Act of 1990 Joint Hearing*] (statement of Sally Ann Lentz) (discussing particular experience with Washington's state initiatives passed after the *Oil Pollution Act of 1990*).

¹⁰ See Amy M. Stolls, *Oil Spill Legislation in the Coastal United States Since the Oil Pollution Act of 1990*, 1993 INT'L OIL SPILL CONF. 643, 643–48 (cataloging lead state agencies, oil spill legislation, and oil spill rules and regulations in twenty-four states).

¹¹ See *supra* note 9.

¹² See Jeffrey G. Miller, *Theme and Variations in Statutory Preclusions Against Successive Environmental Enforcement Actions by EPA and Citizens, Part Two: Statutory Preclusions on EPA Enforcement*, 29 HARV. ENVTL. L. REV. 1, 13–19, 22 (2005).

¹³ *Id.* at 28.

¹⁴ See *id.* at 29–30.

¹⁵ Consent Decree at 8, *United States v. BP Exploration (Alaska) Inc.*, No. 3:09-cv-00064-JWS (D. Alaska May 3, 2011).

North Slope spill.¹⁶ In 2010, Plains All American Pipeline paid over \$3 million for spills occurring in five states.¹⁷ This summer, a spill from a Plains pipeline spread oil 100 miles down the Santa Barbara coast.¹⁸ The bottom line is that serious spills keep happening, and too often by the same companies.

In the wake of environmental disasters such as the *Deepwater Horizon* and other recent spills, scholars have once again called for Congress to pass OPA reforms.¹⁹ However, given the congressional stalemate over most environmental issues,²⁰ this Comment looks to how OPA litigation might be used to make national OPA enforcement more effective.

Notably, a litigation approach calls for a marked departure from the typical mechanics of EPA enforcement. The EPA prefers to settle OPA cases, as evidenced by the fact that, since 1999, more than ten OPA consent decrees have been filed²¹—and only two cases have gone to litigation under OPA 1990.²²

But recent case law indicates that the EPA may no longer have the discretion to continue its preference for settlement if it wishes to effectively enforce OPA violations. In 2013, defendants first availed themselves of the statutory preclusion provision during litigation of an oil pollution civil penalties prosecution in *United States v. CITGO Petroleum Corp.*²³ In *CITGO*, the company's failure to clean its produced water holding tanks resulted in a significant accumulation of oil.²⁴ When the tanks overflowed due to a large storm event, over two million gallons of oil flowed into a nearby river,

¹⁶ Partial Consent Decree Between the Plaintiff United States of America and the Defendants Triton Asset Leasing GmbH, Transocean Holdings LLC, Transocean Offshore Deepwater Drilling Inc., and Transocean Deepwater Inc. at 9, *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico*, on April 20, 2010, 841 F. Supp. 2d 988 (E.D. La. Jan. 3, 2013) (No. 10-4536) [hereinafter Partial Consent Decree].

¹⁷ Consent Decree at 11–12, *United States v. Plains All American Pipeline, L.P.*, No. 4:10-cv-2833 (S.D. Tex. Aug. 10, 2010) (collecting a penalty of \$3.25 million).

¹⁸ Michael R. Blood, *Santa Barbara Spill Might Be Larger than Projected*, L.A. DAILY NEWS (Aug. 5, 2015, 12:26 PM), <http://www.dailynews.com/general-news/20150805/santa-barbara-oil-spill-might-be-larger-than-projected>.

¹⁹ Kenneth A. Murchison, *Liability Under the Oil Pollution Act: Current Law and Needed Revisions*, 71 L.A. L. REV. 917, 938–39 (2011).

²⁰ Hari Osofsky & Jaqueline Peel, *Energy Partisanship*, 65 EMORY L.J. 695 (2016).

²¹ See *Civil Cases and Settlements by Statute*, U.S. ENVTL. PROT. AGENCY <http://cfpub.epa.gov/enforcement/cases/index.cfm?templatePage=12&ID=3> (last visited Sept. 30, 2015).

²² See, e.g., Order Denying Defendant's Motion to Dismiss, *supra* note 8, at 5; see *United States v. CITGO Petrol. Corp.*, 723 F.3d 547, 551 (5th Cir. 2013).

²³ See 723 F.3d at 551.

²⁴ *Id.* at 550.

resulting in a fish kill and covering numerous birds with oil.²⁵ As the first case to go to trial for civil penalties under OPA²⁶ and raise the statutory preclusion defense,²⁷ *CITGO* was closely followed by environmental counsel, states, and firms around the country. In the popular press, *CITGO* was discussed as a model for the *Deepwater Horizon* prosecution.²⁸ Although the statutory preclusion defense was unsuccessful in *CITGO*, the case simultaneously raised the profile of the statutory preclusion provision. Consequently, statutory preclusion is an emerging issue in the effectiveness of oil pollution enforcement.²⁹

In light of the implications of *CITGO*, this Comment analyzes the impacts of statutory preclusion on OPA enforcement. This Comment proceeds in three Parts. Part I explores the relationship between legislative intent, OPA, and statutory preclusion provisions under the principles of cooperative federalism in the CWA. Part I includes a novel analysis of to the EPA's guidance on the application of statutory preclusion to OPA cases and details the broad expansion of statutory preclusion by the federal courts in a manner that is inconsistent with legislative intent. Part II next demonstrates how, contrary to established legislative intent, the broad application of statutory preclusion to oil cases directly undermines effective oil pollution enforcement and cooperative federalism. Finally, Part III explores how the application of *Chevron* deference to the EPA's regulatory interpretation of the statutory preclusion provision would make judicial interpretation of the provision more consistent with legislative intent. Further, arguing for *Chevron* deference places the agency in a position of leadership in oil pollution prosecution and promotes cooperative federalism. Ultimately, this Comment concludes that the application of *Chevron* deference and a uniform national standard for statutory preclusion will create net benefits for states, citizens, the EPA, industry, and the environment.

²⁵ See *id.* at 549.

²⁶ See, e.g., Craig Isenberg, Andrea Mahady Price & Adam Swensek, *Calculating Economic Benefit Under the Oil Pollution Act Amendments to the Clean Water Act*, IN-HOUSE DEF. Q., Fall 2011, at 36.

²⁷ *CITGO Petrol. Corp.*, 723 F.3d at 550.

²⁸ Margaret Cronin Fisk & Brian Swint, *BP Has Road Map in CITGO Oil-Spill Case for Macondo Fine*, BLOOMBERG NEWS (Dec. 6, 2011, 12:10 PM), <http://www.bloomberg.com/news/2011-12-06/bp-has-road-map-in-CITGO-case-to-formula-for-oil-spill-fine.html>.

²⁹ See *infra* note 191 and accompanying text.

I. OIL POLLUTION AND COOPERATIVE FEDERALISM IN THE CLEAN WATER ACT: HOW THE STATUTORY PRECLUSION PROVISION EXPANDED BEYOND ITS INTENDED SCOPE

Even though Congress intended the statutory preclusion provision to support cooperative federalism, nearly thirty years of confused application of the provision by federal courts has resulted in the provision actually undermining the shared responsibility of the federal government and states to manage water pollution.³⁰ In this Part, section A first explains the basic principles of cooperative federalism in the CWA and the Act's statutory preclusion provision. Section B turns to the discussion of the modest roots of the statutory preclusion provision in cooperative federalism through a discussion of legislative history. Section B then traces the parallel development of EPA enforcement of the water and oil provisions of the statute to show how they have diverged over time since the passage of the statutory preclusion provision. This demonstrates the current and substantial potential for statutory preclusion to undermine oil pollution prosecutions. Next, section C discusses EPA guidance documents on the application of the statutory preclusion provision to explain the EPA's early attempts to advocate for judicial interpretation of the provision consistent with legislative intent. Finally, section D traces the development of statutory preclusion litigation by citizens and the EPA to show how courts expanded the provision from its modest roots in the citizen suit context to broadly bar effective enforcement by the federal government.

A. *Cooperative Federalism, Enforcement, and Statutory Preclusion*

The CWA is founded upon cooperative federalism—the notion that the responsibility for the enforcement and maintenance of environmental laws should be shared between the states and federal government.³¹ The EPA administers the CWA,³² but the Act's preamble gives states the primary responsibility “to prevent, reduce, and eliminate pollution.”³³ Accordingly, states have the opportunity to develop and submit for approval National Pollutant Discharge Elimination System (NPDES) programs, which issue

³⁰ 33 U.S.C. § 1319(g)(6) (2012).

³¹ See, e.g., *New York v. United States*, 505 U.S. 144, 167 (1992) (explaining that the CWA is a statute that exemplifies “cooperative federalism”); *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992) (the CWA “anticipates a partnership between the States and the Federal Government, animated by a shared objective”).

³² 33 U.S.C. § 1251(a).

³³ *Id.* § 1251(b).

permits to track and limit discharges into the waters of the United States.³⁴ Although states must obtain the EPA's approval for the administration of such NPDES permitting programs, states maintain the freedom to develop their own statutory schemes to control water pollution.³⁵

Responsibility for enforcement of water pollution laws was also intended to be shared amongst states, citizens, and the federal government.³⁶ Congress enacted the CWA in 1972, at a time when the public and scholars were concerned about agencies being captured by regulated industry.³⁷ Because of this concern, the CWA facilitated citizen enforcement through the creation of a private right of action for citizens to sue under federal law.³⁸ The EPA, states, and citizens all enforce permit compliance.³⁹ The EPA may seek injunctive relief, criminal penalties, civil penalties, and administrative penalties under the water enforcement provisions.⁴⁰ Citizens claiming under the citizen suit provision may also seek injunctive relief and civil penalties under the water enforcement provisions.⁴¹ However, the EPA—and only the EPA⁴²—may prosecute a violator under the OPA provisions for criminal penalties and civil penalties.⁴³

In view of these multiple enforcement authorities, it is critical to understand that, apart from the citizen suit context, CWA enforcement actions are seldom litigated. This has important implications for an analysis of how to improve enforcement. States typically prosecute environmental violators

³⁴ See *id.* § 1342(b).

³⁵ See *id.* § 1342(b)(7).

³⁶ See *id.* § 1365; ENVTL. POLICY DIV. OF THE CONG. RESEARCH SERV. OF THE LIBRARY OF CONG., 93D CONG., A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 215–17 (1973) (statement of Sen. Evan Bayh).

³⁷ Joel A. Mintz, *Has Industry Captured the EPA?: Appraising Marver Bernstein's Captive Agency Theory After Fifty Years*, 17 FORDHAM ENVTL. L. REV. 1, 3 (2005).

³⁸ These are commonly known as citizen suits. See 33 U.S.C. § 1365 (a)(2).

³⁹ See *id.* § 1342(b)(7).

⁴⁰ See *id.* § 1319(c), (d), (g).

⁴¹ See *id.* § 1365 (citizens enforce civil penalties under § 1319(d)).

⁴² This may involve cost recovery for the Coast Guard, but EPA brings the enforcement action. See, e.g., *Order Denying Defendant's Motion to Dismiss*, *supra* note 8 (exemplifying enforcement action).

⁴³ See 33 U.S.C. § 1321(b) (making no reference to state enforcement of OPA); *Apalachicola Riverkeeper v. Taylor Energy Co.*, 954 F. Supp. 2d 448, 454–55 (E.D. La. 2013) (explaining that citizens must prosecute oil pollution under a citizen suit brought under § 1365 to enforce against oil as a pollutant discharged without a permit under § 1342, not § 1321); *Chesapeake Bay Found. v. Severstal Sparrows Point, LLC*, 794 F. Supp. 2d 602, 618–19 (D. Md. 2011) (“[I]f Congress intended to allow citizen suits for the enforcement of § 1321, Congress would have included § 1321 in the citizen suit provision.”).

administratively.⁴⁴ The EPA has the option of pursuing administrative or judicial enforcement.⁴⁵ But even in the case of federal judicial enforcement, generally the end goal for the EPA and the violator is to put a consent decree into place. Such consent decrees are the launch point for a relationship between the agency and the violator. They typically contain detailed prescriptions for injunctive relief and a schedule of activities to be performed by the violator to bring the company into compliance.⁴⁶ In the event of a further violation or recurring harm, the EPA can return to court for an order to enforce a specific provision of the decree. The EPA publishes consent decrees on its website and allows a period for public comment before entering the decree. But the mere publication of a consent decree on the EPA's website provides very little insight into the negotiation process—or what problems might exist within it.

When Congress added the administrative penalties provision in 1987, it recognized that there might be some potential for overlapping enforcement by citizens, and state and federal authorities. Thus, Congress added the statutory preclusion provision to attempt to manage this potential overlap. The statutory preclusion provision dictates that an action by the Administrator will be precluded when a state “has commenced” and is “diligently prosecuting an action under a State law comparable to this subsection.”⁴⁷ Federal or citizen prosecution is also barred when a “State has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under this subsection, or such comparable State law.”⁴⁸ This bar protects violators from a duplicative action brought by the EPA or a citizen under the judicial civil penalties provision of the CWA.⁴⁹ Most curiously, the provision also protects environmental violators from federal judicial civil penalties brought under § 311, the provision that became the central focus of OPA 1990.⁵⁰

Remarkably, the protection afforded to environmental violators by the statutory preclusion from additional claims is much broader than that available

⁴⁴ For example, the controlling statutory preclusion precedent in the First, Ninth, and Eleventh Circuits each resulted from citizen challenges commenced after a state administrative prosecution. *See, e.g., McAbee v. Fort Payne*, 318 F.3d 1248, 1251 (11th Cir. 2003); *see Citizens for a Better Env't-Cal. v. Union Oil Co. of Cal.*, 83 F.3d 1111, 1115–17 (9th Cir. 1996); *N. & S. Rivers Watershed Ass'n v. Town of Scituate*, 949 F.2d 552, 556 (1st Cir. 1991).

⁴⁵ *See* 33 U.S.C. § 1319(e), (g).

⁴⁶ *See, e.g.,* Consent Decree, *supra* note 17, at 13–19 (containing detailed measures for upgrading and maintaining oil pipeline to bring the company into compliance).

⁴⁷ 33 U.S.C. § 1319(g)(6)(A)(ii).

⁴⁸ *See id.*

⁴⁹ *Id.* § 1319(d).

⁵⁰ *Id.* § 1319(g)(6)(A)(iii).

under the common law doctrines of claim and issue preclusion, which bar the ability of an issue or claim to be re-litigated in court.⁵¹ This is because a citizen or federal action may be precluded when the state has commenced and is diligently prosecuting (or has diligently prosecuted) an *administrative penalty action*.⁵² The fact that Congress has *never* shared the EPA's oil enforcement authority with states or citizens makes it even more surprising that Congress would extend this broad protection.⁵³ In an attempt to shed light on the intended purpose of the provision, section B examines the legislative history behind the statutory preclusion provision.

B. The Statutory Preclusion Provision's Modest Roots

Congress intended the statutory preclusion provision to have a modest impact upon enforcement of the CWA. Reviewing the Committee Reports and floor remarks of Senator Lincoln Chafee, the bill sponsor and member of the Senate Committee on the Environment and Public Works, reveals four key observations: (1) the provision was intended to encourage vigilant state enforcement of environmental laws, (2) the provision was only to apply when states had adopted a particular, narrow statutory framework, (3) the provision was not intended to disrupt judicial enforcement, and (4) the provision barred largely interchangeable courses of action under the oil and water provisions where concern for duplication was reasonable.

First, Senator Chafee expressly stated that under the provision “redundant enforcement activity” was “to be avoided and State action to remedy a violation of Federal law . . . to be encouraged.”⁵⁴ As such, an interpretation of the provision that would encourage states to pass lax environmental laws, shield violators from prosecution, or deter states from moving quickly to remedy violations of federal law would contravene legislative intent.

Second, Senator Chafee's floor remarks set out narrow parameters for when state action would be sufficient to preclude a federal prosecution.

⁵¹ See NAT'L ASS'N OF ATTORNEYS GEN., U.S. DEP'T OF JUSTICE, GUIDELINES FOR JOINT STATE/FEDERAL CIVIL ENVIRONMENTAL ENFORCEMENT LITIGATION 17–18 (2003) (discussing particular application of claim and issue preclusion in environmental enforcement cases).

⁵² See Miller, *supra* note 12, at 20, 37. However, some courts have expanded the interpretation so that a penalty order is not necessary. See, e.g., N. & S. Rivers Watershed Ass'n v. Town of Scituate, 949 F.2d 552, 557 (1st Cir. 1991).

⁵³ See, e.g., Chesapeake Bay Found., Inc. v. Severstal Sparrows Point, LLC, 794 F. Supp. 2d. 602, 618–19 (D. Md. 2011); see 33 U.S.C. § 1321(b) (making no reference to state enforcement of OPA).

⁵⁴ See 133 CONG. REC. 1264 (1987) (statement of Sen. Lincoln Chafee).

Significantly, Senator Chafee limited the set of states that could bring an action, noting “only if a State has received authorization under section 402 [the NPDES permitting program]⁵⁵ to implement a particular permitting program can it prosecute a violation of Federal law.”⁵⁶ Further, Senator Chafee explained his perspective regarding the terminology of “proceeding under a State law comparable to [the administrative penalties provision].”⁵⁷ In Senator Chafee’s view, “a State law must provide for a right to a hearing and for public notice and participation procedures . . . it must include analogous penalty assessment factors and judicial review standards; and it must include provisions that are analogous to the other elements of [the administrative penalties provision].”⁵⁸ Senator Chafee also indicated that a “Federal judicial civil penalty action or a citizen suit is not to be commenced if an administrative penalty proceeding is already underway.”⁵⁹ In effect, this statement limited the state or federal action to a penalty proceeding, as opposed to a proceeding for solely injunctive relief.

Third, Senator Chafee’s remarks and the Senate Committee Report expressed that the preclusion provision was not intended to undermine judicial enforcement. Senator Chafee explained that the provision was not “intended to lead to the disruption of any federal judicial penalty action then underway.”⁶⁰ The statement suggests that the intent of the provision—at least in part—was to ensure that more serious violations should be handled judicially instead of administratively.⁶¹ The Senate Committee Report echoed these sentiments. Specifically, the Senate Committee Report expressed that the administrative penalties provision should “not . . . replace a vigorous judicial enforcement program.”⁶² The Senate Committee further recognized that “[c]ivil judicial enforcement is a keystone of successful enforcement of the Act and necessary for . . . serious violations of the Act, or large penalty actions.”⁶³

Fourth, the legislative history is significant in that it fails to distinguish between enforcement actions brought under the administrative penalties provision for water, civil penalties provision for water, and civil penalties

⁵⁵ See *supra* text accompanying notes 33–35.

⁵⁶ 133 CONG. REC. 1264.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ See *id.*

⁶² S. REP. NO. 99-50, at 26 (1985).

⁶³ *Id.*

provision for oil. Regarding applicability to OPA, the interchangeable use of the various penalty provisions in the legislative history reflects that at the time of the statutory preclusion provision's enactment, the new administrative penalties,⁶⁴ water,⁶⁵ and oil⁶⁶ enforcement provisions were similar courses of action for the federal government to pursue.⁶⁷

By all accounts, the legislative history suggests that the statutory preclusion provision was intended to create incentives for effective state enforcement without disrupting the EPA judicial enforcement scheme. Yet, as this Comment will demonstrate in section E of this Part, interpretation of the statutory preclusion provision by federal courts takes the provision far from these modest roots. Such divergence is also significant because Congress and the EPA expanded oil enforcement authority after 1987. Section C explores how the statutory language and federal application of the water and oil enforcement provisions have been adapted so that the enforcement consequences between these provisions are no longer similar.

C. Congressional and Administrative Expansion of Oil Prosecution Since Enactment of the Statutory Preclusion Provision

Three years after the adoption of the statutory preclusion provision, the OPA 1990 amendments resulted in profound changes in oil spill prosecutions in the United States.⁶⁸ Subsection 1 reviews amendments to the definition for what constitutes a violation, potential liability exposure for violators, and criteria considered in penalty assessments, showing how the oil pollution provisions are no longer interchangeable with the administrative penalties provision. Subsection 2 explores how the EPA now applies OPA to prosecute different types of violators and violations under the water and oil enforcement provisions.

1. The OPA Amendments of 1990 Expand Liability

OPA 1990 dramatically changed the scope and liability potential for spilling oil into United States waters. While the CWA administrative penalties scheme and OPA enforcement were roughly comparable in 1987, OPA 1990

⁶⁴ 33 U.S.C. § 1319(d) (1982).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *See id.* § 1321(e) (prohibiting enforcement for the same violations under § 1319(d) and § 1321(b)); 133 CONG. REC. 1264 (1987) (statement of Sen. Lincoln Chafee).

⁶⁸ *See, e.g.*, 145 CONG. REC. 5494 (1999) (statement of Sen. Theodore Stevens).

increased potential liability and amended factors used to calculate a civil penalty. As such, the statutory preclusion provision functions as a much broader bar to oil spill enforcement today than it was enacted.

When the statutory preclusion provision was added to the CWA in 1987, Congress had already declared a national policy that there should be “no discharges of oil or hazardous substances into or upon the navigable waters of the United States.”⁶⁹ A violation occurs if there is a discharge in “quantities which may be harmful.”⁷⁰ Harmful is defined as when the discharge “[c]ause[s] a film or sheen upon or discoloration of the surface of the water or adjoining shorelines or cause[s] a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines.”⁷¹ In the event of such a violation, the 1987 oil pollution provision created a maximum civil penalty of \$50,000 per violation, except in the case of “willful negligence or willful misconduct within the privity and knowledge of the owner.”⁷² In such cases, the oil pollution provision instituted a maximum penalty of \$250,000.⁷³

Especially in the absence of willful negligence, this penalty structure was somewhat similar to what was available in the administrative penalties provision.⁷⁴ Under the administrative penalties provision, a penalty of up to \$10,000 per violation but not to exceed \$25,000 was made available to prosecute a violator under the Act.⁷⁵ Thus, just after the passage of the 1987 amendment the federal government could proceed with a similar penalty action through prosecution under the judicial enforcement provisions for oil⁷⁶ or the administrative penalties provision. As such, the statutory preclusion bar on oil prosecution appeared more reasonable.⁷⁷

OPA 1990 created much greater liability potential for violators than available under the administrative penalties provision.⁷⁸ Today, the administrative penalty provision creates liability of up to \$16,000 per day or

⁶⁹ 33 U.S.C. § 1321(b)(1) (1982). “Navigable waters” is defined as “waters of the United States.” *See id.* § 1362(7).

⁷⁰ 33 U.S.C. § 1321(b)(3).

⁷¹ 40 C.F.R. § 110.3(b) (2014).

⁷² 33 U.S.C. § 1321(f).

⁷³ *Id.*

⁷⁴ *Compare id.* § 1321(b), with 33 U.S.C. § 1319(g)(2) (2012).

⁷⁵ 33 U.S.C. § 1319(g)(2) (2012).

⁷⁶ 33 U.S.C. § 1321(b) (1982).

⁷⁷ 33 U.S.C. § 1319(g)(2)(A) (1988).

⁷⁸ *Compare* 33 U.S.C. § 1321(b)(7) (2012), with 33 U.S.C. § 1319(g)(2)(A) (1988).

per violation with a *total cap* of \$37,500.⁷⁹ In contrast, the oil enforcement provision creates liability of up to a \$37,500 *per day* or \$2,100 per barrel⁸⁰ for spills not occasioned by gross negligence.⁸¹ For spills occasioned by gross negligence, the EPA may seek a civil penalty of up to \$5,300 per barrel and will levy a minimum of \$150,000 in civil penalties.⁸² This dramatic increase in civil penalties was a part of OPA's comprehensive scheme to deter significant environmental damage.⁸³ Consequently, civil penalty liability in OPA cases can easily reach into the millions of dollars,⁸⁴ especially for large spill events or in cases where there have been a series of smaller spills over time.⁸⁵

The significant increase in liability potential under OPA shows how the statutory preclusion provision's capacity to undermine judicial enforcement is much greater now than when it was enacted in 1987. Specifically, state prosecution under a statute with liability limits comparable to the administrative penalties provision, which caps liability at \$37,500 can potentially bar a multi-million dollar OPA civil penalty in a judicial action.

OPA 1990 also amended the factors considered in civil penalty assessments.⁸⁶ While five of these factors are analogous to those set out in the administrative penalties provision, the OPA provision does not account for the violator's ability to pay and presents two additional factors for analysis:

⁷⁹ 33 U.S.C. § 1319(g)(2)(A) (2012), *as modified by* Adjustment of Civil Monetary Penalties for Inflation, 40 C.F.R. 19.4 (2014) (applying the most recent figures adjusted for inflation).

⁸⁰ One barrel of oil equals forty-two gallons. *See* OFFICE OF ENF'T & COMPLIANCE ASSURANCE, CIVIL PENALTY POLICY FOR SECTION 311(b)(3) AND SECTION 311(j) OF THE CLEAN WATER ACT 2, 12 (1998).

⁸¹ 33 U.S.C. § 1321(b)(7), *as superseded by* 40 C.F.R. 19.4 (applying the most recent figures adjusted for inflation).

⁸² *Id.*

⁸³ *See, e.g.*, 136 CONG. REC. 22288 (1990) (statement of Rep. Silvio Conte).

⁸⁴ For an extreme example, see Smith et al., *supra* note 1, at 585 (estimating potential CWA damages at \$4.7 billion). Of course, the actual CWA civil penalty collected was \$1 billion. Partial Consent Decree, *supra* note 16, at 9.

⁸⁵ *See, e.g.*, United States v. CITGO Petrol. Corp., 723 F.3d 547, 551 (5th Cir. 2013) (discussing an appeal in which the United States argued the \$6 million penalty awarded by the lower court was inadequate for a single large spill event); Consent Decree, *supra* note 17, at 1, 11–12 (collecting a penalty of \$3.25 million for ten spills over a span of several years).

⁸⁶ 33 U.S.C. § 1321(b)(8) (tasking the Administrator or court to consider the following factors to assess a civil penalty: “the seriousness of the violation or violations, the economic benefit to the violator, if any, resulting from the violation, the degree of culpability involved, any other penalty for the same incident, any history of prior violations, the nature, extent, and degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge, the economic impact of the penalty on the violator, and any other matters as justice may require”).

(1) additional penalties paid in association with the activities, and (2) the economic impact upon the violator.⁸⁷

The changes in OPA civil penalty assessment factors show that the OPA provisions are now intended to prosecute more serious violations than those prosecuted under the administrative penalties provisions. Under the administrative penalties provision, the government may reduce a penalty in light of ability to pay.⁸⁸ However, the oil enforcement provisions contemplate a civil penalty may still be assessed even when it duplicates a criminal penalty, and has the potential to affect whether an operator may remain in business.⁸⁹ This makes OPA penalties far more punitive in nature. Consequently, the expansion of the oil provisions in OPA 1990 means that the statutory preclusion provision has significantly greater potential to disrupt federal enforcement efforts than when it was enacted.

2. *The EPA's Expanded Application of Oil Pollution Act Civil Penalties Provisions*

After OPA 1990, the EPA has aggressively expanded prosecution under the oil provisions so that the water and oil provisions target dramatically different kinds of violators.⁹⁰ Expanded prosecution means that the statutory preclusion provision can bar prosecutions against classes of polluters and environmental harms unforeseen by the 1987 Congress that passed the statutory preclusion provision.

The types of violators and violations prosecuted under OPA have expanded substantially since 1990. This, in part, is because the oil enforcement provision is used to prosecute individuals who discharge oil *and* those violators discharging other hazardous materials that create a “sheen.”⁹¹ For example, the federal government recently used OPA to prosecute a Tyson Farms rendering facility for the discharge of animal byproducts into a North Carolina

⁸⁷ Compare *id.* § 1319(g)(3), with *id.* § 1321(b)(8).

⁸⁸ *Id.* § 1319(g)(3).

⁸⁹ See *id.* § 1321(b)(8).

⁹⁰ See generally *Civil Cases and Settlements by Statute*, *supra* note 21 (noting various enforcement actions).

⁹¹ 40 C.F.R. § 110.3 (2014) (defining harmful quality as a discharge that “[c]ause[s] a film or sheen upon or discoloration of the surface of the water or adjoining shorelines or cause[s] a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines”).

waterway.⁹² Other violators include railway operators and regional and nationally operating oil companies.⁹³ In a 2010 case brought by the United States against onshore operator Plains All American, the EPA collected civil penalties of \$3.25 million and instituted injunctive relief measures after ten spills occurred in Texas, Louisiana, Oklahoma, and Kansas over a three-year period.⁹⁴ The broad variety of violators prosecuted under OPA share the common distinction of being large companies with a regional, and often national, presence.

In contrast, EPA prosecutes violators under the civil or administrative penalties provisions for violations of NPDES permits⁹⁵—or for failing to obtain a permit—rather than under the outright prohibition created by OPA.⁹⁶ Such violators are usually locally operating facilities or municipality-owned facilities.⁹⁷ Many of the violators under the general water enforcement provisions are municipalities that slip into a pattern of violation through a lack of resources to maintain facilities to prevent discharges.⁹⁸ Typically, to proceed judicially, the EPA requires a pervasive pattern of environmental harm due to lack of maintenance, resource constraints, or institutional constraints.⁹⁹ For example, in a recent consent decree, the EPA obtained a settlement with Fort Smith, Arkansas, which had more than 2,000 discharges of untreated sewage

⁹² See, e.g., Complaint at 7, *United States v. Tyson Farms, Inc.*, No. 5:14cv82 (W.D.N.C. May 28, 2014); see also Complaint at 5, *United States v. Union Pac. R.R.*, No. CV10-0076 (D. Or. Jan. 25, 2010) (spilling diesel into a waterway due to a train derailment).

⁹³ See, e.g., *United States v. CITGO Petrol. Corp.*, 723 F.3d 547, 549 (5th Cir. 2013); Complaint at 4, *Union Pac. R.R.*, No. CV10-0076.

⁹⁴ See Consent Decree, *supra* note 17, at 1, 11–12 (collecting a penalty of \$3.25 million for ten spills over a span of several years).

⁹⁵ See, e.g., Consent Agreement and Final Order at 3, *ABC Coke Division, Drummond Co.*, 2014 WL 5137782 (No. CWA-04-2014-4507(b)) (Envtl. Prot. Agency Sept. 30, 2014).

⁹⁶ 33 U.S.C. § 1321(b)(1) (2012) (explaining that there shall be no spills into or upon the navigable waters).

⁹⁷ See, e.g., Consent Agreement and Final Order, *supra* note 95, at 4 (requiring payment of \$20,550 to settle an unpermitted discharge violation from a biological treatment facility under 33 U.S.C. § 1319(g)(2)); *Fort Smith, Arkansas Agrees to Upgrade Sewer System to Reduce Discharges of Raw Sewage into Local Waterways/City will also Develop a Program to Help Low Income Communities Improve Sewer Infrastructure*, U.S. ENVTL. PROT. AGENCY (Jan. 5, 2015) [hereinafter EPA Press Release], <http://yosemite.epa.gov/opa/admpress.nsf/0/20A98EB2CEA636A285257DC400657AC5>.

⁹⁸ EPA Press Release, *supra* note 97.

⁹⁹ See *id.* (reporting a case in which the EPA found a pervasive pattern of environmental harm due to lack of maintenance). For an example of an institutional barrier addressed in the statute itself, see 33 U.S.C. § 1319(e), which requires that states be joined to any federal action against a municipality to discourage states from passing laws that prevent municipalities from raising funds to comply with a federal judgment.

into local waterways due to its failure to maintain its municipal system since 2004.¹⁰⁰

As demonstrated, OPA and its application by the EPA in federal enforcement actions has evolved substantially since the passage of the statutory preclusion provision.¹⁰¹ OPA prosecutions now serve as a major check on water pollution committed by national companies. Because the diversity of targets and scale of OPA actions have increased, the applicability of the statutory preclusion provision to OPA can shield those who commit significant environmental harm from liability.¹⁰²

D. The EPA Guidance on Statutory Preclusion: Early Efforts to Advocate for a Position Consistent with Legislative Intent

Because the EPA generally operates with a distinct preference for settlement in OPA cases, the EPA's ability to explain and address these changes in light of the statutory preclusion provision has been limited. The EPA continues to rely on agency guidance documents—the most recent of which is more than twenty years old—to assess the application of the statutory preclusion to OPA cases. Reviewing this guidance is critical for two reasons. First, the EPA currently applies these guidance documents when it confronts a potential statutory preclusion problem in an OPA prosecution. Second, and to be explored later in this Comment, it provides a critical record for substantiating the agency's expertise and judgment in securing a more appropriate application of the statutory preclusion provision to OPA cases.

Since the enactment of the statutory preclusion provision, the EPA has advocated that the provision should be interpreted consistently with its legislative history by issuing guidance documents in 1987¹⁰³ and 1993.¹⁰⁴ Both documents provide minimal treatment regarding applicability to OPA.¹⁰⁵ The limited references to OPA in both guidance documents indicated that a state

¹⁰⁰ EPA Press Release, *supra* note 97.

¹⁰¹ Compare 33 U.S.C. § 1321(b) (1982), with 33 U.S.C. § 1321(b)(6)(B) (2012).

¹⁰² See 33 U.S.C. § 1319(g)(6) (2012).

¹⁰³ U.S. ENVTL. PROT. AGENCY, GUIDANCE ON STATE ACTION PREEMPTING CIVIL PENALTY ACTIONS UNDER THE FEDERAL CLEAN WATER ACT 2 (1987) [hereinafter 1987 GUIDANCE].

¹⁰⁴ U.S. ENVTL. PROT. AGENCY, SUPPLEMENTAL GUIDANCE ON SECTION 309(g)(6)(A) OF THE CLEAN WATER ACT (1993) [hereinafter 1993 GUIDANCE].

¹⁰⁵ See generally 1987 GUIDANCE, *supra* note 103, at 1 (providing minimal guidance regarding applicability to OPA); 1993 GUIDANCE, *supra* note 104, at 2 (providing minimal guidance regarding applicability to OPA).

action would not bar a federal OPA claim unless it was brought under a state statute comparable to the administrative penalties provision.¹⁰⁶

The 1987 Guidance, which relies heavily on the aforementioned floor statements of Senator Chaffee, set out three general requirements for a statutory preclusion claim. These are (1) the state has delegated authority for enforcement; (2) the state action must be concluded, or commenced and diligently prosecuted; and (3) the state statutory provision must be comparable to the administrative penalties provision.¹⁰⁷ The guidance documents also address a fourth important point: that the EPA is also affected by federal court interpretation of the statutory preclusion provision, even when this interpretation occurs in citizen suit litigation. The following analysis explores each of these issues in turn.

1. The State Has Delegated Authority for Enforcement

Under the first guidance requirement, the EPA approval of the state NPDES program is critical to whether the EPA has delegated some of its enforcement authority under federal law to the state.¹⁰⁸ Without this delegation of authority, the EPA administers the NPDES permitting program under federal law, giving the EPA the proper authority for enforcement of permit violations.¹⁰⁹ However, the Congress has never created a mechanism for the EPA to delegate its authority to the states to enforce oil pollution laws.¹¹⁰ Nevertheless, under the guidance documents, potential for statutory preclusion would only arise under OPA when a state deputized to enforce the CWA prosecutes an oil spill violation.¹¹¹

2. The Diligent Prosecution Requirements

Regarding the second requirement, the guidance documents create a high bar for the diligence of the state prosecution. In the case of a past action, the state must actually recover, at a minimum, the economic benefit to the violator.¹¹² The state prosecution should be sufficient to gain “compliance

¹⁰⁶ See 1987 GUIDANCE, *supra* note 103, at 1; 1993 GUIDANCE, *supra* note 104, at 2.

¹⁰⁷ See 1987 GUIDANCE, *supra* note 103, at 3–4.

¹⁰⁸ *Id.* at 3.

¹⁰⁹ See 33 U.S.C. § 1342(a)(1) (2012).

¹¹⁰ See *id.* § 1321(b) (containing no discussion of delegated authority for OPA enforcement).

¹¹¹ See 1987 GUIDANCE, *supra* note 103, at 3; 1993 GUIDANCE, *supra* note 104, at 1.

¹¹² 1993 GUIDANCE, *supra* note 104, at 3 n.4.

without undue delay.”¹¹³ Consistent with the guidance interpretation, CWA enforcement regulations have preserved the ability of the EPA to bring an additional action when the state recovers a “substantially inadequate” penalty.¹¹⁴

State OPA prosecutions are unlikely to meet the guidance standards for diligent prosecution where an OPA violator commits a series of violations or even in the event of a large spill occasioned by lack of proper maintenance. Specifically, state penalties for water pollution control laws often track those available under the administrative and civil penalties of the CWA.¹¹⁵ For large oil companies, paying an administrative or civil penalty under state law is likely to cost less than instituting adequate measures to prevent spills. In such cases, the state would not recover the economic benefit to the violator even if it recovered the statutory maximum penalty.¹¹⁶ In applying the guidance documents, the EPA would find that its civil penalty prosecution would not be barred because the state would not have met the minimum requirement of collecting economic benefit. Similarly, if a company continued to have spills after the entry of a consent order with a state, it would likely not meet the guidance requirement that the state prosecution must be sufficient to gain “compliance without undue delay.”¹¹⁷

However, the guidance documents appear to support statutory preclusion in the instance that a state moves first to prosecute a large spill violation. As noted by environmental counsel in *CITGO*, in a number of large oil spill cases there may be little or no economic benefit to the violator from a large spill.¹¹⁸ This is because the loss of oil represents the loss of a valuable resource, and the company was already adopting what it believed to be sufficient measures to guard against such a loss.¹¹⁹ Although the circuit judge was not persuaded by this argument under the facts of *CITGO*,¹²⁰ such reasoning may hold up in other circumstances. However, federal regulators applying the 1993 guidance analysis requiring “compliance without undue delay” may be unsuccessful if

¹¹³ *Id.* at 3.

¹¹⁴ See 40 C.F.R. § 123.27(c) note (2014).

¹¹⁵ Which, even when identical to the administrative penalties provision, would limit liability to \$10,000 per violation with a cap of \$25,000. See 33 U.S.C. § 1319 (g)(2)(A) (2012).

¹¹⁶ See Miller, *supra* note 12, at 25–26.

¹¹⁷ 1993 GUIDANCE, *supra* note 104, at 3.

¹¹⁸ Isenberg et al., *supra* note 26, at 39.

¹¹⁹ *Id.* at 40.

¹²⁰ United States v. CITGO Petrol. Corp., 723 F.3d 547, 552 (5th Cir. 2013).

the violator has already cleaned up the spill and corrected the problem.¹²¹ Consequently, in the case of a large spill violation, a state administrative penalty may bar a federal prosecution—and likely fall short of the congressional demand for deterrence and punishment of OPA violators.¹²²

3. *Requirements for Statutory Comparability*

In their most simple terms, EPA guidance documents require that the state law must be comparable to the CWA administrative penalties provision to bar a judicial action by the EPA. Applying this analysis to the civil liability and penalty assessment factors under OPA is problematic. As described in the previous section, the administrative penalties provision and OPA impose dramatically different liability on the violator¹²³ and set out different factors to be considered in the calculation of a civil penalty.¹²⁴ However, the guidance position is that the state law must contain equivalent civil penalty liability limits¹²⁵ and analogous factors for penalty assessment to the administrative penalties provision.¹²⁶

The plain reading of the guidance and statute is that the action must be brought under a statute comparable to the administrative penalties provision to bar the OPA action.¹²⁷ However, this reading creates the potential for a legally absurd result.¹²⁸ To illustrate, a state could preclude federal enforcement when a state prosecutes an oil spill under its administrative penalties provision, but not if it prosecutes a violator under an oil specific provision. In fact, a number of states adopted oil-specific pollution provisions after OPA 1990.¹²⁹ Applying the figures from section C, a state issuing the maximum penalty could order a state to pay \$37,500 to bar a potential multi-million dollar penalty under

¹²¹ 1993 GUIDANCE, *supra* note 104, at 3.

¹²² See 136 CONG. REC. 21,723–24 (1990) (statement of Sen. Joseph Lieberman) (explaining the importance of assessing significant civil penalties).

¹²³ See *supra* text accompanying notes 79–82.

¹²⁴ See *supra* text accompanying note 78.

¹²⁵ See 1987 GUIDANCE, *supra* note 103, at 4.

¹²⁶ See *id.*

¹²⁷ See 33 U.S.C. §1319(g)(6) (2012) (requiring “[s]tate law comparable to this subsection”); see also Miller, *supra* note 18, at 48–49 (making a convincing argument as to why this was the legislature’s intended reading). However, Professor Miller does not address the absurdity of the provision with applicability to OPA.

¹²⁸ See *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 454–55 (1989) (setting a high standard, but nevertheless acknowledging that there are appropriate circumstances for the application of the absurdity doctrine in statutory interpretation).

¹²⁹ See Stolls, *supra* note 10, at 645–46.

OPA.¹³⁰ As a result, such an interpretation creates the potential for state regulators to shield violators from federal prosecution, directly contrary to the intent of the statutory preclusion provision.¹³¹

4. *Statutory Preclusion Litigation Applies to Citizens and the Agency*

Finally, the 1993 guidance document also illustrates the unique nature of the statutory preclusion provision in that it applies equally to citizens and the EPA.¹³² Consequently, litigation under citizen suits likewise affects the Agency.¹³³ However, the EPA issued both guidance documents prior to any of its actions where the state initially prosecuted a violator and the federal government chose to pursue a subsequent penalty.¹³⁴ The following section explores how federal courts have analyzed statutory preclusion up to this point, and begins a preliminary analysis of how judicial interpretations may impact regulated industry.

E. *Misapplication of Statutory Preclusion by the Federal Courts*

As highlighted by the 1993 guidance document, judicial interpretation of the statutory preclusion provision in citizen suits has direct implications for EPA enforcement. This has become increasingly problematic for federal enforcement because the vast majority of litigation under the statutory preclusion provision has been through citizen suits. As previously explained, the EPA prefers to settle its enforcement actions through consent decrees. Because the same law applies to the EPA as applies to citizens, the EPA, in negotiating consent decrees, must take into account interpretations of the statutory preclusion provision in citizen suits—and broad views of statutory preclusion can (and will) be leveraged against the EPA in settlement negotiations. Nevertheless, the EPA has brought an additional enforcement action after a state, commonly referred to as “overfiling,” on two occasions.¹³⁵ This section examines litigation by citizens and the EPA under the statutory

¹³⁰ See *supra* text accompanying notes 79, 84.

¹³¹ See 1987 GUIDANCE, *supra* note 103, at 4; Miller, *supra* note 12, at 29.

¹³² See Miller, *supra* note 12, at 29.

¹³³ *Id.*; see also Brief for the United States as Amicus Curiae in Support of Plaintiffs-Appellees at 3–4, Citizens for a Better Env’t-Cal. v. Union Oil Co., 83 F.3d 1111 (9th Cir. 1996) (No. 95-15139), 1995 WL 17069780, at *3–4.

¹³⁴ See *United States v. CITGO Petrol. Corp.*, 723 F.3d 547, 550–51 (5th Cir. 2013); *United States v. Smithfield Foods, Inc.*, 191 F.3d 516, 526 (4th Cir. 1999).

¹³⁵ *CITGO Petrol. Corp.*, 723 F.3d at 550–51; *Smithfield Foods, Inc.*, 191 F.3d at 526.

preclusion provision, and demonstrates how interpretations by federal courts fail to align with the statutory preclusion provision's intended purpose.

1. Judicial Creation of a Broad Bar Through Citizen Suit Litigation

Judicial interpretation of the statutory preclusion provision has been chaotic. While courts have used a three-step framework to apply the statutory preclusion analysis to state prosecutions, courts split on the application of each prong of the analysis.¹³⁶ First, courts determine whether an action has been commenced by a state actor.¹³⁷ Second, courts determine whether a state actor is diligently prosecuting the action or has diligently prosecuted the action.¹³⁸ Third, courts analyze whether the state law at issue is sufficiently comparable to the administrative penalties provision of the CWA.¹³⁹

Under the first prong, a court determines whether the action has been commenced for an ongoing prosecution, or if a prosecution has been commenced and concluded in the case of a past state prosecution. Courts have split over when an action is actually commenced by the state. While the majority of courts have found an action is commenced upon the receipt of an administrative compliance order, some courts restrict commencement to filing in a court of law.¹⁴⁰

Turning to the second prong, courts have also split over the requirements for a diligent prosecution. While courts will generally presume the state's prosecution was in fact diligent, courts have differed sharply on the evidentiary

¹³⁶ See, e.g., *McAbee v. City of Fort Payne*, 318 F.3d 1248, 1251 (11th Cir. 2003) (collecting cases for judicial approach to 33 U.S.C. § 1319(g) preclusion claims). Some courts perform similar steps in different order. See, e.g., *Lockett v. EPA*, 176 F. Supp. 2d 628, 634 (E.D. La. 2001).

¹³⁷ The state actor could be either the state Attorney General or the state environmental agency responsible for enforcing the law. Different states adopt different approaches to prosecuting environmental violations. See also *McAbee*, 318 F.3d at 1251. Compare *McAbee*, 318 F.3d at 1252 (prosecution would be barred by an administrative penalty issued by the state environmental department), with *N.Y. Coastal Fishermen's Ass'n v. N.Y.C. Dep't of Sanitation*, 772 F. Supp. 162, 165 (S.D.N.Y. 1991) (providing an example of a state statutory scheme involving state attorney general consultation).

¹³⁸ See, e.g., *McAbee*, 318 F.3d at 1251; *Lockett*, 176 F. Supp. 2d at 634.

¹³⁹ See, e.g., *McAbee*, 318 F.3d at 1251.

¹⁴⁰ See generally *Pape v. Menominee Paper Co.*, 911 F. Supp. 273 (W.D. Mich. 1994) (following the majority approach of allowing administrative activity to preclude a federal action). But see *Jones v. City of Lakeland*, 224 F.3d 518, 522 (6th Cir. 2000) (restricting the diligent prosecution bar to actions pursued in a court of law).

showing necessary to overcome this presumption.¹⁴¹ For example, the Middle District of Alabama has created a multi-factor analysis, which assesses whether the actions target the violations duplicitously under the same standard, the likelihood of continuing violations despite settlement, and any evidence of insufficient recovery of economic benefit to a violator.¹⁴² Applied in an OPA prosecution, this standard would likely prevent a statutory preclusion bar in an OPA action because a state administrative action would not likely proceed under a standard prohibiting spills, as required under OPA. While the Middle District of Alabama's definition roughly tracks the EPA's definition of diligent prosecution, other district courts have held that the presumption may not be overcome "absent persuasive evidence that the state has engaged in a pattern of conduct in its prosecution of the defendant that could be considered dilatory, collusive or otherwise in bad faith."¹⁴³ This standard of bad faith almost creates a conclusive presumption to give broader preclusive effect to state enforcement.

Third, once a court determines that the action was both commenced and diligently prosecuted, the court turns to the task of whether the state prosecuted under comparable state law. Currently, a three-way split divides the relevant jurisprudence. The majority rule, adopted by federal courts in the First,¹⁴⁴ Second,¹⁴⁵ Fifth,¹⁴⁶ Sixth,¹⁴⁷ and Eighth¹⁴⁸ Circuits, generally follows the holding adopted by the First Circuit in *North & South Rivers Watershed Ass'n v. Town of Scituate*.¹⁴⁹ The *Scituate* approach is most deferential to state law because it compares the federal administrative penalties provision with the entirety of the state enforcement scheme.¹⁵⁰ Under *Scituate*, the state scheme satisfies the requirements of comparability when it "contains penalty assessment provisions comparable to the Federal Act, that the State is authorized to assess those penalties, and that the overall scheme of the two acts

¹⁴¹ See, e.g., *Jarrett v. Water Works & Sanitary Sewer Bd. of Montgomery*, No. 00-A-527-N, 2001 U.S. Dist. LEXIS 522, at *19–20 (M.D. Ala. Jan. 16, 2001); *Carrow v. Javit*, No. 292CV00429 (AVC), 1993 U.S. Dist. LEXIS 16410, at *10 (D. Conn. Oct. 14, 1993).

¹⁴² See *Jarrett*, 2001 U.S. Dist. LEXIS 522, at *19–20. This standard is closest to following the framework set out in the EPA's 1993 Guidance. See 1993 GUIDANCE, *supra* note 104, at 3 n.4.

¹⁴³ See, e.g., *Carrow*, 1993 U.S. Dist. LEXIS 16410, at *10.

¹⁴⁴ See generally *N. & S. Rivers Watershed Ass'n v. Town of Scituate*, 949 F.2d 552 (1st Cir. 1991).

¹⁴⁵ See *N.Y. Coastal Fishermen's Ass'n v. N.Y.C. Dep't of Sanitation*, 772 F. Supp. 162, 165 (S.D.N.Y. 1991).

¹⁴⁶ See *Lockett v. EPA*, 319 F.3d 678, 681 (5th Cir. 2003).

¹⁴⁷ See *Pape v. Menominee Paper Co.*, 911 F. Supp. 273, 276–77 (W.D. Mich. 1994).

¹⁴⁸ *Ark. Wildlife Fed'n v. ICI Ams., Inc.*, 29 F.3d 376, 381–82 (8th Cir. 1994).

¹⁴⁹ See 949 F.2d at 556.

¹⁵⁰ *Scituate* is also known as the "overall comparability" standard. *Id.* at 556–57.

is aimed at correcting the same violations, thereby achieving the same goals.”¹⁵¹ *Scituate* also allows a diligent state prosecution to preclude later actions even in the event the state did not collect a civil penalty.¹⁵² As suggested in the previous section, the legislative history of the statutory preclusion provision clearly indicates that preclusion would only be applicable in cases where a penalty was actually being sought by, or had been paid to, the state.

In *Scituate*, the court connected the primacy of state enforcement in the preamble to the Act with the Supreme Court’s pronouncement in *Gwaltney of Smithfield v. Chesapeake Bay Foundation* that citizen suits should “supplement rather than supplant” state enforcement efforts.¹⁵³ However, the *Gwaltney* decision does not address of how the balance should be struck between state and federal efforts, indicating the *Scituate* Court’s seeming blindness to how its decision-making on statutory preclusion might affect federal enforcement efforts.¹⁵⁴

Because the statutory preclusion provision applies to citizens and the EPA equally, a violator can avoid liability for OPA civil penalties by entering a consent decree with the state prior to the federal judicial action. That consent decree can bar the federal action even if *no actual penalty* was paid to the state or the state has *no intention to collect a penalty*. Thus, under the majority rule, an OPA violator can entirely avoid civil liability if a state consent order precedes federal enforcement—eviscerating the punitive and deterrent functions of OPA 1990.

Next, the Ninth and Seventh Circuits follow the holding in *Citizens for a Better Environment-California v. Union Oil Co. (Unocal)*,¹⁵⁵ determining that only the provisions under which the state proceeded and the federal law should be compared, specifically rejecting the approach in *Scituate* of evaluating the entire state statutory scheme.¹⁵⁶ However, courts adopting *Unocal* have not applied criteria for assessing statutory comparability; rather, they merely

¹⁵¹ See *id.* at 556. For a comprehensive discussion of how the *Scituate* decision is contrary to the legislative history of the provision, see *Miller, supra* note 12, at 33–38.

¹⁵² See *Scituate*, 949 F.2d at 556.

¹⁵³ *Id.* at 555 (quoting *Gwaltney of Smithfield v. Chesapeake Bay Found.*, 484 U.S. 49, 60 (1987)).

¹⁵⁴ See generally *Gwaltney of Smithfield*, 484 U.S. 49 (noting that the settlement involved was made to avoid enforcement action).

¹⁵⁵ 83 F.3d 1111, 1116 (9th Cir. 1996); see *Friends of Milwaukee’s Rivers v. Milwaukee Metro. Sewerage Dist.*, 382 F.3d 743, 756–57 (7th Cir. 2004).

¹⁵⁶ See *Union Oil Co.*, 83 F.3d at 1115–17.

require that the state must have proceeded under the portion of the state statute comparable to the administrative penalties provision.¹⁵⁷ The technicalities of this interpretation only offer minimal comfort to the bar against OPA actions because a state penalty proceeding under its administrative penalties provision, so long as it is comparable to the federal administrative penalties provision, will still bar the federal prosecution.

Finally, the Eleventh and Tenth Circuits follow the reasoning of *McAbee v. City of Fort Payne*, which rejected both the *Scituate* and *Unocal* holdings.¹⁵⁸ The *McAbee* approach assesses whether the entirety of the state statutory scheme includes provisions for civil penalties, public participation, and judicial review that are each roughly comparable to those contained within the federal administrative penalties provision for an action to be brought under comparable state law.¹⁵⁹ In *McAbee*, the Eleventh Circuit held that Alabama's civil penalties and the CWA civil penalties were sufficiently comparable.¹⁶⁰ However, the court held that lack of pre-hearing notice in the Alabama public participation provisions of the state law did not meet its comparability standard.¹⁶¹ By requiring the comparison of the public participation, civil penalties, and judicial review portions of the statute, the *McAbee* decision most nearly approximates EPA guidance.¹⁶²

Because of the three-way split among the circuits, citizen and federal plaintiffs face significant asymmetries in whether they will likely succeed in a civil penalties prosecution after the state has commenced proceedings against the violator. Courts in circuits adopting the *Scituate* holding are far more likely to bar a federal or administrative suit subsequent to state action than in courts adopting the *Unocal* or *McAbee* approaches.¹⁶³ OPA violators in *Scituate* circuits may be able to shield themselves from liability without even paying an

¹⁵⁷ *Id.* at 1117.

¹⁵⁸ *McAbee v. City of Fort Payne*, 318 F.3d 1248, 1256 (11th Cir. 2003); Paper, Allied-Indus., Chem. & Energy Workers Int'l Union v. Cont'l Carbon Co., No. Civ-02-1677-R, 2003 U.S. Dist. LEXIS 26858, at *17 (W.D. Okla. June 23, 2003).

¹⁵⁹ *McAbee*, 318 F.3d at 1256.

¹⁶⁰ *Id.* at 1256.

¹⁶¹ *Id.*

¹⁶² *Id.* at 1257; see also 1987 GUIDANCE, *supra* note 104, at 3–4.

¹⁶³ Compare *N. & S. Rivers Watershed Ass'n v. Town of Scituate*, 949 F.2d 552, 556 (1st Cir. 1991) (barring a citizen suit when no civil penalty had been collected by the state), with *McAbee*, 318 F.3d at 1257 (only precluding a suit when the state had collected a penalty under a state enforcement scheme with comparable civil penalties, public participation, and judicial review), and *Citizens for a Better Env't-Cal. v. Union Oil Co.*, 83 F.3d 1111, 1115–17 (9th Cir. 1996) (only precluding a citizen suit when the action was brought under the statutory provision comparable to federal law).

administrative penalty.¹⁶⁴ Consequently, so long as a polluter enters into a consent order with the state, regulated industries enjoy lower costs of compliance in regions adopting *Scituate* relative to other regions of the country. While asymmetric regional costs of compliance may not be a significant issue for the locally operating wastewater facilities and municipalities targeted by the general water enforcement provisions,¹⁶⁵ industries regulated under OPA with multi-regional or national presence¹⁶⁶ are more likely to be hurt by a non-uniform rule.¹⁶⁷ This is because operators concentrated in circuits with the *Scituate* approach will enjoy relatively lower compliance costs compared with operators concentrated in other regions.

2. Limited EPA Overfiling Actions

The EPA has “overfiled” a state under the CWA to collect a civil penalty subsequent to state enforcement action on two occasions. Notably, the EPA carefully considers whether it should overfile the state.¹⁶⁸ EPA Regions cultivate their relationships with state regulators, who often partner with the EPA in joint enforcement actions.¹⁶⁹ Overfiling places the EPA in the uncomfortable position of being adverse to the state. This is a strong deterrent to prevent EPA from exercising this authority. Moreover, the EPA is typically very successful in obtaining settlements from both CWA and OPA violators. A review of the national civil enforcement database reveals that the EPA has successfully prosecuted numerous multi-million dollar civil penalties under the CWA and OPA over the past several years.¹⁷⁰ As such, the small number of cases in which the EPA has chosen to overfile do not suggest that the issue is not important. Rather the small number of prosecuted cases reflect the nature of enforcement actions under the Act itself. Nevertheless, the preference for settlement makes what law that does exist in the overfiling context particularly important. Namely, any weakness or opportunities identified to strengthen a

¹⁶⁴ See *Scituate*, 949 F.2d at 557.

¹⁶⁵ See *supra* text accompanying note 100.

¹⁶⁶ See *supra* text accompanying note 100.

¹⁶⁷ See Alan Untereiner, *The Defense of Preemption: A View from the Trenches*, 84 TUL. L. REV. 1257, 1262 (2010) (discussing advantages for reduced cost of doing business under uniform liability rules in tort law).

¹⁶⁸ Stephen C. Robertson, Note, *State Permitting: United States v. Smithfield Foods, Inc. and Federal Overfiling Under the Clean Water Act*, 23 WM. & MARY ENVTL. L. & POL’Y REV. 593, 594–95 (1999).

¹⁶⁹ See NAT’L ASS’N OF ATTORNEYS GEN., *supra* note 51, at 2–3.

¹⁷⁰ See generally *Civil Cases and Settlements by Statute*, *supra* note 21 (noting various enforcement actions).

defendant's negotiating position will be raised against the EPA in subsequent settlement negotiations.

EPA brought its first overfiling action under the water enforcement provision of the CWA in *United States v. Smithfield Foods*.¹⁷¹ In *Smithfield Foods*, the Fourth Circuit held that the state had not proceeded against the violator under a comparable statute because the Virginia penalty enforcement scheme only allowed for the assessment of penalties with the violator's consent and did not provide adequate procedures for notice and participation.¹⁷² However, the court did not adopt a particular position with regard to statutory preclusion defense.¹⁷³

The EPA brought its first overfiling action under OPA in *United States v. CITGO Petroleum Corp.*, which also was the first case to go to trial under the civil penalty provision of the statute.¹⁷⁴ In *CITGO*, the company's failure to clean its produced water holding tanks resulted in a significant accumulation of oil.¹⁷⁵ When the tanks overflowed due to a large storm event, over two million gallons of oil flowed into a nearby river, resulting in a fish kill and covering numerous birds with oil.¹⁷⁶ After the initial spill, the Louisiana Department of Environmental Quality issued a compliance order and notified CITGO of the potential penalties it faced.¹⁷⁷ However, when the EPA initiated an investigation for criminal penalties, the state suspended its activities.¹⁷⁸ In the subsequent civil case, the state joined the federal civil penalty prosecution to bring additional actions under state law.¹⁷⁹ The Fifth Circuit rejected CITGO's defense that the federal civil penalty prosecution should be barred, finding that the state's attention to the case after the EPA became involved was "at best, desultory."¹⁸⁰ The state also joined the federal action in pursuing its own civil penalties, suggesting that concurrent state prosecution may not bar a federal action.¹⁸¹

¹⁷¹ 191 F.3d 516, 526 (4th Cir. 1999).

¹⁷² *Id.* at 525.

¹⁷³ *See id.* at 526 n.5.

¹⁷⁴ *See* 723 F.3d 547, 551 (5th Cir. 2013); Isenberg et al., *supra* note 26, at 36.

¹⁷⁵ 723 F.3d at 550.

¹⁷⁶ *See id.* at 551.

¹⁷⁷ *See id.* at 549.

¹⁷⁸ *Id.* at 551.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 550.

¹⁸¹ *Id.*

The danger of the *CITGO* opinion for federal enforcement of OPA is in what the decision leaves unresolved. What would the state had to have done to succeed in barring the action? Continue to investigate after the EPA's criminal investigation commenced? Collect an administrative penalty under the state's water enforcement provisions? What if the state had not joined the federal action? The case raised the specter of the statutory preclusion defense, but provided little analysis of what standard for diligent prosecution should be adopted and did not reach the issue of how it would proceed with an analysis of statutory comparability in an OPA action.¹⁸² As a result, the *CITGO* opinion leaves a number of options open to less than diligent state prosecutors or oil companies seeking to avoid federal liability under statutory preclusion.

In light of the three-way split among the circuits¹⁸³ and the uncertainty regarding how each analysis may apply in an OPA prosecution given the limited jurisprudence on overfiling,¹⁸⁴ there is no clear legal framework for assessing a statutory preclusion defense raised in an OPA case. However, there is broad potential for EPA civil penalty actions to be barred, especially in circuits adopting the *Scituate* approach. The following Part analyzes how the uncertainties and perverse incentives created by the statutory preclusion jurisprudence undermine the effective enforcement of OPA.

II. STATUTORY PRECLUSION UNDERMINES EFFECTIVE OIL POLLUTION ENFORCEMENT

This Part explores the consequences of the statutory preclusion jurisprudence for OPA enforcement. Section A first considers how the *CITGO* case is likely to affect the EPA's enforcement activities, and concludes that increased use of the statutory preclusion defense in settlement negotiations and litigation will compromise the effectiveness of OPA civil penalty enforcement. Section B examines how the reduction in the effectiveness of the OPA civil penalty scheme compromises overall enforcement and is directly contrary to the legislative history of OPA and the statutory preclusion provision. Finally, section C demonstrates how uncertainty regarding the applicability of statutory

¹⁸² See *id.* at 550–51.

¹⁸³ See, e.g., *McAbee v. City of Fort Payne*, 318 F.3d 1248, 1252–1256 (11th Cir. 2003); *Citizens for a Better Env't-Cal. v. Union Oil Co.*, 83 F.3d 1111, 1115–17 (9th Cir. 1996); *N. & S. Rivers Watershed Ass'n v. Town of Scituate*, 949 F.2d 552, 556 (1st Cir. 1991).

¹⁸⁴ See *CITGO Petrol. Corp.*, 723 F.3d at 551; *United States v. Smithfield Foods, Inc.*, 191 F.3d 516, 526 (4th Cir. 1999).

preclusion in OPA cases produces results antithetical to cooperative federalism.

A. *Increased Use of the Statutory Preclusion Defense After United States v. CITGO Petroleum Corp. Will Erode the Effectiveness of Civil Enforcement*

The *CITGO* case involved a highly publicized, two million gallon oil spill that caused significant environmental harm.¹⁸⁵ In fact, one media outlet called the spill a “man-made devastation rivaling Hurricane Rita.”¹⁸⁶ Although the EPA negotiates consent decrees involving civil penalty actions under OPA with considerable frequency,¹⁸⁷ *CITGO* was the first case to go to trial for civil penalties under the OPA amendments.¹⁸⁸ The case also tested whether the federal government could recover a significant civil penalty after the collection of a large criminal penalty.¹⁸⁹ As a result, the case attracted national attention¹⁹⁰ and environmental law firms and operators around the country closely followed the case.¹⁹¹ The fact that the statutory preclusion defense was raised, even though it was not successful, means that operators and environmental counsel are acutely attuned to its availability in an OPA civil penalty action. Consequently, once an operator anticipates a federal enforcement action,¹⁹² it is likely that the operator will approach the state and agree to a penalty before the federal action may be organized to avoid the high penalties of OPA.¹⁹³ State regulators wishing to keep the business of the highly lucrative national industries regulated by OPA have a strong incentive to enter these Consent Orders.¹⁹⁴

As a result of *CITGO*'s national exposure of the applicability of statutory preclusion of OPA civil penalties, the United States is likely to face growing and significant pushback from violators that have received a state compliance

¹⁸⁵ *CITGO Petrol. Corp.*, 723 F.3d at 549.

¹⁸⁶ Rhonda Kitchens, *Putting CITGO's Oil Spill in Perspective*, 7KPLC (June 27, 2006), <http://www.kplctv.com/story/5086955/putting-CITGOs-oil-spill-in-perspective>.

¹⁸⁷ See, e.g., OFFICE OF ENF'T & COMPLIANCE ASSURANCE, *supra* note 80, at 8.

¹⁸⁸ See Isenberg et al., *supra* note 26, at 36.

¹⁸⁹ See *id.* at 37.

¹⁹⁰ Fisk & Swint, *supra* note 28.

¹⁹¹ See Isenberg et al., *supra* note 26, at 1.

¹⁹² See 33 U.S.C. § 1319 (2012). Because EPA requests § 308 responses to get details of various spills to build a case and notifies violators when a case has been judicially referred, violators are put on notice well before the time that they are likely to face prosecution.

¹⁹³ *Id.* § 1321(b)(7).

¹⁹⁴ See *infra* notes 27–32.

order or entered into consent decrees and paid some kind of penalty to the state.

As a part of any civil penalty assessment, the EPA must take into account litigation risk, or the risk that the EPA might lose on an issue, in determining its final penalty figure. Calculating litigation risk is more complicated in any CWA civil penalty action involving prior state enforcement because of the enduring circuit splits for diligent prosecution and statutory comparability. And, it is further unclear how a diligent prosecution analysis or a statutory comparability analysis should proceed when the OPA provisions are involved. Thus, the calculation of litigation risk in an OPA civil penalty prosecution with prior state action places a particularly heavy burden upon the EPA.

The growing size, scale, and diversity of prosecutions under OPA further complicate the calculation of litigation risk.¹⁹⁵ As regional and national actors, OPA violators may do business in several states that span multiple federal circuits, and thus have different state enforcement schemes and federal statutory preclusion law to be applied.¹⁹⁶ Because EPA takes more time to build a multi-state or multi-region case, violators may have entered into consent decrees with multiple states before a complaint can be filed. This places the EPA in the difficult position of possibly needing to perform a diligent prosecution analysis and a statutory comparability analysis for each state involved and under different judicial precedent when the action could be filed in district courts in different circuits.

Such difficulty in calculating litigation risk compromises effective OPA civil enforcement. Generally, the EPA prefers to settle OPA cases and to create compliance through the entry of negotiated consent decrees.¹⁹⁷ But, significant push back on OPA civil penalties during settlement negotiations because of statutory preclusion may make it impossible for the EPA to comply with the requirements of its civil penalty policy in collecting the economic benefit from the violator.¹⁹⁸ As a result, the EPA would need to devote scarce resources to litigating OPA cases in federal court. Indeed, even though *CITGO* was the first case to go to trial for civil penalties under OPA, a second case is already

¹⁹⁵ See *supra* note 92 and accompanying text.

¹⁹⁶ Consent Decree, *supra* note 17, at 14–18 (explaining that ten spill violations occurred in multiple states and EPA enforcement regions 2004–2007).

¹⁹⁷ See *id.*; Isenberg et al., *supra* note 26, at 37.

¹⁹⁸ See OFFICE OF ENF'T & COMPLIANCE ASSURANCE, *supra* note 80, at 8.

underway in *United States ex rel. California Department of Fish & Game v. HVI Cat Canyon*.¹⁹⁹

Increased litigation under OPA may mean that the EPA will effectively prosecute fewer OPA cases. This is mainly because DOJ and the EPA have limited resources to prosecute cases, and it is more expensive and costly to litigate cases rather than settle them. In specific instances, litigation risk may shift the tenor of settlement negotiations. For example, in OPA enforcement actions with fewer violations and less significant environmental harm, the United States may settle cases at figures below the recommended penalty policy due to litigation risk.²⁰⁰ As another example, in actions involving a series of violations, the EPA may drop potentially precluded violations from a larger enforcement action. Dropping violations undermines the objective to collect economic benefit by allowing some violations to escape penalty.²⁰¹ Thus, increased use of the diligent prosecution defense in OPA cases threatens the efficacy of OPA civil enforcement. The following section explores how compromising OPA civil penalty enforcement is contrary to legislative history and reduces the overall effectiveness of OPA enforcement.

B. Reduced Efficacy of Civil Enforcement is Contrary to Legislative History and Compromises Overall OPA Enforcement

Reducing the effectiveness of OPA civil penalty enforcement compromises the comprehensive nature of OPA 1990. Congress envisioned strong enforcement of civil penalties against violators as a key component of OPA enforcement actions.²⁰² As explained by Senator Lieberman, the author of the OPA penalty provisions, it was intended that

in the event of a spill, the Government apply the penalty provisions in a manner which will punish the violator and deter and prevent future violations. Large civil penalties . . . are also especially important because, in certain cases, the liability of the spiller for cleanup costs

¹⁹⁹ In the midst of OPA litigation Greka Oil and Gas changed its name from Greka to HVI Cat Canyon. Complaint for Civil Penalties, Injunctive Relief, Cost Recovery, and Damages Under the Clean Water Act, Oil Pollution Act of 1990, California Water Code, and California Fish and Game Code, *United States ex rel. Cal. Dep't of Fish & Game v. HVI Cat Canyon, Inc.*, No. CV11-05097 (C.D. Cal. June 17, 2011) [hereinafter *HVI Cat Canyon, Inc. Complaint*]; Order Denying Defendant's Motion to Dismiss, *supra* note 8.

²⁰⁰ See *HVI Cat Canyon, Inc. Complaint*, *supra* note 199, at 17–18.

²⁰¹ See *id.* at 7–8.

²⁰² See Oil Pollution Act of 1990 Joint Hearing, *supra* note 9, at 2–3 (statement of Rep. Fred Gilchrest and Rep. Peter DeFazio).

under Federal law is limited by the provisions of this bill; aggressive penalties may need to compensate for this limited liability.²⁰³

Allowing a state action to limit the effectiveness of a federal civil penalty action in an OPA case is also logically inconsistent with other provisions of the OPA amendments. As described in Part I, courts are directed to take into account the amount of criminal penalties a violator has already paid when making a civil penalties assessment.²⁰⁴ Thus, it is clear that a violator may pay both criminal and civil penalties to the federal government without potential for preclusion.²⁰⁵ Both OPA criminal penalty liability and civil penalty liability alone significantly outweigh state law liability under most state water pollution laws.²⁰⁶ Yet, a violator first prosecuted under state law may entirely avoid federal civil liability under OPA, and under more extreme judicial interpretations, without paying any administrative penalty.²⁰⁷

The broad expansion of the statutory preclusion provision's application to civil penalties by federal courts threatens to eviscerate the overall deterrent effect of the OPA provisions. Without a doubt, most OPA actions are brought under the civil penalties provision of the statute, with accompanying claims for injunctive relief. The core function of the civil penalties provision is to collect the economic benefit a violator has obtained by failing to comply with environmental laws.²⁰⁸ For the regional and national industries subject to OPA, civil penalties play a critical role in leveling the playing field by taking away any competitive advantage a violator may have enjoyed relative to those in compliance with environmental laws.²⁰⁹ By forcing a violator to internalize their costs of noncompliance, they also deter noncompliance in the future.²¹⁰ Violators pay civil penalties into the Oil Spill Liability Trust Fund.²¹¹ As such, the federal government is unlikely to refer a case for judicial enforcement that does not carry the potential for considerable civil penalty liability.

When the EPA is precluded from bringing a civil penalty action, the EPA's ability to prosecute oil spills is confined to claims for criminal penalties and

²⁰³ 136 CONG. REC. 21724 (1990) (statement of Sen. Joseph Lieberman).

²⁰⁴ See *supra* text accompanying note 86.

²⁰⁵ See *supra* text accompanying notes 86–87.

²⁰⁶ Which, even when identical to § 309(g), would limit liability to \$10,000 per violation with a cap of \$25,000. See 33 U.S.C. § 1319(g)(2)(A) (2012).

²⁰⁷ See *supra* text accompanying notes 149–52.

²⁰⁸ See OFFICE OF ENF'T & COMPLIANCE ASSURANCE, *supra* note 80, at 3–4.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 3–4.

²¹¹ *Id.* at 1.

injunctive relief.²¹² There are significant disadvantages to these courses of action for enforcement. The DOJ and EPA continuously operate under a shortage of prosecutorial resources, and there is no way for the agencies to recoup these costs by statute. Prosecuting actions for injunctive relief alone and prosecuting actions for injunctive relief and civil penalties each place a demand on these limited resources. When an action is for injunctive relief alone, the result is specific and tailored to an individual company.²¹³ As such, even if costly to that company, injunctive relief does not have a similar deterrent effect on other companies as a civil penalty. Because civil penalties have a stronger deterrent effect to other potential violators, EPA enforcement prioritizes pursuing cases with significant penalties.²¹⁴ Prosecuting violators for civil penalties and injunctive relief is also a more attractive investment of federal prosecutorial resources because OPA civil penalties are paid into the Oil Spill Liability Trust Fund, and in turn, fund the clean up of future spills.²¹⁵

Prosecuting companies under the criminal penalties provision presents different obstacles for successful enforcement. Primarily, bringing a criminal penalty prosecution under OPA requires a much higher burden of proof than a civil penalty action, meaning that criminal penalties are available in a smaller subset of OPA cases due to evidentiary restrictions.²¹⁶ Significant environmental harm can occur, even when activity is not criminal, so confining prosecutions to criminal liability leads to under-enforcement. Further, the criminal penalty provisions target individuals instead of corporations, as is generally the case under civil penalties.²¹⁷ Thus, criminal penalties do not have the same deterrent effect as civil penalties. Specifically, most OPA violators are large, publicly traded corporations concerned with their public image.²¹⁸ Tagging the corporation for liability, rather than the individuals it employs, creates a strong negative association that adversely impacts the company's commercial reputation. Because the civil penalties provisions of OPA are the heart of most OPA judicial enforcement actions, compromising the ability to

²¹² See Miller, *supra* note 12, at 29. Other branches of government may seek natural resource damages, which are intended to fund the repair and rehabilitation of the environment after a catastrophic event.

²¹³ For an example of a highly tailored course of injunctive relief in the context of a joint injunctive relief and civil penalty prosecution see Consent Decree, *supra* note 17, at 14–23.

²¹⁴ See OFFICE OF ENF'T & COMPLIANCE ASSURANCE, *supra* note 80, at 15.

²¹⁵ *Id.* at 2.

²¹⁶ See 33 U.S.C. § 1319(c)(3)(A) (2012).

²¹⁷ See *id.*

²¹⁸ See Consent Decree, *supra* note 17, at 1, 11–12.

bring civil penalties significantly reduces the effectiveness of OPA enforcement.

C. Application of Statutory Preclusion to OPA Cases Undermines Cooperative Federalism

This section explores how application of statutory preclusion undermines cooperative federalism. Unlike the creation of the NPDES permitting programs, which allow states to exercise primary control over water pollution from point sources,²¹⁹ Congress has never created a program to deputize the states to enforce federal oil pollution laws.²²⁰ Nevertheless, the federal government may desire to work cooperatively with states in prosecuting violations of OPA to enjoy the benefits of sharing prosecutorial resources, compiling evidence to build a stronger case, and developing more locally tailored solutions in settlement negotiations.²²¹

Because of the unclear jurisprudence regarding statutory preclusion, state action cannot precede federal action without risk of statutory preclusion.²²² Potential preclusion of OPA actions leads to a number of outcomes antithetical to cooperative federalism. For example, the availability of statutory preclusion incentivizes states to enact and maintain laws that provide the bare minimum of environmental protection under circuit precedent. Moreover, such states can administratively prosecute violators more quickly than the federal government,²²³ enabling a state to limit a violator's liability for oil pollution.²²⁴ Consequently, statutory preclusion encourages a race to the bottom among states to gain favor with powerful industries, instead of facilitating cooperative enforcement relationships with the EPA.²²⁵ The creation of significant disparities in state and federal enforcement runs contrary to cooperative federalism's promise of shared responsibility for pollution reduction.²²⁶

²¹⁹ See *supra* text accompanying note 34.

²²⁰ See *supra* text accompanying note 110.

²²¹ See NAT'L ASS'N OF ATTORNEYS GEN., *supra* note 51, at 2.

²²² See *United States v. CITGO Petrol. Corp.*, 723 F.3d 547, 551 (5th Cir. 2013).

²²³ See *id.* at 549–50.

²²⁴ See *supra* Part I.E.1.

²²⁵ See Miller, *supra* note 12, at 8. This is not to be confused with the largely debunked argument that cooperative federalism itself facilitates a race to the bottom. See Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1211–12 (1992). Rather, *undermining* cooperative federalism facilitates a race to the bottom.

²²⁶ See 33 U.S.C. § 1251(b) (2012).

However, a race to the bottom among states and regulators is not the only way that statutory preclusion jurisprudence undermines cooperative federalism. This is because a consent decree entered between the state and the violator that is not intended to have preclusive effect may do so under some federal court precedent.²²⁷ Further, large spill events or chronic patterns of violations may result in significant pressures on state regulators to proceed against a violator before the federal government has the opportunity to build a regional or national case.²²⁸ For example, there was no evidence that Louisiana intended to disrupt a federal enforcement action in *CITGO*. But what if it took the federal government longer to build a case?

Because of the greater liability provisions under OPA and the structure of the federal enforcement scheme, handling oil prosecution federally rather than through state enforcement has the potential to deliver a more comprehensive and lasting solution. When a consent decree is entered between the EPA and the violator, the terms of the consent decree are specifically enforceable. Further, while factors weighed by states in issuing a civil penalty may vary, federal civil penalty assessments must capture the economic benefit received by the violator to more effectively deter future violations.²²⁹ And, federally negotiated solutions can accomplish strong deterrence while delivering community benefit. Federal law allows a company to conduct Supplemental Environmental Projects (SEPs) to offset civil penalties in OPA cases.²³⁰ SEPs are voluntary projects undertaken by a violator to improve environmental quality in the area affected by the violator's pollution.²³¹ As a result, SEPs can deliver greater local benefit to a community from a civil penalty action than state action alone.²³² Ultimately, the sub-optimal results achieved when a federal action is precluded may actually serve as a disincentive to state enforcement officials desiring to act quickly in the aftermath of a spill. Discouraging diligent state enforcement undermines the envisioned primary role of states in reducing pollution under the CWA.

²²⁷ For example, under the "bad faith" test, state prosecutions under these circumstances would uniformly be upheld. *See, e.g.,* Carrow v. Javit, No. 292CV00429 (AVC), 1993 U.S. Dist. LEXIS 16410, at *10 (D. Conn. Oct. 14, 1993). Further, the statutory preclusion provision is silent with regard to intent of the regulator. So, a state regulator simply trying to do the best thing for the community in prosecuting an oil spill action may unintentionally bar a federal prosecution without meaning to do so. *See* 33 U.S.C. § 1319(g)(6).

²²⁸ *See, e.g., CITGO*, 723 F.3d at 549.

²²⁹ *See* OFFICE OF ENF'T & COMPLIANCE ASSURANCE, *supra* note 80, at 3–4.

²³⁰ *See* U.S. ENVTL. PROT. AGENCY, EPA SUPPLEMENTAL ENVIRONMENTAL PROJECTS POLICY 1 (1998).

²³¹ *See id.*

²³² *See id.*

III. JUDICIAL APPLICATION OF *CHEVRON* DEFERENCE TO RESTORE THE STRENGTH OF OPA ENFORCEMENT AND COOPERATIVE FEDERALISM

If the application of the statutory preclusion provision to OPA cases is such a problem, why has nothing been done before now? Congress had the opportunity to amend the statutory preclusion provision so that it would not apply to the OPA 1990 amendments at the time the amendments were passed. Yet, as suggested by the legislative history, Congress probably never envisioned the expansive interpretation of the provision by federal courts. But why not enact an amendment after the fact? Why has the EPA not done more to advocate for a narrow interpretation of the provision?

The answer probably lies in the way that the EPA has done business under OPA. In the twenty-five years since OPA 1990 was enacted, only two cases have gone to trial under the civil penalties provision—providing very limited opportunity for any exposure of the problem.²³³ Virtually all other OPA cases are settled.²³⁴ They are the product of long, protracted, closed-door negotiations between the violator and the EPA. It is impossible to determine how many times the issue of statutory preclusion has been raised in such negotiation for oil cases, or to know how many violators were even aware it could apply to OPA before the *CITGO* case. But violators certainly know it now.

But the relative knowledge of violators is not the only thing that has changed. The *Deepwater Horizon* spill,²³⁵ controversies over fracking,²³⁶ and the recent spill by Plains All American down the Santa Barbara coast²³⁷ have kept the harm of oil pollution in the mainstream media discussion. Such environmental catastrophes continue to dominate public discourse and cultivate strong public sentiment against pollution of U.S. waters by oil and hazardous wastes.

While comprehensive legislative reform would likely be the most effective avenue for eliminating the application of statutory preclusion to OPA, congressional stalemate over most environmental issues renders this an

²³³ See *supra* text accompanying note 22.

²³⁴ *Civil Cases and Settlements by Statute*, *supra* note 21.

²³⁵ See Partial Consent Decree, *supra* note 16.

²³⁶ See Hilary Boudet et al., “Fracking” Controversy and Communication: Using National Survey Data to Understand Public Perceptions of Hydraulic Fracturing, 65 ENERGY POL’Y 57, 57 (2014).

²³⁷ See Blood, *supra* note 18.

unlikely option.²³⁸ This may also be an opportune time for administrative interpretation to limit the applicability of statutory preclusion. Recently, the Obama Administration has also taken a particularly strong position on strengthening environmental enforcement through regulatory actions and litigation.²³⁹ For example, the Waters of the United States Rule significantly expands the EPA's jurisdiction²⁴⁰ by creating six categories of presumptively jurisdictional waters rather than allowing for a case-by-case determination of the waters that fall under this elusive definition.²⁴¹ The Obama Administration has also used judicial interpretation of the Clean Air Act in *Massachusetts v. EPA* to expand its jurisdiction over greenhouse gases.²⁴²

That OPA actions have become more litigious in the past five years is no accident. The public and the EPA are unlikely to be satisfied with a significantly discounted penalty where there has been serious environmental harm, and the EPA has shown recent willingness to litigate to obtain damages up to the statutory maximum.²⁴³ Part III explores a potential solution to restore the strength of OPA enforcement and cooperative federalism.

Unlike the citizen plaintiffs in statutory preclusion actions discussed in Part I,²⁴⁴ the EPA has the opportunity to use litigation to limit the applicability of statutory preclusion to OPA actions and ultimately resolve the underlying circuit split. This Comment proposes that the EPA argue its determinations: that the state has not diligently prosecuted or that the state statute is not comparable to the EPA's interpretation such that it should be accorded deference under *Chevron U.S.A. Inc. v. National Resources Defense Council*.²⁴⁵ Section A of this Part briefly reviews agency deference frameworks applied by courts to lay the foundation for the EPA's ability to argue for deference to its interpretation of the statutory preclusion provision. Next, section B explains the different procedural and analytical postures to justify the application of *Chevron*. The following section, C, provides a construction of the statute based upon EPA's existing regulation for overfiling under the CWA

²³⁸ Osofsky & Peel, *supra* note 20.

²³⁹ *Id.*

²⁴⁰ U.S. ENV'T'L PROT. AGENCY, ECONOMIC ANALYSIS OF EPA—ARMY CLEAN WATER RULE 14 (2015).

²⁴¹ 40 C.F.R. § 110.1 (2014) (outlining the Clean Water Rule).

²⁴² Osofsky & Peel, *supra* note 20.

²⁴³ *United States v. CITGO Petrol. Corp.*, 723 F.3d 547, 551 (5th Cir. 2013) (discussing an appeal in which the United States argued that the \$6 million penalty awarded by the trial court was inadequate for a single large spill event and asked for the statutory maximum gross negligence penalty).

²⁴⁴ *See supra* text accompanying notes 144–58.

²⁴⁵ 467 U.S. 837, 842–43 (1984).

and guidance documents, and a corresponding assessment of how such arguments would fare under various deference frameworks. Finally, section D explores the implications of applying *Chevron* deference to the EPA's interpretation of the statute to permit overfiling.

A. Differing Frameworks for Deference to Agency Decision-Making

When a federal agency provides an interpretation of the statute it has been delegated by Congress to administer, a court will generally apply a deferential legal framework to assess the agency's interpretation of the statute.²⁴⁶ The EPA has developed a legal²⁴⁷ and administrative record²⁴⁸ that permits it to argue for deference under several deference frameworks.

The threshold test for what level of deference should apply is set out by *United States v. Mead Corp.* Under *Mead*, the initial determination of a reviewing court is whether the agency has acted with the force of law in interpreting the statute it has been delegated to administer.²⁴⁹ Agency actions that carry the force of law are those with general effect, meaning that the agency's construction of the statute is intended to apply to more than a particular individual—indeed, it is intended to apply to all similarly situated individuals.²⁵⁰ The most common examples of an agency acting with the force of law are notice and comment rulemaking and adjudication.²⁵¹

Once the court determines that the agency has acted with the force of law, the two-step *Chevron* framework applies.²⁵² The first question in *Chevron* is whether the statute offers a clear expression from Congress with regard to the issue in controversy.²⁵³ In the event that the intent of Congress is clear, the court and agency must construct the statute to give effect to that intent.²⁵⁴ If the intent of Congress is not clear, the court must determine whether the agency's interpretation is within the range of ambiguity permitted by the statutory language.²⁵⁵ In the event that a federal court constructs a statute prior to the

²⁴⁶ *United States v. Mead Corp.*, 533 U.S. 218, 221 (2001).

²⁴⁷ *See, e.g.*, *United States v. Power Eng'g Co.*, 303 F.3d 1232, 1240 (10th Cir. 2002); *United States v. Elias*, 269 F.3d 1003, 1009 (9th Cir. 2001).

²⁴⁸ *See* 40 C.F.R. § 123.27(c) note (2014); 1993 GUIDANCE, *supra* note 104.

²⁴⁹ *See Mead Corp.*, 533 U.S. at 231–32.

²⁵⁰ *See id.* at 232.

²⁵¹ *Id.* at 226–27.

²⁵² *Id.* at 232.

²⁵³ *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

²⁵⁴ *Id.* at 842–43.

²⁵⁵ *Id.* at 843.

agency, the court should attempt to use its basic tools of statutory interpretation.²⁵⁶ However, if the agency constructs the statute in a different manner after the court's decision, a reviewing court is bound to give the agency deference to its interpretation, rather than apply the court's previous interpretation under *National Cable & Telecommunications v. Brand X Internet Services*.²⁵⁷

When a court determines that the agency has not acted with the force of law, then the analytical framework of *Skidmore v. Swift & Co.* applies.²⁵⁸ Under *Skidmore*, a court weighs the following factors: the thoroughness of the agency's consideration, the validity of its reasoning, its consistency with past action, and all those factors that make it persuasive.²⁵⁹ The EPA has developed a legal²⁶⁰ and administrative record²⁶¹ that permits it to argue for deference under both frameworks. Section B explains how the EPA should argue for *Chevron* deference in future litigation involving the OPA provision of the CWA.

B. Deference to the EPA in Judicial Overfiling

This Comment proposes that the EPA's interpretation of the CWA, as provided in its regulations,²⁶² should be accorded *Chevron* deference in a future overfiling action under OPA. This argument is rooted in holdings by the Ninth and Tenth Circuits under procedurally analogous circumstances in cases brought under the Resource Conservation and Recovery Act (RCRA).²⁶³ Under the RCRA and the CWA, the EPA has adopted identical regulations permitting the EPA to overfile the state "when authorized by the applicable statute" if the state collects a "substantively inadequate" penalty.²⁶⁴ Courts typically apply

²⁵⁶ See *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005).

²⁵⁷ See *id.* at 980.

²⁵⁸ See *United States v. Mead Corp.*, 533 U.S. 218, 234–35 (2001).

²⁵⁹ *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

²⁶⁰ See, e.g., *United States v. Power Eng'g Co.*, 303 F.3d 1232, 1240 (10th Cir. 2002); *United States v. Elias*, 269 F.3d 1003, 1009 (9th Cir. 2001).

²⁶¹ See 40 C.F.R. § 123.27(c) note (2014); 1993 GUIDANCE, *supra* note 104.

²⁶² See 40 C.F.R. § 123.27(c) note ("To the extent that [s]tate judgments or settlements provide penalties in amounts which EPA believes to be substantially inadequate in comparison to the amounts which EPA would require under similar facts, EPA, when authorized by the applicable statute, may commence separate actions for penalties.").

²⁶³ *Power Eng'g Co.*, 303 F.3d at 1240; *Elias*, 269 F.3d at 1009; see also *United States v. Murphy Oil U.S.A., Inc.*, 143 F. Supp. 2d 1054, 1087–92 (W.D. Wis. 2001); *United States v. LTV Steel Co.*, 118 F. Supp. 2d 827, 835 (N.D. Ohio 2000); cf. *Harmon Indus., Inc. v. Browner*, 191 F.3d 894, 898 (8th Cir. 1999).

²⁶⁴ See 40 C.F.R. § 271.16(c) note (RCRA provision explaining requirements for enforcement authority); *id.* § 123.27(c) note (CWA provision explaining requirements for enforcement authority).

Chevron deference in the context of a challenge to a regulatory interpretation adopted during notice and comment rulemaking.²⁶⁵ But in *United States v. Elias*²⁶⁶ and *United States v. Power Engineering*²⁶⁷ the Ninth and Tenth Circuits accorded *Chevron* deference to the EPA when it cited its regulation to support overfiling in a judicial action.²⁶⁸

In *Elias* and *Power Engineering*, the RCRA enforcement provision of the statute was silent as to whether the EPA had the authority to overfile the state.²⁶⁹ Interpreting the CWA statutory preclusion provision under the “when authorized by the applicable statute” regulation²⁷⁰ offers a slightly different scenario. Unlike the RCRA statutory enforcement provision,²⁷¹ The CWA statutory preclusion provision clearly permits overfiling because it prescribes some limitations to that power.²⁷² Consequently, the EPA would merely be constructing the statutory phrase “diligently prosecuting an action under [comparable] State law” in interpreting its regulation to allow the EPA to exercise its overfiling authority under the CWA,²⁷³ as opposed to whether Congress had given it the power to overfile at all under the RCRA.²⁷⁴ The key question in every *Chevron* determination is “whether the agency has stayed within the bounds of its statutory authority.”²⁷⁵ Because the EPA answers a narrower question in asserting its overfiling authority through its interpretation in its regulations under the CWA than it did in overfiling under the RCRA, the EPA is arguably in a stronger position to argue for *Chevron* deference to its regulatory interpretation of the statutory preclusion provision.

The alternative mechanism for the EPA to obtain *Chevron* deference for its interpretation of the statutory preclusion provision would be to institute a new proceeding for notice and comment rulemaking and wait for this to be challenged in court. However, there are practical reasons for the EPA to pursue *Chevron* deference based on its existing regulation. Not only would further notice and comment rulemaking be extremely time consuming and expensive,

²⁶⁵ See, e.g., *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

²⁶⁶ 269 F.3d at 1009.

²⁶⁷ 303 F.3d at 1240.

²⁶⁸ 40 C.F.R. § 123.27(c) note.

²⁶⁹ See 42 U.S.C. § 6926(b) (2012) (providing EPA may enforce a violation “in lieu” of the state).

²⁷⁰ 40 C.F.R. § 123.27(c) note.

²⁷¹ *Id.*

²⁷² 33 U.S.C. § 1319(g)(6)(A) (2012).

²⁷³ *Id.*

²⁷⁴ 42 U.S.C. § 6926(b).

²⁷⁵ *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013).

the EPA has also struggled in recent years to efficiently execute rulemaking under the CWA.²⁷⁶ For example, the EPA's recent rulemaking regarding the definition of Waters of the United States received more than 900,000 comments, and incited considerable tension with the agricultural community.²⁷⁷ Interestingly, the Waters of the United States rulemaking arose as the result of a circuit split, and ultimately a split on the Supreme Court,²⁷⁸ suggesting that it is even more likely that the EPA will seek resolution to this issue through litigation first.²⁷⁹

In the aftermath of *CITGO*, the EPA will likely litigate OPA cases with greater frequency.²⁸⁰ Although EPA may fear the possibility of creating unfavorable precedent,²⁸¹ the OPA Civil Penalty policy forbids the EPA from giving consideration to this factor in deciding whether to litigate a case.²⁸² Given the advantages that arguing for *Chevron* deference to the EPA's existing regulation has over instituting further notice and comment rulemaking, it is the best option for the EPA to clarify this area of law and make application of the provision consistent with legislative intent.²⁸³ The following section proposes a construction of the statute based upon the EPA's water enforcement regulation²⁸⁴ and guidance documents.²⁸⁵

²⁷⁶ The rule has prompted legal challenges from state and industry groups alike. *See, e.g.*, Plaintiff State's Brief in Support of a Nationwide Preliminary Injunction, North Dakota v. U.S. Env'tl. Prot. Agency, No. 3:15-cv-00059-RRE-ARS (D.N.D. Aug 10, 2015); Timothy Cama, *Lawmakers Clash Over 'Mythical' EPA Water Rule*, HILL (Feb. 4, 2015, 12:43 PM), <http://thehill.com/policy/energy-environment/231722-lawmakers-fight-over-mythical-epa-water-rule>.

²⁷⁷ Cama, *supra* note 276.

²⁷⁸ *Id.*

²⁷⁹ Because it is difficult for the EPA to effect notice and comment rulemaking, the EPA is inclined to maintain inefficient procedures (such as assessing litigation risk under statutory preclusion) rather than adopting new rulemaking. *See generally* Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 524 (1997) (explaining ossification and proposing courts review "signals from interested parties, the regulators . . . and Congress about [significant] issues").

²⁸⁰ *See supra* text accompanying note 190–92.

²⁸¹ *See, e.g.*, *Harmon Indus., Inc. v. Browner*, 191 F.3d 894, 898, 902 (8th Cir. 1999) (prohibiting RCRA overfilling in a state with an established permitting program).

²⁸² *See* OFFICE OF ENF'T & COMPLIANCE ASSURANCE, *supra* note 80, at 18 (directing that the agency should not seek to "avoid litigation or . . . potentially precedential areas of the law").

²⁸³ A curious reader may ask why the EPA has not already adopted this approach. Close analysis of the voluntary penalty scheme in *Smithfield Foods* and suspension of state investigation in *CITGO* reveals that neither case was sufficiently ambiguous in relation to the statutory preclusion provision to merit further interpretation of the EPA's regulation. *See* *United States v. Smithfield Foods, Inc.*, 191 F.3d 516, 526 (4th Cir. 1999); Appellee/Cross-Appellant's Cross-Appeal Reply Brief at 6, *United States v. CITGO Petrol. Corp.*, 723 F.3d 547 (5th Cir. 2013) (No. 11-31117), 2012 WL 5996162, at *6.

²⁸⁴ EPA State Program Requirements are noted in 40 C.F.R. § 123.27(c) note (2014).

²⁸⁵ *See* 1987 GUIDANCE, *supra* note 103; 1993 GUIDANCE, *supra* note 104.

C. A Proposed Construction of the Statutory Preclusion Provision Based upon Existing Regulation and EPA Guidance Documents

As evidenced by the split among the federal circuits, the EPA should utilize its regulation to clarify two disputed areas of the statutory preclusion provision. These are (1) the determination of whether a state is “diligently prosecuting” or has diligently prosecuted²⁸⁶ a violator and (2) what criteria should be used to determine whether a state statute is “comparable.”²⁸⁷ To present the strongest case for deference, the EPA should base its interpretations on its existing regulation, guidance documents, and federal and citizen experience in litigating cases under the statutory preclusion provision.²⁸⁸

1. Setting a High Bar for Diligent Prosecution

First, the EPA should address the determination of diligent prosecution.²⁸⁹ The EPA’s regulation specifies that it has authority to overfile the state in the event that the state collects a “substantially inadequate” penalty compared to what the EPA would “require under similar facts . . . when authorized by the applicable statute.”²⁹⁰ Following from its regulation, the EPA should argue that in the case of a past prosecution, the state must have recovered the economic benefit to the violator resulting from its actions.²⁹¹ In the case of an ongoing prosecution, the EPA should require that the state action be contemporaneous.²⁹² Finally, in both cases, the state prosecution should be sufficient to gain “compliance without undue delay.”²⁹³

The EPA’s actions accord with prioritizing the collection of economic benefit because the government is required to recover, at a minimum, the economic benefit to the violator in OPA civil penalty actions.²⁹⁴ Subsequent court decisions also support the reasonableness of economic benefit as a

²⁸⁶ Compare *Carrow v. Javit*, No. 292CV00429 (AVC), 1993 U.S. Dist. LEXIS 16410, at *6–7, 10 (D. Conn. Oct. 14, 1993), with *Jarrett v. Water Works & Sanitary Sewer Bd. of Montgomery*, No. 00-A-527-N, 2001 U.S. Dist. LEXIS 522, at *19–20 (M.D. Ala. Jan. 16, 2001).

²⁸⁷ Compare *N. & S. Rivers Watershed Ass’n v. Town of Scituate*, 949 F.2d 552, 556 (1st Cir. 1991), with *Citizens for a Better Env’t-Cal. v. Union Oil Co.*, 83 F.3d 1111, 1117 (9th Cir. 1996), and *McAbee v. City of Fort Payne*, 318 F.3d 1248, 1257 (11th Cir. 2003).

²⁸⁸ 40 C.F.R. § 123.27(c) note; see 1993 GUIDANCE *supra* note 104, at 2–3.

²⁸⁹ 40 C.F.R. § 123.27(c) note.

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ See OFFICE OF ENF’T & COMPLIANCE ASSURANCE, *supra* note 80, at 2.

measure of diligent prosecution. Specifically, the court in *Jarrett v. Water Works & Sanitary Sewer Board of Montgomery* examined factors—including recovery of economic benefit to the violator and whether violations continued—as part of a multi-factor framework to determine whether an action has been diligently prosecuted.²⁹⁵ Additionally, the Fifth Circuit’s holding in *CITGO*, where it overturned the district court’s award of civil penalties because they were inadequate to capture economic benefit, affirmed the importance of collecting economic benefit to enforcement.²⁹⁶

The EPA can also support this interpretation of “diligently prosecuting” with a strong policy rationale and legislative history.²⁹⁷ As previously discussed in Part II, civil penalties play a critical role in overall OPA enforcement, particularly by leveling the playing field between OPA violators by forcing them to internalize the cost of their failure to adopt sufficient measures for environmental compliance.²⁹⁸ Ensuring that the state has collected a penalty that is at least equivalent to the economic benefit to the violator serves the critical functions of enforcement to deter future violations and prevent a race to the bottom.²⁹⁹

Finally, the requirement that the state’s action be sufficient to “gain compliance without undue delay”³⁰⁰ serves as a catchall provision. In the case of an ongoing prosecution, it prevents a state from filing a compliance order and then failing to take further action.³⁰¹ In the case of past action, it likewise prevents the state from evading the diligent prosecution requirement by imposing a penalty sufficient to recover economic benefit, but stretching out the payment period indefinitely. Under both scenarios, the provision would also allow the EPA to present evidence of continuing violation to demonstrate that the prosecution had been inadequate to bring the violator into compliance. In effect, the proposed framework for diligent prosecution operates to ensure

²⁹⁵ No. 00-A-527-N, 2001 U.S. Dist. LEXIS 522, at *19–20 (M.D. Ala. Jan. 16, 2001) (noting the other factors include “whether the government required or sought compliance with the specific standard, limit, or order invoked by the citizen suit; whether the government was monitoring the polluter’s activities or otherwise enforcing the permits at issue after settlement with the polluter and up to the time of the citizen suit”).

²⁹⁶ *United States v. CITGO Petrol. Corp.*, 723 F.3d 547, 551, 554 (5th Cir. 2013).

²⁹⁷ *See Miller*, *supra* note 12, at 12–13, 31–32.

²⁹⁸ *See supra* text accompanying notes 212–18.

²⁹⁹ *Id.*

³⁰⁰ *See* 1993 GUIDANCE, *supra* note 104, at 3.

³⁰¹ Such a strategy may be adopted by the state in the event that the state is concerned that it may lose an important industry to its state. *See supra* text accompanying note 225.

that a dilatory state prosecution does not serve as a shield for violators of the Act.³⁰²

2. *Providing a Framework to Assess Statutory Comparability*

The second issue the EPA should address is clarifying the “when authorized by applicable statute” prong of its regulation,³⁰³ the EPA should argue that its interpretation of “proceeding under comparable state law” described in its guidance documents, is entitled to *Chevron* deference.³⁰⁴ Consistent with the framework set down by the 1987 Guidance,³⁰⁵ the EPA should propose that the state statute must provide a right to a hearing, equivalent civil penalty liability, analogous penalty assessment factors, analogous procedures for public participation, analogous standards for judicial review, and analogous collection authorities and streamlined procedures.³⁰⁶ Additionally, the EPA should clarify that the proper civil penalties scheme to be compared with state law is the OPA scheme in an OPA case. While the general policy rationales are explained in Part I for each of the guidance criteria, this analysis focuses on the likely effect of the provision and key areas for OPA.³⁰⁷

In particular, the requirement of equivalent civil penalty liability in the statutory schemes is critical to effective enforcement of OPA actions. If the state does not have the same potential as the federal government to hold violators accountable for their pollution with equivalent civil penalty provisions, the statutory preclusion creates a perverse incentive. Specifically, violators can enter into administrative penalty consent orders with the state before a federal action can be commenced to bar the EPA’s prosecution at a higher liability limit.³⁰⁸ State regulators, wishing to keep large and lucrative industries prosecuted under OPA in their state,³⁰⁹ will be inclined to approve such orders to promote state economic development.³¹⁰ The enactment of equivalent civil penalty liability schemes closes this loophole. Once a state has adopted an equivalent liability scheme, the violator no longer has a reason to

³⁰² See 1987 GUIDANCE, *supra* note 107, at 3–4.

³⁰³ 40 C.F.R. § 123.27(c) note (2014).

³⁰⁴ See 1987 GUIDANCE, *supra* note 103, at 3–4.

³⁰⁵ See *id.*

³⁰⁶ See *id.* at 4.

³⁰⁷ See *supra* text accompanying notes 125–27.

³⁰⁸ See *supra* text accompanying note 223.

³⁰⁹ See *supra* text accompanying note 95–98.

³¹⁰ See *supra* text accompanying note 225.

approach the state in the first place because it will face equivalent liability potential to the state or federal government. If the state has not adopted an equivalent civil penalty scheme, the violator would still face the threat of overfiling because the state statutory scheme would not be “comparable,” and thus insufficient to bar federal action.

A strong construction of statutory comparability also supports the ideal of cooperative federalism inherent to the statutory preclusion provision and the CWA.³¹¹ To illustrate, six months after the *McAbee* decision found that the state statute’s provisions for public participation were not sufficiently comparable to bar a citizen suit, the Alabama legislature amended these provisions to provide pre-order participation to the public.³¹² These provisions made environmental enforcement proceedings more publicly accessible, as required by federal law.³¹³ The aftermath of *McAbee* demonstrates that a high standard for statutory comparability can be a powerful incentive for state legislatures to align their provisions with federal law, opposing the potential race to the bottom created by requiring minimal statutory comparability.³¹⁴ The creation of parallel and effective schemes for enforcement supports the ideal shared responsibility of state and federal regulators for enforcement.³¹⁵

3. *The Proposed Interpretations Are Likely to Survive Chevron Review*

The proposed interpretations of diligently prosecuting and statutory comparability are likely to withstand the scrutiny of *Chevron* review.³¹⁶ As the starting point, the statute offers no clear explanation for the terms “diligently prosecuting” or “comparable state law.”³¹⁷ And, dictionary definitions of “diligently” or “comparable” offer a range of meanings.³¹⁸ Thus, a reviewing court is likely to conclude that the terms are ambiguous and will proceed to analyze whether the EPA’s interpretation is within the range of ambiguity permitted by the statutory language.³¹⁹

³¹¹ See *supra* text accompanying note 33.

³¹² *McAbee v. City of Fort Payne*, 318 F.3d 1248, 1257 (11th Cir. 2003); Environmental Management, 2003 Ala. Legis. Serv. 2003-397, § 22-22-A-5 (West).

³¹³ See *McAbee*, 318 F.3d at 1256–57.

³¹⁴ See *supra* text accompanying note 225.

³¹⁵ See *supra* note 34 and accompanying text.

³¹⁶ *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.* 467 U.S. 837, 843 (1984).

³¹⁷ See 33 U.S.C. § 1319(g)(6) (2012).

³¹⁸ *Comparable*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com> (last visited Nov. 2, 2015); *Diligent*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com> (last visited Nov. 2, 2015).

³¹⁹ See, e.g., *Chevron*, 467 U.S. at 843.

Under *Chevron*, courts consider whether the agency substantiates its justification of its interpretation of an ambiguous statute through application of its expert knowledge to carry out legislative intent.³²⁰ The offered construction of diligently prosecuting is likely to be upheld under *Chevron* because it explicates the agency's existing regulation, provides benchmarks for assessment that are supported by legislative history, and reflects the agency's expertise to enforce oil pollution control laws. .

For statutory comparability, the EPA's determinations of whether overfiling is "authorized by the applicable statute"³²¹ are similarly grounded in legislative history and agency expertise. Further, the EPA can advance additional arguments that the interpretation supports cooperative federalism and effective environmental enforcement.³²² Nevertheless, the EPA is likely to face some pushback on the derivation of such a specific framework from the phrase "comparable to this subsection."³²³ The EPA can bolster its argument with the fact that its regulations clearly require that the state must operate an approved NPDES program to levy penalties³²⁴ and that the statutory subsection contains each of the provisions the EPA adopts as criteria for comparison.³²⁵ Finally, Senator Chafee specifically outlined these requirements during his floor statements on the provision.³²⁶

Defendants may also attempt to rebut this construction of the statute as having the practical effect of creating an implied repeal of the statutory provision as it applies to OPA. This is because the vast majority of states do not have equivalent penalty regimes. In fact, at the time of this writing, only Texas has adopted a penalty scheme with equivalent liability limits to the federal provisions.³²⁷ Due to the presumption against implied repeals, this would render the EPA's interpretation unacceptable.³²⁸ However, the fact that Texas has created an equivalent penalty scheme demonstrates that the construction is not, in fact, an implied repeal. If Texas were to have enacted a

³²⁰ *Id.*; Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 666 (2007).

³²¹ For examples, see the EPA State Program Requirements in 40 C.F.R. § 123.27 note (2014).

³²² See *supra* text accompanying notes 314–15.

³²³ 33 U.S.C. § 1319(g)(6) (2012); see *Hector v. U.S. Dep't of Agric.*, 82 F.3d 165, 171–72 (7th Cir. 1996) (holding that requiring a seven-foot fence in a guidance document after issuing a regulation requiring a fence of reasonable height invalid).

³²⁴ See 40 C.F.R. § 123.27(a)(3)(i).

³²⁵ See 33 U.S.C. § 1319(g) (2012).

³²⁶ See 1987 GUIDANCE, *supra* note 103, at 5–6.

³²⁷ TEX. NAT. RES. CODE ANN. § 40.251 (West 2010).

³²⁸ See, e.g., *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 191 (1978) (discussing the general presumption against an implied repeal from subsequent legislative action).

provision otherwise comparable to the administrative penalties provision as part of its state law, it would have the ability to bar a federal action.

More generally, the interpretation of diligent prosecution and statutory comparability based on the EPA's regulation show a reasonable effort by the EPA to carry out conflicting aims under the provisions of the statute. On the one hand, the EPA is charged with the duty to vigorously enforce OPA to eliminate oil spills nationally,³²⁹ which in large part is accomplished through levying civil penalties.³³⁰ On the other, the EPA is supposed to avoid punishing a violator twice under the statutory preclusion provision.³³¹ Where statutory directives conflict, the reviewing court will defer to the agency's application of its expertise to reconcile the terms of the statute.³³² Consequently, the proposed interpretations are likely to be upheld under *Chevron*.³³³

4. Potential Outcomes if the Agency Is Not Accorded Chevron Deference

Despite the likely success of the EPA in obtaining *Chevron* deference for the proposed interpretation of its regulation, it is still worthwhile to consider two other potential outcomes. First, the reviewing court could find that the agency's interpretation is simply outside the range of ambiguity permitted by the statute. In declining to adopt the EPA's proposed statutory construction, the court must construct the statute to give justice to the parties in a present case. However, the EPA would then be able to try for another construction in a later action that may be accorded *Chevron* deference. Under *Brand X*, the court would be obligated to review each attempt at constructing the statute by the agency under *Chevron* rather than applying its precedent developed in a prior case.³³⁴

Second, there is some risk that, in relying on its previously issued guidance documents for statutory construction, a reviewing court may conclude that the guidance documents issued in 1987 and 1993 are the actual documents that should be accorded deference,³³⁵ and not the interpretation of the regulation that the statute permitted overfiling.³³⁶ If the court reaches this conclusion, then

³²⁹ See 33 U.S.C. § 1321(b)(1) (2012).

³³⁰ 136 CONG. REC. 21724 (1990) (statement of Sen. Joseph Lieberman).

³³¹ See 33 U.S.C. § 1319(g)(6).

³³² Nat'l Ass'n of Home Builders v. Defs. Of Wildlife, 551 U.S. 644, 666 (2007).

³³³ Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

³³⁴ Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 969 (2005).

³³⁵ See 1987 GUIDANCE, *supra* note 103; 1993 GUIDANCE, *supra* note 104.

³³⁶ See *supra* text accompanying note 262.

it is more likely to apply the *Skidmore* analysis rather than the *Chevron* analysis.³³⁷ This is because the guidance documents, by their very name, are non-binding on the agency or on individuals.³³⁸ Consequently, the documents are unlikely to meet the “force of law” criterion for *Chevron* to apply.³³⁹ In such a case, the proper deference analysis is *Skidmore*.³⁴⁰

Nevertheless, the guidance interpretations of diligently prosecuting and statutory comparability are also likely to be upheld under *Skidmore*’s multi-factor analysis. In issuing its 1987 and 1993 guidance documents, the EPA closely analyzed legislative history³⁴¹ and subsequent court cases to develop its analysis,³⁴² which demonstrated thorough consideration of its interpretation and validity of its reasoning, one key factor under *Skidmore*.³⁴³ Further, in subsequent agency actions, the EPA has behaved consistently with the guidance documents, satisfying another *Skidmore* factor.³⁴⁴ Regarding diligent prosecution, the EPA issued an OPA Civil Penalty Policy that emphasizes the importance of economic benefit.³⁴⁵ The EPA’s record of enforcement is also consistent with the guidance considerations for diligent prosecution and statutory comparability.³⁴⁶ Finally, the fact that the guidance documents emanate from the EPA headquarters also a recognized factor that makes the interpretation proffered by the agency more persuasive.³⁴⁷ With all factors weighing positively in favor of deference under *Skidmore*, the guidance interpretations of the statute are also likely to be upheld.

D. Implications of the Application of Chevron Deference

Once an interpretation adopted by the EPA is accorded *Chevron* deference, the impacts will be far reaching. Under *Brand X*, once the agency is accorded

³³⁷ See *United States v. Mead Corp.*, 533 U.S. 218, 221 (2001) (in which a headquarters letter binding only on the individual was directed on remand to be assessed under *Skidmore* and not *Chevron*).

³³⁸ See *id.*

³³⁹ See *id.* at 218.

³⁴⁰ See *id.* at 221.

³⁴¹ 1987 GUIDANCE, *supra* note 103, at 3–6.

³⁴² 1993 GUIDANCE, *supra* note 104, at 2–3.

³⁴³ *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

³⁴⁴ *Id.*

³⁴⁵ See OFFICE OF ENF’T & COMPLIANCE ASSURANCE, *supra* note 80, at 2 (discussing the role of civil penalties in recovering economic benefit to the violator to deter future violations).

³⁴⁶ *Skidmore*, 323 U.S. at 140 (listing consistency with past agency action as a factor weighing in favor of deference); see *United States v. CITGO Petrol. Corp.*, 723 F.3d 547, 551 (5th Cir. 2013); *United States v. Smithfield Foods, Inc.*, 191 F.3d 516, 526 (4th Cir. 1999).

³⁴⁷ *United States v. Mead Corp.*, 533 U.S. 218, 221 (2001) (indicating that a headquarters letter would be more persuasive than a letter from a field office).

Chevron deference for its interpretation of a statute, that interpretation becomes controlling and overrules prior judicial interpretations of the statute.³⁴⁸ Consequently, according *Chevron* deference to the EPA's interpretation of the statute would have the effect of overruling any prior case law in that circuit on statutory preclusion. While this holding would need to emanate from the Supreme Court to bind all the circuits, the adoption of *Chevron* deference to the agency's interpretation is likely to be highly persuasive,³⁴⁹ even in circuits with prior precedent. This is because failing to adopt the holding as long as the agency's interpretation is reasonable would contravene *Brand X* and likely be overturned by the Supreme Court.³⁵⁰ Thus, the eventual effect of according *Chevron* deference to the EPA would be to eliminate the circuit splits described in Part I.

Eliminating the circuit splits would have profound impacts for states, the EPA, citizens, regulated industry, and the environment. First, states would be presented with a menu of options regarding the types of laws to enact if they wish to have the ability to preclude federal environmental enforcement. States seeking the maximum level of independence could adopt civil penalty schemes for enforcement comparable to the water and oil enforcement provisions of the CWA to be able to bar the EPA from prosecuting violators under both the CWA and OPA enforcement provisions. Because the federal government took several years to implement OPA, a number of coastal states adopted oil-pollution-specific provisions.³⁵¹ The proposed interpretation provides a framework for these states to develop their statutes into effective parallel enforcement schemes, if so desired. The adoption of this interpretation of the statutory preclusion provision would legitimize the gap-filling function of the states in enforcing oil pollution actions for the first time.

At the other extreme, states wishing to leave the option for federal enforcement open could keep more minimal statutory schemes that have equivalent liability to neither provision, and rely on the threat of EPA

³⁴⁸ *Nat'l Cable & Telecomms. v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005).

³⁴⁹ No court has returned to the *Harmon v. Browner* rationale after the Ninth and Tenth Circuits accorded *Chevron* deference. *See also* *United States v. Murphy Oil USA, Inc.*, 143 F. Supp. 2d 1054, 1087–92 (W.D. Wis. 2001). *Compare* *Harmon Indus., Inc. v. Browner*, 191 F.3d 894, 898 (8th Cir. 1999), *with* *United States v. Power Eng'g Co.*, 303 F.3d 1232, 1240 (10th Cir. 2002), *and* *United States v. Elias*, 269 F.3d 1003, 1010 (9th Cir. 2001).

³⁵⁰ *Nat'l Cable & Telecomms.*, 545 U.S. at 982.

³⁵¹ *See* Stolls, *supra* note 10, at 643–48.

overfiling to deter pollution.³⁵² States that wish to have the ability to bar EPA prosecutions for water but not for oil would have the intermediate option to adopt an equivalent civil liability scheme for water. Providing the states a range of options without compromising the effectiveness of uniform pollution enforcement carries out the ideal of cooperative federalism.³⁵³

Clarity regarding the diligent prosecution and statutory scheme will go a long way to prevent the negative impacts of the uncertainty of the application of statutory preclusion for cooperative federalism. Significantly, a state without a comparable oil scheme could move quickly in prosecuting a violator without compromising a larger federal action.³⁵⁴ The provision also destroys the incentive for violators to enter into consent decrees with the state to avoid federal liability.³⁵⁵ This is because, unless the state had recovered the economic benefit and had adopted a comparable statute, the EPA would still be able to overfile.³⁵⁶ Most importantly, the violator would be equally accountable regardless of which authority prosecuted the action.

Second, resolving the circuit splits through *Chevron* deference also has important implications for the EPA. Eliminating the circuit split largely removes statutory preclusion from the calculation of litigation risk, encouraging settlement.³⁵⁷ However, the reach would not be confined to OPA actions, as it would be inconsistent to apply the statute differently with regard to OPA and the other provisions of the CWA.³⁵⁸ Thus, the construction would also be beneficial to EPA overfiling actions brought under water enforcement provisions of the Act and citizen suits brought subsequent to state action.³⁵⁹

Being accorded *Chevron* deference would also place the agency in a more proactive stance to ensure that the statutory preclusion provision carries out legislative intent in the face of changing circumstances in environmental enforcement. Because of the application of *Chevron*, the EPA would be free to change its mind to adjust the legal rule to new circumstances, so long as its proffered interpretation is justified and within the range of ambiguity permitted

³⁵² See, e.g., *United States v. CITGO Petrol. Corp.*, 723 F.3d 547, 551 (5th Cir. 2013); *United States v. Smithfield Foods, Inc.*, 191 F.3d 516, 526 (4th Cir. 1999).

³⁵³ See text accompanying notes 33–35.

³⁵⁴ See *supra* text accompanying note 222.

³⁵⁵ See *supra* text accompanying note 310.

³⁵⁶ See *supra* text accompanying note 310.

³⁵⁷ See *supra* text accompanying note 198.

³⁵⁸ See Miller, *supra* note 12, at 29; see also Brief for the United States as Amicus Curiae in Support of Plaintiffs-Appellees, *supra* note 133, at 3–4.

³⁵⁹ Citizens would still be subject to the notice provisions. 33 U.S.C. § 1319(g)(6) (2012); *id.* § 1365.

by the statute.³⁶⁰ This proactive position restores the EPA's leadership in oil pollution enforcement, rather than placing the agency at the mercy of misguided circuit precedent.³⁶¹

Clearer construction of the statutory preclusion provision also stands to benefit regulated industry. The pitfalls the current split of authority creates in the enforcement of OPA also negatively impact regional and national industries. Specifically, under the current split in statutory preclusion law, companies operating in varying regions of the country face asymmetric costs of compliance with the CWA.³⁶² Nevertheless, most of the companies regulated under OPA compete with one another nationally.³⁶³ A uniform rule for statutory preclusion levels the playing field, at least in the area of liability for oil pollution.³⁶⁴ Further, a uniform national rule lowers the cost of doing business for both new companies and existing actors present in multiple regions.³⁶⁵ Consequently, regulated industry also benefits from EPA leadership in creating a national rule.

Most importantly, the ultimate benefactor from a uniform statutory preclusion provision is the environment. Instead of serving as a shield to violators of the Act,³⁶⁶ a strong uniform statutory preclusion provision closes the loophole that undermines effective enforcement of OPA violations.³⁶⁷ Further, for the first time it would provide the opportunity for effective national enforcement of oil pollution by states and the federal government³⁶⁸—restoring the balance of cooperative federalism for an effective and comprehensive scheme of oil pollution enforcement.³⁶⁹

CONCLUSION

The application of the CWA statutory preclusion provision by federal courts is contrary to legislative intent and has practical, negative implications

³⁶⁰ See *Nat'l Cable & Telecomms. v. Brand X Internet Servs.*, 545 U.S. 967, 1001 (2005) (“[T]he Commission is free within the limits of reasoned interpretation to change course if it adequately justifies the change.”).

³⁶¹ See 1993 GUIDANCE, *supra* note 104, at 5; see also *Miller*, *supra* note 12, at 33–37.

³⁶² See *supra* text accompanying notes 163–67.

³⁶³ See *supra* text accompanying notes 163–64.

³⁶⁴ See *supra* text accompanying notes 163–64.

³⁶⁵ See *supra* text accompanying note 167.

³⁶⁶ See 1987 GUIDANCE, *supra* note 104, at 4.

³⁶⁷ See *Miller*, *supra* note 12, at 8; *supra* text accompanying note 12.

³⁶⁸ See *supra* text accompanying notes 351–53.

³⁶⁹ 33 U.S.C. § 1321(b)(1) (2012).

for effective enforcement.³⁷⁰ In no area of environmental enforcement is this more apparent than the application of the statutory preclusion provision to OPA, where current precedent threatens to eviscerate the effectiveness of the civil penalties provision.³⁷¹

Too long has the EPA sat back and watched these conditions unfold.³⁷² This Comment has proposed a call to action for the EPA to argue that its determinations of diligent prosecution and statutory comparability are entitled to *Chevron* deference.³⁷³ If it is successful, the EPA has the opportunity to take a leadership role in restoring the statutory preclusion provision to an interpretation consistent with its legislative intent. The EPA will also encourage cooperative federalism under the CWA by incentivizing states to adopt vigilant laws for pollution enforcement.³⁷⁴ Such ambition supports the development of a coherent legal framework for responding to and deterring future oil spills, bringing the country closer than ever to the national goal of finally ending oil spills into waters of the United States.”³⁷⁵

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³⁷⁰ See *supra* text accompanying notes 197–201.

³⁷¹ See *supra* text accompanying note 212.

³⁷² See 33 U.S.C. § 1319(g)(6).

³⁷³ See *supra* text accompanying notes 352–54.

³⁷⁴ See *supra* text accompanying notes 352–54.

³⁷⁵ See 33 U.S.C. § 1321(b)(1).

* Executive Articles Editor, Emory University School of Law, J.D. 2016; M.S. Agricultural and Applied Economics, Virginia Tech, 2011. First, I would like to thank my advisor, Professor Jonathan Remy Nash, who continuously encouraged me to seek out new ideas to improve this piece. I am also grateful to the individuals who reviewed my piece at EPA Region 4 and the Department of Justice Environmental and Natural Resource Division. I am especially appreciative to the editors of the Emory Law Journal that helped prepare my comment for publication, and particularly Matt Johnson and Ryan Pulley. Finally, I must thank the three most important gentlemen in my life: my father, Pete Lamb, my fiancé, Chris Rogers, and my horse (of course), Denny. They are the best listeners and I am lucky to have each of them as a constant source of joy in my life. Any errors or omissions remaining in this Comment are entirely my own.