Conflicting Enforcement Mechanisms Under RCRA: The Abstention Battleground Between State Agencies and Citizen Suits

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In enacting the Resource Conservation and Recovery Act, Congress granted enforcement authority to the Environmental Protection Agency and state governments as well as to ordinary citizens under the citizen suit provision. These enforcement mechanisms often overlap and sometimes conflict, especially in circumstances of dual-track enforcements that occur simultaneously. Federal circuit courts rarely review such cases; however, three separate circuits recently addressed citizen suits in a manner that may significantly affect the balance between citizen and state enforcement under the statute. All three courts refused to dismiss citizen suits despite previously filed state agency actions. Each court also overturned lower court decisions to abstain from exercising federal jurisdiction that would have allowed state agencies to handle the matter in state court. This trend solidifies the power of the statute’s citizen suit provision and may have tremendous implications on a state’s ability to set and maintain its own waste disposal policy. This Note argues that courts must be mindful of the enforcement mechanisms set up by the statute and thus must leave open the opportunity for state agencies to foreclose dual-track enforcements to ensure that citizen suits do not supplant governmental action. In particular, state agencies should be able to maintain the ability to request that courts abstain from exercising jurisdiction over citizen suits in those cases in which the state agency is truly diligent in pursuing its own enforcement action. States can protect this option by enhancing the process for citizen input during enforcement policy decision making.
making. In particular, states should require that agencies expand consideration of citizen perspectives before filing suit in agency enforcement actions.

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INTRODUCTION

Growing problems\(^1\) with traditional state-regulated waste disposal led Congress to pass the Resource Conservation and Recovery Act (RCRA) in 1976.\(^2\) Congress intended that RCRA oversee the collection, treatment, and disposal of solid and hazardous waste by providing technical and financial support to state and local governments, and setting minimum nationwide waste standards.\(^3\) This framework allows states to develop enhanced, comprehensive waste management programs with significant federal oversight and assistance.\(^4\)

Congress devised three separate but related mechanisms to oversee and enforce RCRA. First, Congress granted primary enforcement to the Environmental Protection Agency (EPA).\(^5\) Second, Congress authorized the EPA to share this primary authority with a state upon EPA approval of a state-administered program.\(^6\) In such cases, RCRA authorizes cognizant state agencies to enforce the law.\(^7\) Third, as a supplementary mechanism, Congress created a separate avenue allowing ordinary citizens to enforce the statute under a citizen suit provision.\(^8\) Congress intended such citizen suits to “supplement rather than to supplant governmental action.”\(^9\) These enforcement mechanisms often overlap and sometimes conflict, especially in circumstances of dual-track\(^10\) enforcements that occur simultaneously.\(^11\)

Federal circuit courts do not often review overlapping dual-track enforcements under RCRA. However, a recent Seventh Circuit case addressed two issues in a citizen suit that may significantly affect the citizen/state balance of RCRA enforcement. In Adkins v. VIM Recycling, Inc.,\(^12\) the Seventh Circuit refused to dismiss a citizen suit filed under the statute despite a previously filed state agency action because the citizen suit raised new issues not previously

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3. Id. § 6902.
4. See id.
5. The Supreme Court noted that “[c]hief responsibility for the implementation and enforcement of RCRA rests with the Administrator of the Environmental Protection Agency (EPA). See §§ 6928, 6973. But, like other environmental laws, RCRA contains a citizen suit provision, § 6972, which permits private citizens to enforce its provisions in some circumstances.” Meghrig v. KFC W., Inc., 516 U.S. 479, 483–84 (1996).
7. See id.
8. Id. § 6972.
10. This Note focuses on the relationship between RCRA enforcement actions by state agencies and actions under the citizen suit provision, and does not touch on those types of cases normally falling under the EPA enforcement mechanism. Thus, “dual-track” enforcement in this Note refers to enforcement actions brought simultaneously by state agencies and through citizen suits, not by the EPA.
12. 644 F.3d 483 (7th Cir. 2011).
addressed in the state agency case.\(^\text{13}\) The court also overturned the district court’s decision to abstain from exercising federal jurisdiction and allow the state agency to handle the matter in state court.\(^\text{14}\)

In compelling the district court to exercise jurisdiction, the Seventh Circuit joined two other recent circuit courts in narrowing the circumstances under which district court judges can defer to state agency action.\(^\text{15}\) At the same time, even if state agencies diligently prosecute enforcement actions in state courts, the Seventh Circuit’s decision enables citizens to file suit in federal court as long as they can fashion a complaint broader than the action pending in the state court. This trend solidifies the power of the RCRA citizen suit provision and will have tremendous implications on a state’s ability to set and maintain its own waste disposal policy.

Opening the aperture to greater access for citizen suits certainly promotes the viability of the supplementary citizen suit enforcement mechanism under RCRA.\(^\text{16}\) However, this Note argues that courts must be mindful of the enforcement mechanisms set up by the statute and thus leave open the opportunity for state agencies to foreclose—or at least stay—dual-track enforcements to ensure that citizen suits do not “supplant governmental action.”\(^\text{17}\) In particular, state agencies should be able to maintain the ability to request that courts abstain from exercising jurisdiction over citizen suits in those cases in which the state agency is truly diligent in pursuing its own enforcement action.

Part I of this Note provides background on the RCRA citizen suit provision and its place in the overall enforcement scheme of RCRA. Part II summarizes the Seventh Circuit’s reasoning in expanding the RCRA citizen suit in \textit{Adkins} and addresses its key holdings. Part III examines the RCRA diligent prosecution statutory bar\(^\text{18}\) provision and argues that the Seventh Circuit’s holding significantly narrows the possible overlap of enforcement mechanisms. Part IV looks at federal common law abstention doctrines and traces their history in the context of RCRA litigation. Part V turns to the implications of these decisions on state agencies and argues that courts must allow for the use of abstention to protect important state interests in true dual-track enforcements. Part V also considers a framework for using abstention in these cases, emphasizing the importance of the diligent prosecution bar, as well as the benefits of public participation rights in state agency judicial action.

\(^{13}\) See id. at 487.

\(^{14}\) See id.

\(^{15}\) See generally Chico Serv. Station, Inc. v. Sol P.R. Ltd., 633 F.3d 20 (1st Cir. 2011); Raritan Baykeeper v. NL Indus., Inc., 660 F.3d 686 (3d Cir. 2011).


\(^{17}\) See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 60 (1987).

\(^{18}\) The operation of RCRA’s diligent prosecution statutory bar provision is discussed \textit{infra} Part I.B.
decisions.

1. **Setting the Scene for Competing Enforcement Mechanisms Under RCRA**

Congress enacted RCRA in 1976 as a way to reorganize the regulation of solid and hazardous waste throughout the country. The statute addressed significant problems with the accumulation of waste, including the potential risks to human health. RCRA also created liability for owners and operators of facilities that failed to comply with the statutory and regulatory requirements.

In order to implement these goals, Congress devised three related programs. First, RCRA encourages states to develop comprehensive solid waste programs to manage non-hazardous industrial solid waste and municipal solid waste, sets criteria for municipal solid waste landfills and other solid waste disposal facilities, and prohibits the open dumping of solid waste. Second, the hazardous waste program establishes a federal “cradle to grave” system for controlling hazardous waste from generation to disposal. RCRA allows the EPA to authorize state implementation and enforcement of their own hazardous waste regulations as long as the state programs are at least as stringent or broader in scope than the federal regulations. Currently, fifty states and territories have been granted authority to implement initial programs. Third, Congress amended RCRA in 1984 to include a provision regulating underground storage tanks containing hazardous substances and petroleum products.


20. See H.R. REP. NO. 94-1491, at 3 (1976) (“The overriding concern of the Committee however, is the effect on the population and the environment of the disposal of discarded hazardous wastes—those which by virtue of their composition or longevity are harmful, toxic or lethal. Unless neutralized or otherwise properly managed in their disposal, hazardous wastes present a clear danger to the health and safety of the population and to the quality of the environment.”); see also Meghrig v. KFC W., Inc., 516 U.S. 479, 483 (1996) (“RCRA’s primary purpose . . . is to reduce the generation of hazardous waste and to insure the proper treatment, storage, and disposal of that waste which is nonetheless generated, ‘so as to minimize the present and future threat to human health and the environment.’” (quoting 42 U.S.C. § 6902(b) (2006))).


Notably, in discussing the purposes of interrelated federal and state responsibilities, the RCRA legislative history notes, "[i]t is the purpose of this legislation to assist the cities, counties and states in the solution of the discarded materials problem and to provide nationwide protection against the dangers of improper hazardous waste disposal." Through this structure, RCRA leverages cooperative federalism to allow states the broad authority of implementation and enforcement while maintaining strict national standards as an ultimate backstop.

A. EPA and State Agency Enforcement

While RCRA grants primary enforcement authority to the EPA, states take on this authority when they create approved hazardous waste programs. In such cases, the EPA maintains the authority to take enforcement actions. However, after receiving approval from the EPA, the state may implement its hazardous waste program instead of the federal scheme. In line with the legislative history, the EPA by policy normally defers enforcement actions to states with approved programs and only intervenes in exceptional circumstances. Thus, primary enforcement under RCRA rests with state agencies to take the lead in enforcement matters.

27. The legislative history recognizes this cooperative federalism ideal by listing four purposes for creating federal minimum standards, with the option of state implementation of programs equivalent or stricter than the federal program. See id. at 30 ("(1) it provides uniformity among the states as to how hazardous wastes are regulated, (2) it provides industry and commercial establishments that generate such wastes uniformity among states, (3) by providing such uniformity a state with environmentally sound laws does not drive business out of the state to a state which, for economic reasons, decides to be a dumping ground for hazardous wastes, and (4) by permitting states to develop and implement hazardous waste programs equivalent to the federal program, the police power of the states are utilized rather than the creation of another federal bureaucracy to implement this act.").
28. Id. at 31 (once EPA authorizes an approved state hazardous waste program, RCRA allows state agencies to take the lead in enforcement matters).
29. The allocation of enforcement authority is not clearly delineated in the statute, but the legislative history is instructive in this matter. To begin, Congress specifically relied on previous environmental laws in regards to this issue. See S. REP. NO. 94-988, at 17 (1976) ("In any regulatory program involving Federal and State participation, the allocation or division of enforcement responsibilities is difficult. The Committee drew on the similar provisions of the Clean Air Act of 1970 and the Federal Water Pollution Control Act of 1972."). Regarding those statutes, the same committee discussed the FWPCA allocation as follows:

Against the background of the Clean Air Act and the Refuse Act the Committee concluded that the enforcement presence of the Federal government shall be concurrent with the enforcement powers of the States. The Committee does not intend this jurisdiction of the Federal government to supplant state enforcement. Rather the Committee intends that the enforcement power of the Federal government be available in cases where States and other appropriate enforcement agencies are not acting expeditiously and vigorously to enforce control requirements.

31. EPA policy limits enforcement actions to circumstances in which an authorized state (1) asks EPA to do so; (2) fails to take its own timely and appropriate action; (3) has no authority to take the action; or (4) in those infrequent cases that could set a legal precedent. See EPA, Office of Solid Waste
agencies in those states that administer their own programs. Depending on the severity of a violation, the EPA and the states can both take administrative action, civil judicial action, or criminal action to remedy a violation.

1. **Informal and Formal Administrative Actions**

   The EPA or a state agency can take a broad range of informal or formal administrative actions to address violations under RCRA. Informal actions include notifying a facility of a violation and detailing steps necessary to bring the facility into compliance. These informal actions generally occur via letter and other forms of communication. The EPA and state agencies can also take formal administrative actions whenever significant noncompliance is detected or a facility fails to respond to an informal action. These actions are in the form of an administrative order issued under the authority of RCRA or state law that requires the recipient to correct the violation immediately or within a given time period. The EPA or state can issue a unilateral administrative order demanding compliance, or a consent order in which the agency and the facility agree on how to reach compliance. These orders may also assess a penalty for noncompliance.

2. **Civil Judicial Actions**

   RCRA also authorizes the EPA or state agencies to take civil judicial actions against violators. The EPA files suit in federal district court, while state agencies may bring an action in state courts under their own specific implementing programs. These suits are often aimed at facilities that fail to comply with the statutory or regulatory requirements of RCRA, release
hazardous wastes, or fail to comply with an administrative order. 43 The EPA and state agencies most often file suit in cases of repeat violations, in cases involving violations of a significant nature, or when serious environmental damage is involved. 44

3. Criminal Actions

In addition to administrative and civil enforcement actions, RCRA provides authority for criminal judicial actions against violators responsible for serious abuses (e.g. knowing endangerment). 45

B. Supplementary Citizen Suit Enforcement Mechanism and the Diligent Prosecution Statutory Bar

Most major federal environmental statutes, including RCRA, allow citizens to file suit to enforce the law. 46 RCRA’s citizen suit provision provides two routes for plaintiffs to file suit. 47 Section (a)(1)(A) allows citizens to file private suits against “any person . . . who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter.” 48 Subsection (a)(1)(B) allows citizen suits against “any person . . . who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment of health or the environment.” 49 In both violation and endangerment actions, the plaintiff must file the lawsuit “in the district court for the district in which the alleged violation occurred or the alleged endangerment may occur.”

The citizen suit provision also establishes limitations—or statutory bars—to suit. 50 For example, plaintiffs must first provide notice to the EPA...

43. ORIENTATION MANUAL, supra note 33, at III-127.
44. Id.
45. Id. at III-128 to -29.
47. Section 6972(a)(2) also provides a route to sue the EPA Administrator for failing to perform any non-discretionary act or duty under RCRA. 42 U.S.C. § 6972(a)(2) (2006).
48. Id. § 6972(a)(1)(A). Suits under this provision are often called “Violation” or “Subsection (1)(A)” complaints. For the purpose of consistency, this Note refers to such suits as Violation actions.
49. 42 U.S.C. § 6972(a)(1)(B). Suits under this provision are often called “Endangerment” or “Subsection (1)(B)” complaints. For the purpose of consistency, this Note refers to such suits as Endangerment actions.
50. Id. § 6972(a). The issue of whether this provision requires suits to be filed in a district court of the United States becomes vital in the context of federal abstention doctrines. Whether or not this provision provides exclusive federal jurisdiction over RCRA citizen suits is discussed more fully infra Part IV.
51. See Organic Chems. Site PRP Grp. v. Total Petrol., Inc., 6 F. Supp. 2d 660, 664 (W.D. Mich. 1998) (“To assure that the EPA Administrator remains the primary enforcement authority under this statute and that polluters are not the subject of duplicative litigation, the statute provides that several
administrator, the local state agency, and the alleged violator, then wait sixty to ninety days prior to filing suit; if a plaintiff does not follow procedure, a subsequent suit will be barred. As this Note highlights, diligent prosecution of a civil or criminal action in court by the EPA or a state can also bar a subsequent citizen suit. This diligent prosecution statutory bar prohibits violation actions when the EPA or a state “has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or a State to require compliance.” Similarly, actions under the endangerment prong are barred when the EPA or a state “has commenced and is diligently prosecuting an action.”

As mentioned in Part I, the chief responsibility for the enforcement of RCRA rests with the states when they administer EPA-approved solid and hazardous waste programs. While Congress intended citizens to serve an important enforcement function, this mechanism was designed to be supplementary in nature. Indeed, relying on the diligent prosecution statutory bar and the underlying intentions of Congress, courts have limited the reach of citizen suits.

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52. This Notice Requirement acts as a condition precedent to a citizen suit, and is intended to provide the state agency with an opportunity to enforce RCRA violations in line with state policy. See 42 U.S.C. § 6972(b); Hallstrom v. Tillamook Cnty., 493 U.S. 20, 31 (1989).
54. Id. § 6972(b)(2)(C)(i). Note the difference in language between the two “diligent prosecution” bars regarding the required action of the EPA or a state (by a “civil or criminal action in a court” for the “violation” prong versus by “an action” for the “endangerment” prong). Most courts conclude that “an action” for the “endangerment” prong requires some formal action in court. See Chico Serv. Station, Inc. v. Sol P.R. Ltd., 633 F.3d 20, 35 & n.18 (1st Cir. 2011). States can also prevent citizen endangerment actions from going forward by either (1) engaging in a removal action under CERCLA that addresses the imminent endangerment alleged by the citizen suit; or (2) by incurring costs to initiate a Remedial Investigation and Feasibility Study under CERCLA and is diligently proceeding with a remedial action that address the alleged imminent endangerment. 42 U.S.C. §§ 6972(b)(2)(C)(ii)–(iii).
55. See, e.g., Gibson, supra note 16, at 271–72.
57. The HSWA of 1984 expanded the reach of citizen suits, but the legislative history explains that this expansion of the citizens suit provision will complement, rather than conflict with, the Administrator's efforts to eliminate threats as to public health and the environment, particularly where the Government is unable to take action because of inadequate resources. It is expected that EPA and the Department of Justice will carefully monitor litigation under this provision and file, where appropriate, amicus curiae briefs with the court in order to assure orderly and consistent development of caselaw in this area. Moreover, nothing in this provision is intended to preclude EPA (or an authorized state) from intervening in a suit filed by a citizen in a 7003 action where such intervention furthers the expeditious resolution of the litigation.

58. See Organic Chems. Site PRP Grp. v. Total Petrol., Inc., 6 F. Supp. 2d 660, 664 (W.D. Mich. 1998) (“The role of the citizen suit is limited, however. Indeed, it is perhaps best described as interstitial, for such suits are generally only viable where neither the federal and state governments act to remedy the problem. McGregor v. Industrial Excess Landfill, 709 F. Supp. 1401, 1407 (E.D. Ohio 1987), aff’d, 856 F.2d 39 (6th Cir. 1988) (‘Only when the federal and the state governments fail to act to remedy the
II. THE SEVENTH CIRCUIT SETS FORTH GREATER LEEWAY FOR CITIZEN SUITS TO AVOID DISMISSAL IN ADKINS v. VIM RECYCLING

In 1999, the Indiana Department of Environmental Management (IDEM) directed VIM Recycling to revise its solid waste dumping practices in compliance with state environmental regulations. Rather than comply, VIM moved operations to a neighboring town, raising the ire of local citizens. After years of complaints, IDEM and VIM signed an Agreed Order in 2007 requiring VIM to obtain essential permits, remove all so-called C class waste from the facility, and to cease dumping all other unregulated waste onto a berm at VIM’s site. IDEM filed suit in state court to enforce the order requiring removal of the C class waste after VIM failed to comply with the order. Several local citizens sought to intervene, and requested an injunction ordering VIM to cease all dumping operations of wastes, not just C class. VIM opposed the intervenors’ request to expand the scope of the lawsuit. The state court sided with VIM and limited the citizen intervention to the issues originally raised by IDEM: removal of C class waste.

In response, the intervenors withdrew from the state court action and filed suit in federal district court under both the violation and endangerment prongs of the RCRA citizen suit provision. The citizens distinguished their action from the IDEM state court suit by alleging VIM’s actions were illegal due to mishandling A and B class wastes in addition to C class wastes. Thereafter, IDEM re-inspected VIM’s facility and found further violations of state regulations. IDEM then filed a second action in state court regarding VIM’s improper dumping of B class wastes. Facing three separate suits, VIM asked the federal district court to dismiss the citizen suit, arguing that the federal district court lacked subject-matter jurisdiction because IDEM commenced actions in state court regarding the facility. Further, VIM argued that, even assuming jurisdiction, the court should abstain from exercising it to allow the
The district court held that it lacked subject-matter jurisdiction over the citizens’ violation claim because it failed the diligent prosecution statutory bar. The district court then abstained from exercising jurisdiction over the “endangerment” claim in order to allow the issues to be considered in state court. The Seventh Circuit reversed on both issues.

A. Neither IDEM Suit Barred the Citizen Suit from Going Forward

Immediately, the court held that the diligent prosecution statutory bar is a procedural issue rather than a question of subject-matter jurisdiction. Thus, the court must review the issue under the standards for a motion to dismiss, rather than under the more stringent standard in determining proper subject-matter jurisdiction.

The court first addressed whether the second IDEM suit barred the earlier-in-time citizen suit under the diligent prosecution bar. Looking at the plain language and verb tense of the statute, the court noted that a citizen suit is barred only if an agency “has commenced and is diligently prosecuting” its own action. The court held that the diligent prosecution provision bars citizen suits only if the agency action is filed first. Thus, because the citizens filed suit first, they could continue pursuing a remedy despite the later-in-time filed IDEM suit.

The court then turned to the suit IDEM filed prior to the citizen suit. The court held that since IDEM filed the first suit on narrow grounds, the subsequently filed broader citizen suit was not barred. The court cited several reasons for its holding. First, VIM successfully objected to the citizens’ attempts to intervene in the state court action by arguing that the broader issues were separate from the original IDEM allegations. Thus VIM could not then argue that the broader issues overlapped with the state court action. Second, IDEM’s original allegations in state court involved violations of state

71. Id.
72. Id.
73. Id.
74. Id. at 487.
75. The court held that the diligent prosecution statutory bar did not define the jurisdiction of the court; rather, it only served as a standard “claims processing rule.” Id. at 491 n.2.
76. The distinction between the two standards is discussed in more detail infra Part III.A.
77. In this case, the citizens provided proper notice as required. Since neither the EPA nor IDEM responded within sixty days, the notice provision did not bar the citizen suit and was not an issue in the ruling. Adkins, 644 F.3d at 487.
78. Id. at 491 (emphasis added).
79. Id. at 491–92.
80. Id. at 491–94.
81. See id. at 494–96.
82. Id. at 496.
83. Id. at 494.
84. Id.
85. Id.
environmental law, while the citizens’ allegations in federal court involved violations of federal law. 86 Thus, IDEM’s original suit could not address the citizens’ federal claims. 87

B. Seventh Circuit Rules that Abstention Was Improper

The court also ruled that the lower court abused its discretion in refusing to exercise jurisdiction over the endangerment allegation. 88 The court considered whether concurrent federal jurisdiction in the case would disrupt Indiana’s efforts to establish coherent waste disposal policy. 89 However, under Seventh Circuit precedent, the court noted that it was not enough to simply implicate a statewide regulatory regime; rather, the state must provide for a forum specialized to hear such cases so that the matter can be litigated in front of an expert body before this type of abstention would be appropriate. 90

The court also held that the district court’s action could not be sustained “as a matter of wise judicial administration.” 91 In particular, the court disagreed with the district court’s emphasis on wanting to avoid piecemeal litigation. 92 The court held that, in this context, the RCRA statute specifically contemplated parallel proceedings as long as the citizens could meet the statutory bar requirements of the citizen suit provision. 93

III. EXPANDING THE REACH OF CITIZEN SUITS BY LOWERING THE STANDARD OF REVIEW FOR SURVIVING MOTIONS TO DISMISS BASED ON DILIGENT PROSECUTION

While many courts have discussed the role of the diligent prosecution statutory bar, 94 the Seventh Circuit was the first to discuss specifically whether

86. Id. at 495.
87. See id.
88. Id. at 496. Specifically, the court stated that “there is little or no discretion . . . to abstain in a case that does not meet traditional abstention requirements . . . .” Id. (quoting Prop. & Cas. Ins. Ltd. v. Cent. Nat’l Ins. Co. of Omaha, 936 F.2d 319, 321 (7th Cir. 1991)).
89. See id. at 503–07.
90. Id. at 505. Since all Indiana courts sit in general jurisdiction, the court stated they offer no technical expertise in environmental matters. Thus, the court held the use of abstention under this rubric would be “an end run around RCRA.” Id. (quoting PMC, Inc. v. Sherwin-Williams Co., 151 F.3d 610, 619 (7th Cir. 1998)).
91. See id. at 497–99.
92. See id. at 501–03.
93. See id. Judge Ripple concurred in the judgment, except he would have stayed the federal court action pending further developments in state court. In doing so, he would not have dismissed the importance of avoiding piecemeal litigation as quickly as the majority did. Further, he disagreed with what he characterized as the majority’s over-emphasis on the right of citizen suits. Id. at 507–10 (Ripple, J., concurring in part and dissenting part). In particular, Judge Ripple stated that the majority lost sight of an overall theme of RCRA, namely that “the statutory scheme places great emphasis on permitting the state government to manage environmental problems that endanger the health and safety of its residents.” Id. at 509–10.
94. See, e.g., Conn. Fund for the Env’t v. Contract Plating Co., 631 F. Supp. 1291, 1293 (D. Conn. 1986) (“The court must presume the diligence of the state’s prosecution of a defendant absent persuasive evidence that the state has engaged in a pattern of conduct . . . that could be considered dilatory, collusive or otherwise in bad faith.”); Karr v. Hefner, 475 F.3d 1192, 1198 (10th Cir. 2007) (“Citizen-
it limits the jurisdiction of federal courts. In holding that the diligent prosecution bar did not require dismissal, the Seventh Circuit provided leeway for the development of future RCRA citizen suits. This holding is key to controlling the competing interests of state agencies and citizen suits. By marking such a bright line, the court puts state agencies on notice that narrowly tailored enforcement actions will not occupy the field in a particular matter. Thus, states agencies will need to carefully consider broader actions or face the potential for citizen suits to complicate policy decisions.

A. Defining the Diligent Prosecution Bar as a Procedural Issue Means Citizen Suits Will Face a Lower Standard of Review

In the mid-1980s, the courts of appeal split on the issue of whether the sixty-day notice requirement in the RCRA citizen suit provision was jurisdictional or procedural in nature.\(^9\) The First, Sixth, and Ninth Circuits held that the sixty-day notice requirement was jurisdictional in nature,\(^6\) while the Second, Third, and Eighth Circuits held the requirements to be procedural.\(^7\) The Supreme Court faced the issue in 1989 in *Hallstrom v. Tillamook County*.\(^8\) In that case, the owners of a farm failed to properly notify a state agency and the EPA prior to commencing a citizen suit, as required by RCRA.\(^9\) In dismissing the case, the Court held “that the notice and 60-day delay requirements are mandatory conditions precedent to commencing suit,” but chose not to address whether the requirement was procedural or

\(^9\) Some of the courts reviewed the issue in the context of the Clean Water Act (CWA) and the Clean Air Act (CAA), which contain sixty-day citizen suit notice requirements identical to RCRA. See 33 U.S.C. § 1365(b) (2006) (CWA); 42 U.S.C. § 7604(b) (2006) (CAA).

\(^6\) Hallstrom v. Tillamook Cnty., 844 F.2d 598, 600–01 (9th Cir. 1987) (holding that the sixty-day notice requirement of the RCRA was jurisdictional rather than procedural because such an interpretation “serves better the underlying policy aims of encouraging non-judicial resolution of environmental conflicts”); see also Walls v. Waste Res. Corp., 761 F.2d 311, 316 (6th Cir. 1985); Garcia v. Ceesco Int'l, Inc., 761 F.2d 76, 79 (1st Cir. 1985).

\(^7\) Hempstead Cnty. & Nev. Cnty. Project v. EPA, 700 F.2d 598, 600–01 (9th Cir. 1987) (noting that the sixty-day notice requirement of the RCRA was jurisdictional rather than procedural because such an interpretation “serves better the underlying policy aims of encouraging non-judicial resolution of environmental conflicts”); see also Walls v. Waste Res. Corp., 761 F.2d 311, 316 (6th Cir. 1985); Garcia v. Ceesco Int'l, Inc., 761 F.2d 76, 79 (1st Cir. 1985).


\(^9\) Id. at 23–24.
Despite this clear opportunity to resolve the circuit split, the Court declined to do so.\textsuperscript{101}

The \textit{Adkins} court is the only circuit court since 1991 to address the jurisdictional/procedural issue in a RCRA context. The Seventh Circuit’s decision distinguished true jurisdictional rules from ordinary “claims processing rules.”\textsuperscript{102} The court noted that “Congress can specify that a particular claims-processing rule is jurisdictional, but it is clear that the Supreme Court is not expanding the category of jurisdictional rules without explicit indications from Congress that it intended such drastic results.”\textsuperscript{103} The Seventh Circuit noted that the Supreme Court declined to rule on the issue in \textit{Hallstrom}, but read the Supreme Court’s current jurisprudence as indicating the RCRA requirements should not be jurisdictional.\textsuperscript{104}

Of import, the Seventh Circuit’s holding is the first time a circuit court decision extended the jurisdictional question to the diligent prosecution provision. Indeed, the Seventh Circuit argued that the diligent prosecution requirement may be even more procedural than the notice requirement because its limit

has the potential to ebb and flow depending on whether the government agency is ‘diligently prosecuting’ an earlier lawsuit . . . . Subject matter jurisdiction, on the other hand, is usually thought of in binary terms. It either exists or it does not . . . . [I]t’s hard to fit into the concept of subject matter jurisdiction the idea that the ability to pursue the citizen suit could disappear, return, and disappear again, depending on the government agency’s changing approach to its own enforcement action.\textsuperscript{105}

Defining the diligent prosecution statutory bar as procedural instead of as jurisdictional lowers the standard of review a RCRA citizen suit will face. It is well settled that a plaintiff has the burden of distinctly and affirmatively pleading the facts forming the basis of subject-matter jurisdiction.\textsuperscript{106} On the other hand, procedural rules are reviewed under the relatively lenient motion-to-dismiss standard, which requires viewing the facts in the light most

\begin{itemize}
  \item \textsuperscript{100} Id. at 31.
  \item \textsuperscript{101} Despite the Court’s holding in \textit{Hallstrom}, circuit courts have continued to struggle on this issue. For example, in 2004 two circuit courts addressed the issue for a similar notice requirement under the Clean Water Act and issued conflicting opinions. \textit{Compare} Waterkeepers N. Cal. v. Ag Indus. Mfg., Inc., 375 F.3d 913, 916 (9th Cir. 2004) (holding that jurisdiction is only allowed when a plaintiff complies with the CWA notice provision), \textit{with} Am. Canoe Ass’n v. City of Attalla, 363 F.3d 1085, 1088 (4th Cir. 2004) (holding that, under the CWA, “the notice requirement is more procedural than jurisdictional”).
  \item \textsuperscript{102} \textit{See} Adkins v. VIM Recycling, Inc., 644 F.3d 483, 491 (7th Cir. 2011).\textsuperscript{102}
  \item \textsuperscript{103} Id. at 491–92.
  \item \textsuperscript{104} \textit{See} id. at 492 n.3. As precedent for this proposition, the Seventh Circuit quoted the Supreme Court’s discussion of a case under Title VII: “[W]hen Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.” Id. at 492 (quoting \textit{Arbbaugh} v. Y & H Corp., 546 U.S. 500, 516 (2006)).
  \item \textsuperscript{105} Id. at 492.
  \item \textsuperscript{106} McNutt v. Gen. Motors Acceptance Corp., 298 U.S. 178, 189 (1936).
\end{itemize}
favorable to the plaintiff. Lowering the standard of review for the diligent prosecution statutory bar sends a distinct message to district court judges to scrutinize RCRA citizen suits less in the early stages of litigation, and instead leave specific determinations regarding statutory bar requirements to the fact finder. This will likely lead to more citizen suits, considering the increased scope of citizen suits, especially when combined with the Seventh Circuit’s holding limiting the barring effect of previously filed state court actions as discussed infra Part III.B. Ultimately, state agencies will no longer be able to rely on district courts to scrutinize citizen suits at the outset of litigation.

B. Limiting the Diligent Prosecution Bar to Specific Violations Named in an Agency Enforcement Actions Opens the Door to Subsequent Broader Citizen Suits

Courts often dismiss citizen suits in RCRA cases based on concurrent diligent prosecution of a matter by a state agency. Such cases sometimes involve whether the state agency enforcement qualifies as an “action,” or whether the agency is diligent enough in its prosecution. However, the Adkins court held that an agency can diligently enforce an action but still be limited in its ability to bar a subsequent broader citizen suit. The court cited only one other circuit case standing for this proposition. In that case, Francisco Sánchez v. Esso Standard Oil Co., the First Circuit considered whether “a civil action filed by a state under RCRA is sufficiently similar to a subsequent citizen suit so as to preclude it.” The First Circuit determined that a subsequent citizen suit can survive the diligent

107. See FED. R. CIV. P. 12(b)(6).

108. The Seventh Circuit recognized this difference when it said that even if the plaintiff’s colorable claims were not ultimately successful “whether because of a statutory bar or for some other reason,” the claims were at least enough to give the district court subject matter jurisdiction. Adkins, 644 F.3d at 492.

109. See, e.g., Chico Serv. Station, Inc. v. Sol P.R. Ltd., 633 F.3d 20, 35–36 (1st Cir. 2011). The test for determining whether an enforcement in a violation prong context qualifies as an “action” is straightforward: the statute requires the state agency to file a civil or criminal court lawsuit. Likewise, most courts also require a state agency to commence a formal adjudicative court action to bar citizen suits in endangerment prong cases. See supra note 54.

110. Courts have been extremely deferential when determining whether an agency enforcement action is diligent enough. See, e.g., Karr v. Hefner, 475 F.3d 1192, 1198 (10th Cir. 2007) (“Citizen-plaintiffs must meet a high standard to demonstrate that [a government agency] has failed to prosecute a violation diligently.”); cf. Matthew D. Zinn, Policing Environmental Regulatory Enforcement: Cooperation, Capture, and Citizen Suits, 21 STAN. ENVTL. L.J. 81, 160–61 (discussing an extreme case of collusion between a defendant and a state agency). The implications of such a high standard are discussed infra Part V. In particular, I argue that by requiring a more searching review of a state agency’s diligent efforts, courts can be more certain that the agency is doing all it can to enforce RCRA requirements. The corresponding higher level of confidence in the state agency enforcement will allow courts to feel more comfortable in dismissing citizen suits in favor of the state agency’s diligent efforts.

111. See Adkins, 644 F.3d at 495 & n.5.

112. See id. at 495 n.5 (citing Francisco Sánchez v. Esso Standard Oil Co., 572 F.3d 1 (1st Cir. 2009)).

113. 572 F.3d 1 (1st Cir. 2009).

114. Id. at 10.
prosecution statutory bar if it seeks to enforce violations other than those covered in the previous state agency action. In agreeing with the First Circuit, the Seventh Circuit followed the trend of limiting the ability of state agencies to bar subsequent citizen suits. Together with the Seventh Circuit’s holding that the diligent prosecution bar is procedural in nature, this holding allows plaintiffs to avoid early dismissal by alleging harm that is separate and distinct from that alleged by state agencies.

IV. FEDERAL COMMON LAW ABSTENTION DOCTRINES

Federal common law doctrines of abstention grew out of concerns over the proper jurisdictional balance between state and federal courts. Federal district courts have a “virtually unflagging obligation . . . to exercise the jurisdiction given them.” Abstaining from the exercise of jurisdiction thus becomes “the exception, not the rule,” based on the “undisputed constitutional principle that Congress, and not the Judiciary, defines the scope of federal jurisdiction within the constitutionally permissible bounds.”

However, the Supreme Court approved several different abstention doctrines based on exceptional circumstances. In each case, the Court created a doctrine because “denying a federal forum would clearly serve an important countervailing interest,” such as “federal-state relations” or “wise judicial administration.”

Defendants in RCRA citizen suits have invoked abstention doctrines stemming from the Supreme Court decisions in Burford v. Sun Oil, Colorado River Water Conservation District v. United States, and Younger v. Harris to seek dismissal from federal courts, as well as the related Primary Jurisdiction doctrine. Looking at the current trend on abstention in RCRA citizen suit cases, I provide background on each of these doctrines to

115. Id. The First Circuit based its holding in part on research by Professor Jeffrey Miller, who notes that, “[w]here the government has enforced against some, but not all of such violations alleged by the citizen, it has foregone its opportunity to foreclose the citizen from enforcing against the violations the government chose to ignore. Most, but not all courts considering the issue have so held.” Miller, supra note 94, at 473–74; see Francisco Sánchez, 572 F.3d at 10 (quoting Miller, supra note 94, at 473–74).

116. See Adkins, 644 F.3d at 494–95 & n.5.


118. Id. at 813.


122. While not as ubiquitous as Burford abstention, Colorado River abstention is argued in many RCRA citizen suit cases. In most of these cases, the defendants invoke both Burford and Colorado River. See, e.g., Interfaith Cmty. Org. Inc. v. PPG Indus., Inc., 702 F. Supp. 2d 295, 307–10 (D.N.J. 2010) (rejecting defendants’ request for abstention under Burford and Colorado River).

discuss their purposes and goals.

A. Burford Abstention: Avoiding Disruption to Comprehensive State Policy Efforts

The Supreme Court addressed the issue of abstention in Burford. The case involved a challenge in federal court to oil-drilling permits issued by the Texas Railroad Commission. The Supreme Court determined that the Texas Legislature had created a thorough administrative and judicial system, including specialized courts to administer and review the disputed permits. Deferring to this system, the Court held that a parallel federal review would frustrate the comprehensive and detailed state process. Thus, the Court affirmed the district court’s decision to abstain from exercising jurisdiction to avoid disrupting Texas’s comprehensive policy efforts.

The Court later refined the standard of review limiting the use of Burford abstention. First, the Court required the availability of “timely and adequate state-court review.” If such review exists, a federal court must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are “difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar”; or (2) where the “exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.”

Several circuits now define this review as a two-step test, first requiring a threshold determination of whether timely review of the plaintiff’s claims can be available at the state level, and second looking at the two substantive questions.

B. Younger Abstention: Important State Interests

The Younger abstention doctrine arose from a criminal prosecution but has since been extended to other contexts. In Younger, the Court held that federal courts should not enjoin pending state criminal prosecutions except under extraordinary circumstances where the danger of irreparable loss is both great and immediate, in that there is a threat to the plaintiff’s federally

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125. Id. at 316–17.
126. Id. at 321 n.12 (quoting a Railroad Commission report stating that the Commission “carried out its functions of production control or proration by an elaborate system of orders, schedules, and reports”).
127. Id. at 333–34.
129. Id. at 361.
130. Id. (quoting Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 814 (1976)).
131. See, e.g., Riley v. Simmons, 45 F.3d 764, 771, 773 (3d Cir. 1995) (holding that the availability of “timely and adequate state court review” is a threshold question for the use of Burford abstention).
133. See infra notes 136–39 and accompanying text.
protected rights that cannot be eliminated by his defense against a single prosecution.134 The Court reasoned that the defendant can raise the constitutional argument in state court, thus negating any immediate danger of irreparable harm based on principles of federalism and comity.135

The Court gradually expanded application of the Younger doctrine, including requests for declaratory relief,136 certain state civil proceedings between private parties,137 and administrative agency decisions.138 The Supreme Court has yet to fully extend this doctrine to civil monetary damages cases, but has allowed lower courts to issue stays utilizing Younger.139

The Court has specified that the doctrine of Younger abstention "does not arise from lack of jurisdiction in the District Court, but from strong policies counseling against the exercise of such jurisdiction where particular kinds of state proceedings have already been commenced."140 With this in mind, courts must use Younger abstention when: (1) judicial state proceedings are pending, (2) the state proceedings involve important state interests, and (3) the state proceedings afford adequate opportunity to raise the federal issue.141

C. Colorado River Abstention: Wise Administration of Judicial Resources

After creating the Burford and Younger abstention doctrines, the Supreme Court fashioned a catchall for other exceptional circumstances. In the Colorado River decision, the Court recognized that

there are principles unrelated to considerations of proper constitutional adjudication and regard for federal-state relations which govern in situations involving the contemporaneous exercise of concurrent jurisdictions . . . . These principles rest on considerations of "[wise] judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation."142

134. Id. at 46.
135. See id. at 43–46.
138. See Ohio Civil Rights Comm’n v. Dayton Christian Sch., Inc., 477 U.S. 619, 627 (1986) (holding that abstention would be appropriate in cases that would interfere with "state administrative proceedings in which important state interests are vindicated, so long as in the course of those proceedings the federal plaintiff would have a full and fair opportunity to litigate his constitutional claim").
139. See Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 721 (1986) ("[W]hile we have held that federal courts may stay actions for damages based on abstention principles, we have not held that those principles support the outright dismissal or remand of damages actions."). Several commentators argue that, for all practical purposes, the Court’s holdings also allow lower courts to dismiss monetary damage civil case outright under the Younger abstention doctrine. See, e.g., Daniel C. Norris, The Final Frontier of Younger Abstention: The Judiciary’s Abdication of the Federal Court Removal Jurisdiction Statute, 31 FLA. ST. U. L. REV. 193 (2003).
140. Ohio Civil Rights Comm’n, 477 U.S. at 626.
Recognizing that the facts in Colorado River did not fit the requirements of either the Burford or Younger abstention doctrines, the Court created a new route for dismissal of federal suits that parallel state court actions. The Court noted that the circumstances giving rise to a reason for a lower court to dismiss a case based on “wise judicial administration” must be limited in scope, given the “virtually unflagging obligation of the federal courts to exercise the jurisdiction given them.” Even so, the Court recognized that exceptional circumstances could exist that would make dismissal appropriate.

The Court did not establish a hard and fast rule, but listed four examples of situations which could support the dismissal of a federal court action: (1) a court first assuming jurisdiction over property exercising that jurisdiction to the exclusion of other courts; (2) factors such as the inconvenience of the federal forum; (3) the desirability of avoiding piecemeal litigation; and (4) the order in which jurisdiction was obtained by the concurrent forums.

D. Primary Jurisdiction: Appropriate Deferral to Administrative Agencies

The primary jurisdiction doctrine serves the same purpose as the abstention doctrines, but stems from a separate principle of deference to agency decision making. The doctrine allows a court either to stay its jurisdiction or to grant a dismissal pending a hearing before the agency. In such matters, the issues of the case can be appropriately divided between the administrative agency and the federal court.

143. The Court also briefly analyzed the case under the Pullman abstention doctrine, involving “cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law,” but found that doctrine clearly inapposite. Id. at 814 (quoting Cnty. of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 189 (1959)). See generally R.R. Comm’n v. Pullman Co., 312 U.S. 496 (1941).

144. Colo. River, 424 U.S. at 817. The Court did not originally consider itself creating a new abstention doctrine and thus differentiated its ruling from Pullman, Buford, and Younger. However, most courts and commentators now refer to the common law rule created in the case as Colorado River abstention. But see Holder v. Holder, 305 F.3d 854, 867 n.4 (9th Cir. 2002) (“The Colorado River doctrine is not technically an abstention doctrine, although it is sometimes referred to as one.”).


146. In creating a balancing test in which no one factor was necessarily determinative, the Court stated, “[A] carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counseling against that exercise is required.” Id. at 818–19; see also Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 16 (1983) (stating that the standard “does not rest on a mechanical checklist, but on a careful balancing of the important factors as they apply in a given case,” and that “[t]he weight to be given to any one factor may vary greatly from case to case, depending on the particular setting of the case”).

147. The Court first discussed the doctrine in Texas & Pacific Railway Co. v. Abilene Cotton Oil, a case reviewing shipping rates under the Commerce Act. In Abilene, the plaintiff requested judicial review of allegedly unreasonable rates charged for shipping goods. The railway asked the court to dismiss the suit arguing the court had no power to devise a remedy because the Interstate Commerce Commission (ICC) already set the rates. The Court interpreted the Commerce Act to allow only the ICC to hear claims based on the reasonableness of rates. The Court focused on the purpose of the Act, namely the authority of the ICC to set uniform rates in order to avoid discrimination. The Court said that intervention by the courts would frustrate the statute’s purpose and deferral to the administrative agency would thus be appropriate. See Tex. & Pac. Ry. v. Abilene Cotton Oil, 204 U.S. 426 (1906).
The Court has refined the doctrine by providing that, “in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over.” 148 Several years later, the Court noted that the primary jurisdiction doctrine should be applied on a case-by-case basis, reiterating the lack of a fixed standard of review. 149

E. New Roadmap for Abstention in RCRA Cases

In addition to the Seventh Circuit’s decision in Adkins, two other circuit courts recently overturned district court attempts to abstain from exercising jurisdiction in RCRA citizen suit cases. 150 Combined, the three cases run the gamut of all four abstention doctrines. While each case presented factually distinct scenarios, all three courts came to the same conclusion that abstention would not be appropriate. Thus, judges in future district court cases are left with deciphering whether any room still exists to use these doctrines.

1. The First Circuit Weighs In

In Chico v. SOL Puerto Rico, the defendant owned a gas station for a number of years before selling it to the plaintiff. 151 Several years after the sale, the defendant discovered groundwater and soil contamination from underground storage tanks (UST) and notified the Puerto Rico Environmental Quality Board (EQB). 152 The EQB took no action for many years, until it approved the defendant’s request to remove the leaking USTs in 2004. 153 Despite this removal, soil and groundwater contamination remained. 154 The EQB then ordered the defendant to create a plan detailing the nature and extent of the remaining pollution and to remediate the contamination. 155 The defendant submitted the report along with updates, but in 2009 the EQB rejected the reports and ordered the defendant to create a new characterization plan. 156

Shortly thereafter, the plaintiff filed a RCRA citizen suit seeking civil penalties and an order requiring the defendant to remediate the site. 157 The district court granted the defendant’s motion to dismiss under Burford abstention due to the ongoing administrative proceedings aimed at addressing

150. See Chico Serv. Station, Inc. v. Sol P.R. Ltd., 633 F.3d 20, 22 (1st Cir. 2011); Raritan Baykeeper v. NL Indus., Inc., 660 F.3d 686, 689 (3d Cir. 2011).
151. Chico, 633 F.3d at 23.
152. Id.
153. Id. at 24.
154. Id.
155. Id.
156. Id. at 25.
157. Id.
the issue. In overturning that holding, the First Circuit noted,

[when it enacted RCRA . . . Congress recognized and addressed the
specific clash of interests at issue here, by carefully delineating (via the
diligent prosecution bar) the situations in which a state or federal agency’s
enforcement efforts will foreclose review of a citizen suit in federal court.
To abstain in situations other than those identified in the statute thus
threatens an “end run around RCRA.”

This initial concern, echoed in Adkins, casts grave doubt on the availability of
the abstention doctrine outside what Congress already delineated in the RCRA
statute.

Despite this dour initial language, the First Circuit still thoroughly
reviewed the district court’s use of Burford under the two step test. In doing
so, the court questioned the plaintiff’s ability to receive truly timely review in
state court, given the decades the EQB was taking in reaching a reviewable
final order.

The court then turned to the question of whether difficult questions of state
law bear on state public policy. Even though the EPA previously authorized
the state-level UST plan under RCRA, the court found that the substantive
Commonwealth law still rested on the framework of federal law. The court
stated that, to “a large extent, RCRA dictates the content and standards of
Puerto Rico’s UST program,” thus the issues only involved “marginal
questions of commonwealth law.” Finally, in discussing any possible
interference with state efforts to establish coherent policy, the court harkened
back to its initial doubts about abstention in general. The court noted that
Congress specifically designed RCRA to “interfer[e] with state efforts to
establish its own policy with respect to hazardous waste.” Thus, the federal
policy developed by Congress under RCRA did not leave room for
comprehensive policies by each of the states that would require only individual
state-based judicial review.

The court noted one additional factor in rejecting Burford abstention in
this case. In using a functional approach to comity and federalism, the court
asked whether the district court’s review would necessarily intrude on state
affairs. Aside from the factors above, even if a conflict arose between

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158. Id. at 26.
159. Id. at 31 (quoting PMC, Inc. v. Sherwin-Williams Co., 151 F.3d 610, 619 (7th Cir. 1998)).
160. Adkins v. VIM Recycling, Inc., 644 F.3d 483, 497 (7th Cir. 2011) (“Abstention doctrines are
not intended, however, to alter policy choices that Congress itself considered and addressed.”).
161. See Chico, 633 F.3d at 28–29.
162. See id.
163. Id. at 33.
164. Id.
have found the enactment of the citizen’s suit provision of RCRA to be an expression of Congress’s
intent that the federal courts should not abstain under Burford in RCRA actions, where plaintiffs have
satisfied the conditions set forth in the Act.”)
166. Chico, 633 F.3d at 33.
167. Id. at 34–35.
federal review and EQB action, the district court could structure its relief so as to avoid interference with the EQB proceedings. Thus, even in overlapping cases, the district court could still fashion appropriate non-conflicting relief.\textsuperscript{168} This catchall, functional factor serves as one more pointed direction to district court judges to avoid use of the abstention doctrine in RCRA cases.

2. The Third Circuit Shuts the Door

From the 1930s until 1982, NL Industries (NL) manufactured pigments near the Raritan River.\textsuperscript{169} NL ceased operations in 1982, but continued to lease the property to other companies that manufactured sulfuric acid.\textsuperscript{170} In 2004, testing of the river sediments showed pollutants including arsenic, copper, lead and zinc, prompting the New Jersey Department of Environmental Protection (NJDEP) to recommend that NL take remedial actions as part of a regional approach;\textsuperscript{171} however, the agency took no action.\textsuperscript{172} NL sold the property in 2005, but maintained liability for contaminating sediments in the Raritan River.\textsuperscript{173} In 2009, the EPA ordered NL to remediate contamination of river sediments upstream from the property.\textsuperscript{174} Shortly after the EPA issued its order, Raritan Baykeeper brought a citizen suit against NL and others under RCRA and CWA.\textsuperscript{175} Raritan Baykeeper sought injunctive relief requiring the defendants to remediate sediments in the Raritan River.\textsuperscript{176} The defendants moved to dismiss the suit on abstention grounds.\textsuperscript{177} The district court granted the motion, concluding that dismissal was appropriate under the primary jurisdiction doctrine and under \textit{Burford} abstention.\textsuperscript{178}

The Third Circuit reversed, holding neither the primary jurisdiction doctrine nor \textit{Burford} abstention appropriate.\textsuperscript{179} Even though NJDEP had clear expertise in the field, the court noted that Congress specifically drafted RCRA to allow for citizen suits.\textsuperscript{180} Thus, federal district judges are fully competent to hear matters arising under RCRA and should not simply defer to administrative agencies.\textsuperscript{181} Since agency expertise forms a core principle of both doctrines, the court’s holding seems to foreclose their use in almost\textsuperscript{182} any RCRA

\begin{thebibliography}{9}
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\item[168] Id. at 34.
\item[169] Raritan Baykeeper v. NL Indus., Inc., 660 F.3d 686, 689 (3d Cir. 2011).
\item[170] Id.
\item[171] Id. at 689–90.
\item[172] Id. at 689.
\item[173] Id.
\item[174] Id. at 690.
\item[175] Id.
\item[176] Id.
\item[177] Id.
\item[178] Id.
\item[179] Id. at 692–94.
\item[180] See id. at 691.
\item[181] See id.
\item[182] The court pointed to a small subset of cases in which a few courts abstained from hearing permitting and siting challenges under RCRA. See id. at 692. Those particularized cases, as other courts and commentators have noted, form a collateral attack on agency action and are not within the purposes
\end{thebibliography}
Like the First and Seventh Circuits, the Third Circuit also reviewed the case under the two-step *Burford* test and found abstention unwarranted.\textsuperscript{184} The Third Circuit agreed with most other courts in holding that federal courts have exclusive jurisdiction over RCRA cases.\textsuperscript{185} However, the court still analyzed whether New Jersey state courts could provide timely and adequate review of the plaintiff’s claims.\textsuperscript{186} Specifically, the court reviewed the district court’s determination that the New Jersey Environmental Rights Act\textsuperscript{187} provided a functional equivalent to RCRA, thus giving the plaintiffs an avenue of redress in state court.\textsuperscript{188} The court noted that the New Jersey statute did not allow for citizen suits “in instances where the conduct complained of constitutes a violation of a statute . . . which establishes a more specific standard for the control of pollution.”\textsuperscript{189} Since RCRA creates a more specific standard, the New Jersey statute could not provide a functionally equivalent route for the plaintiffs to sue in state court.\textsuperscript{190} Even so, the court still provided an analysis, albeit curt, of the remaining factors and determined federal review would not disrupt any New Jersey efforts to establish a coherent environmental policy.\textsuperscript{191}

### 3. The Seventh Circuit Casts Doubts on the Catchall

As discussed in Part II, *supra*, the Seventh Circuit rejected the district court’s decision to abstain from exercising jurisdiction. The court agreed with the First Circuit that application of the *Burford* abstention doctrine in the case would be an “end run around RCRA.”\textsuperscript{192} In turning to the catchall *Colorado River* abstention doctrine, the court laid out ten non-exclusive factors to

\textsuperscript{183} See *Coalition for Health Concern v. LWD, Inc.*, 60 F.3d 1188, 1189–90 (6th Cir. 1995) (abstaining from deciding plaintiffs’ claim that a hazardous waste facility was operating without a final permit); *Sugarloaf Citizens Ass’n v. Montgomery Cnty.*, 33 F.3d 52 (4th Cir. 1994) (unpublished disposition) (abstaining from plaintiffs’ challenge to the issuance of permits for an incinerator facility); *Palumbo v. Waste Techs. Indus.*, 989 F.2d 156, 159–60 (4th Cir. 1993) (rejecting “a collateral attack on the prior permitting decisions of the federal EPA regarding an incinerator”); *Davies v. Nat’l Refi nery Assoc.*., 963 F. Supp. 990, 998–99 (D. Kan. 1997) (abstaining where state agency had created a remedial plan, but no court action had been undertaken); *Friends of Santa Fe Cnty. v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 1347–49 (D.N.M. 1995) (abstaining where state agency and defendants had reached a stipulated agreement after administrative proceedings).

\textsuperscript{184} See *Raritan Baykeeper*, 660 F.3d at 692–94.

\textsuperscript{185} *Id.* at 693.

\textsuperscript{186} *See id.* at 693–94.


\textsuperscript{188} *Raritan Baykeeper*, 660 F.3d at 693.

\textsuperscript{189} *Id.* at 693–94.

\textsuperscript{190} *Id.* at 694.

\textsuperscript{191} *See id.*

\textsuperscript{192} *Adkins v. VIM Recycling, Inc.*, 644 F.3d 483, 505 (7th Cir. 2011).
determine whether “exceptional circumstances” existed supporting abstention:

1) whether the state has assumed jurisdiction over the property; 2) the inconvenience of the federal forum; 3) the desirability of avoiding piecemeal litigation; 4) the order in which jurisdiction was obtained by the concurrent forums; 5) the source of governing laws; 6) the adequacy of state-court action to protect the federal plaintiff’s rights; 7) the relative progress of state and federal proceedings; 8) the presence or absence of concurrent jurisdiction; 9) the availability of removal; and 10) the vexations of contrived nature of the federal claim.193

The district court gave significant weight to the threat of piecemeal litigation in deciding to abstain from exercising jurisdiction. In reversing, the Seventh Circuit held that the RCRA citizen suit provision “envisioned, embraced, and expressly permitted parallel (i.e., ‘piecemeal’) litigation when the citizen suit has satisfied RCRA’s statutory conditions.”194 Thus, the Seventh Circuit determined that judicial efficiency was simply not an important factor for the analysis of RCRA citizen suit cases under the *Colorado River* rubric. Without this key factor, the court found no extraordinary circumstances calling for abstention under *Colorado River*.195

V. RECONCILING THE CIRCUIT COURT TREND WITH THE PURPOSES OF RCRA IN DUAL-TRACK ENFORCEMENTS

The First, Third and Seventh Circuit decisions have tremendous implications on the allocation of authorities between enforcement mechanisms in hazardous and solid waste cases. There is no doubt these cases will encourage more citizen suits, greatly improving that mechanism’s reach. However, district courts should not read these cases as completely taking the abstention doctrines off the table as tools to use in dual-track enforcements. Instead, these doctrines can help courts balance the enforcement mechanisms in line with the purposes of RCRA.

A. Exclusive Jurisdiction Over RCRA Citizen Suits Should Not Shut the Door on State Agencies

As noted in Part IV.1, a district court judge must first get past the threshold question of whether plaintiffs can obtain adequate and timely review in state court before contemplating if abstention would be the right course of action. This issue has turned on whether exclusive jurisdiction over RCRA lies in federal courts, or if state courts have concurrent jurisdiction.196 Since RCRA

193. Id. at 500–01.
194. Id. at 501.
195. Indeed the court stated that use of *Colorado River* abstention in a RCRA citizen suit case would be unprecedented given the statute’s intent to allow parallel litigation. Id. at 502.
196. See, e.g., Riley v. Simmons, 45 F.3d 764, 771 (3d Cir. 1995) (holding that a two-step analysis is necessary in determining whether abstention is appropriate, with the first question being “whether timely and adequate state-court review is available,” and only if the answer to the first question is yes should a court continue).
provides specific and comprehensive baseline standards of enforcement, the opportunities for timely and adequate review in state courts decrease dramatically if a state court cannot hear a case under the actual statute.  

Currently, only one circuit allows concurrent jurisdiction over RCRA cases. The Sixth Circuit holds that Congress must “either expressly state[] that federal jurisdiction is exclusive or in some other affirmative way overcomes the strong presumption that jurisdiction is concurrent with state courts.” In reference to RCRA, the court held that Congress failed to overcome this presumption. Specifically, the court cited a case interpreting Title VII for the proposition that the term “shall” does not confer exclusive jurisdiction. Since the RCRA citizen suit also uses the term “shall,” the court found it was not express enough to overcome the presumption of concurrent jurisdiction.

This curious decision defies logic. The language in Title VII says that “each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction under this subchapter.” This language is clearly different than the RCRA citizen suit provision which provides, “[a]ny action under paragraph (a)(1) of this subsection shall be brought in the district court . . . .” The former only specifies that the federal court has jurisdiction, but not to the detriment of any other possible forum. The latter clearly limits lawsuits to be filed only in the district court. Since the Supreme Court denied certiorari, the case stands. However, no other court has adopted the same stance and the Sixth Circuit’s faulty logic appears unlikely to win any other converts.

On the other hand, the Chico and Raritan Baykeeper courts appear to foreclose the use of abstention based solely on their holdings that state courts lack jurisdiction over RCRA citizen suits. However, each opinion still

197. This issue also forecloses Colorado River abstention. Several circuits hold that the Colorado River abstention doctrine is inapplicable in cases involving exclusive federal jurisdiction. See Minucci v. Agrama, 868 F.2d 1113, 1115 (9th Cir. 1989); Medema v. Medema Builders, Inc., 854 F.2d 210, 213 (7th Cir. 1988). The Supreme Court has not resolved the issue of whether federal court abstention is proper when there are claims raised within the federal court's exclusive jurisdiction. The Supreme Court declined to address the issue when presented in Will v. Calvert Fire Ins. Co. 437 U.S. 655, 666-67 (1978).


199. Davis, 148 F.3d at 611.

200. See id. at 612.

201. Id. (citing Yellow Freight Sys., Inc. v. Donnelly, 494 U.S. 820 (1990)).

202. See id.


205. See Gibson, supra note 16, at 281–82 (discussing Davis).

206. See id.


208. See Raritan Baykeeper v. NL Indus., Inc., 660 F.3d 686, 694 (3d Cir. 2011) (“[w]e doubt that Raritan Baykeeper could obtain timely and adequate state court review”); Chico Serv. Station, Inc. v.
includes an analysis of the additional factors under the abstention doctrines.\textsuperscript{209} Thus, these courts must believe that state courts can satisfy the threshold factor in some manner, even without concurrent jurisdiction over RCRA cases. The lack of concurrent jurisdiction cannot by itself prevent district courts from abstaining from exercising jurisdiction in appropriate cases.

\textbf{B. Current Caselaw Still Leaves Room for the Use of Abstention in a Limited Context}

When synthesized, these cases seem to foreclose on all of the abstention doctrines in RCRA citizen suit cases. However, the courts specifically declined to categorically reject the doctrine, theoretically leaving some room for the use of abstention in RCRA citizen suits.\textsuperscript{210} I describe below two possible scenarios in which one of the abstention doctrines might be appropriate in the RCRA context.

First, an outlier case provides an example of how unique facts can allow a court to meet the threshold question and use \textit{Burford} abstention. In a District of Oregon case,\textsuperscript{211} the state environmental agency issued numerous enforcement actions and imposed civil penalties for petroleum contamination.\textsuperscript{212} The penalized owner brought a RCRA citizen suit against alleged past owners, seeking an order requiring them to remedy the contamination and reimburse remediation costs.\textsuperscript{213} The court abstained under the \textit{Burford} doctrine after finding that the court’s involvement would interfere with the state’s efforts to establish coherent policy specifying who would be liable for remediation.\textsuperscript{214} The court also noted that the full measure of remediation costs were available through the state administrative process.\textsuperscript{215} Thus, the court found timely and adequate state court review available, and held that the federal lawsuit would disrupt the state’s efforts to establish and maintain its own policy.\textsuperscript{216} The penalized owner clearly sought to use RCRA as a secondary route for

\textsuperscript{209} See \textit{Raritan Baykeeper}, 660 F.3d at 694 ("[e]ven if we concluded that Raritan Baykeeper could obtain adequate and timely state court review, we would not find any disruption of New Jersey’s efforts to establish a coherent policy on a matter of public concern"); \textit{Chico}, 633 F.3d at 32–34 ("[e]ven if we were to find adequate review available in the commonwealth courts, we nonetheless would consider this case to be an improper candidate for Burford abstention").

\textsuperscript{210} See \textit{Chico}, 633 F.3d at 31–32 ("While we are not prepared to rule out categorically the possibility of abstention in a RCRA citizen suit, we believe that the circumstances justifying abstention will be exceedingly rare."); \textit{Raritan Baykeeper}, 660 F.3d at 695 ("[L]ike our sister circuits, we decline to impose such a general rule.").


\textsuperscript{212} Id. at *3–4.
\textsuperscript{213} \textit{Id}.
\textsuperscript{214} Id. at *7–8.
\textsuperscript{215} Id. at *6–7, *11.
\textsuperscript{216} \textit{See id. at *7–8}.
Thus, this case may be best categorized as the federal judge’s way to prevent a plaintiff from using RCRA as an end run around state indemnification law.

Second, several courts have upheld Burford abstention in circumstances where a citizen suit would disrupt a formal administrative proceeding. This has occurred most often in cases where a citizen suit challenged a permitting or siting decision. Such a challenge is specifically barred under the endangerment prong of the citizen suit provision, but not under the violation prong. Federal courts have abstained from hearing these suits on the grounds that they would disrupt a state’s attempt to establish coherent policy. The Third Circuit recently approved this approach in Raritan Baykeeper, saying that abstention may be appropriate in an exceptional case involving a heightened state interest and a formal administrative proceeding.

C. A Future Proposal: Opening the Door to the Use of Abstention When Requested by State Agencies

The trend away from abstention in RCRA cases will have the greatest impact on dual-track enforcements, where state agencies and citizens seek to simultaneously enforce hazardous and solid waste violations. In such cases, courts should return to the purposes of RCRA as well as to the enforcement scheme established by the statute to support their determinations about the interaction between state agency actions and citizen suits. As discussed above, Congress intended for the EPA (or state agencies with approved state programs) to have primary enforcement authority, while citizen suits fill a supplementary role. Thus, Congress’s primary intent was to permit the states to create, administer, and enforce hazardous and solid waste regulations with EPA oversight. However, private citizen interests that form the basis of a...

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217. Indeed, it is not even clear which prong the plaintiff claimed under the RCRA citizen suit provision as its complaint failed to specify either the violation or endangerment provisions. See Interfaith Cmty. Org. Inc. v. PPG Indus., Inc., 702 F. Supp. 2d 295, 309 (D.N.J. 2010) (discussing Space Age Fuels).
218. See supra note 182.
219. See 42 U.S.C. § 6972(b)(2)(D) (2006) (“No action may be commenced under [the endangerment prong] by any person (other than a State or local government) with respect to the siting of a hazardous waste treatment, storage, or a disposal facility, nor to restrain or enjoin the issuance of a permit for such facility.”); but see Gibson, supra note 16, at 288–90 (arguing that a full review of RCRA indicates that challenges to permitting and siting decisions should be barred both “endangerment” and “violation” citizen suits making the use of abstention unnecessary).
220. See Coalition for Health Concern v. LWD, Inc., 60 F.3d 1188, 1195 (6th Cir. 1995) (“We do not see how plaintiffs’ claims can be decided without interfering with Kentucky’s policies governing the issuances of hazardous waste incineration permits. . . . Simply put, federal adjudication of plaintiffs’ claims presented here would be disruptive of Kentucky’s attempt to ensure uniformity in its hazardous waste policy.”).
221. See Raritan Baykeeper v. NL Indus., Inc., 660 F.3d 686, 695 (3d Cir. 2011) (citing PMC, Inc. v. Sherwin-Williams Co., 151 F.3d 610, 619 (7th Cir. 1998)).
222. See supra Part I.
223. A state agency’s ability to establish coherent policy on the enforcement of RCRA approved hazardous and solid waste programs has been discussed often. See generally, e.g., David L. Markell,
citizen suit do not always conflict with a state agency’s enforcement agenda in RCRA cases. Indeed, in the recent three circuit court cases discussed above, none of the state agencies sought to intervene in the citizen suits. In other words, none of the state agencies alleged that the citizen suits truly interfered with their ability to enforce the law. Rather, the polluters raised the alleged state interests in order to defend against the citizen suits. In such cases, courts understandably tend to look skeptically at the polluters’ claims that the citizen suits would undermine important state interests or interfere with the establishment of coherent state policy. In the RCRA context, the abstention doctrines are designed to protect the state, not individual polluters. Thus, without the support of the state agency, a request for abstention should necessarily fall flat. Courts should instead focus on cases in which state agencies argue that citizen suits will interfere with their efforts. It is the state agency that sets the policy, and thus the state agency that knows when that policy may be adversely affected by outside interference.

A presumption in favor of state agencies cannot go unchecked, though. Just because a state agency argues that a citizen suit interferes with important state interests does not mean it actually does. Courts must carefully control the use of abstention doctrines in these cases, which is where the Seventh Circuit’s reading of the diligent prosecution statutory bar becomes vital in two ways. First, by reading the statutory bar procedurally rather jurisdictionally, courts will allow far more citizen suits to continue during the early stages of litigation. State agencies will not be able to object to every case, so the increase of competing citizen suits will help state agencies focus only on those suits that truly interfere with the establishment of state policy. Second, the Adkins court held the diligent prosecution provision only bars citizen suits where they overlap earlier state actions. In doing so, the court read the supplementary purpose of citizen suits in RCRA broadly. While this does not directly speak to the ability of courts to later abstain from exercising jurisdiction, a broader approach by courts to citizen suits will make it harder for state agencies to

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224. The only exception would be abstention under Colorado River, as the catch-all doctrine. Individual polluters can argue that the principle of wise judicial administration demands consideration of abstention, for example in an unusual case where piecemeal litigation between state and federal courts will frustrate the purpose of RCRA enforcements, i.e. swift and efficient cleanup of solid and hazardous waste.

225. In using Colorado River abstention, courts can consider using stays more often instead of outright dismissals. This will not foreclose citizen suits, but allow state agencies to meet the purposes of RCRA. At the same time this will encourage states to remain diligent, because the federal court could always change their mind and vacate the stay. Indeed, while all three judges in Adkins agreed that dismissal of the citizen suit in Adkins was improper, the dissenting judge would have affirmed a stay. Adkins v. VIM Recycling, Inc., 644 F.3d 483, 511 (7th Cir. 2011) (Ripple, J., concurring in part and dissenting in part). The two judges in the majority did not reach the issue of a stay, thus leaving open the possibility of a stay under Colorado River. See id. at 502 n.8 (majority opinion).

226. By only focusing on a few cases, this in turn will help state agencies convince courts that the particular citizen suit in the particular case truly does interfere.
argue for abstention.227

To find the proper balance between state agency and citizens enforcement mechanisms, state agencies need a method to bring citizen input into enforcement policy decision making, while still preserving the ability to request abstention later. State legislatures should foster this process by structuring statutes in a manner that brings public participation principles to state agency prosecution decisions. One proposal would be to create a requirement on state agencies to fully consider citizen perspectives before filing suit in enforcement actions. Such a law could contain the following language:

For violations of statutes that implement a federally authorized or delegated program, or any implementing rule, permit, assurance, or order:

The agency shall publish a notice of its intent to file a civil enforcement suit, along with the contents of the proposed civil complaint. The public shall have 20 calendar days to submit comments prior to the filing of the civil complaint. At the close of the comment period, the agency shall evaluate the civil complaint in light of any and all comments received and make necessary changes prior to filing.

Such a law would allow citizens to participate in decisions made by agency regarding judicial actions. The agency would be more likely to incorporate some of the citizen goals into their litigation, thus lowering the possibility of piecemeal litigation through separate RCRA citizen suits.228 Such a law would also provide courts with a more robust formal administrative process to review. Depending on the good faith nature of the state agency action, courts would defer more to state agencies and protect against an unchecked presumption if the state agency later requests a court to abstain from hearing a citizen suit. Furthermore, required formal public participation could help state agencies meet the “timely and adequate review” requirement inherent in the abstention doctrines. As long as state agencies act in good faith, they could point to this requirement as a method for citizens to air their interests and get some level of state adjudication. While this does not rise to the level of state court review, it should still provide federal district courts with enough confidence that citizens have a real avenue of review in the state system, thus allowing them to consider abstaining from exercising jurisdiction in later

227. If a state agency wishes to avoid this possibility, it will be forced to widen the scope of its original lawsuit. This will improve overall enforcement.

citizen suits.

One could argue that this public participation requirement might discourage states from filing suits in the first place to avoid the hassle. However, adequate safeguards exist against this possibility. First, failure of a state agency to act in such a manner would only hurt the agency’s authority in the long run. Shying away from filing civil actions solely to avoid procedural burdens would prevent agencies from completing their required job. While individuals can disagree over policy, continuous failure to act will not sit well with agencies supervisors or the electorate. Second, if state agencies fail to truly move enforcement actions forward, the new “diligent prosecution” standard established by the Seventh Circuit will prevent them from having control over environmental enforcement.229 Indeed, as the recent cases show, courts will not continue seven-year delays without any action from state agencies230 or decades-long enforcement proceedings.231 Further, state agencies will not be able to rely on consent decrees to bar subsequent citizen suits, even after diligently prosecuted enforcement actions in court.232

CONCLUSION

Congress devised RCRA under the concept of cooperative federalism to ensure baseline national standards for the control and disposal of hazardous waste. In doing so, Congress expressly allowed states to earn the right to serve as primary enforcers of these standards by obtaining EPA approval for state-implemented hazardous waste programs in line with the national standards. At the same time, Congress recognized that state agencies and the EPA will not always rise to the challenge, and thus gave supplementary power to all citizens to enforce the statute.

Since RCRA’s enactment in 1976, courts have struggled to find the right balance between state agency and citizen enforcement. In many cases, these two enforcement mechanisms do not conflict, whether due to lack of resources or drive for a state agency to take action on the one hand, or lack of funding or ability of a citizen group to move forward on the other. However, in those circumstances where the two mechanisms overlap, courts are left sorting out the conflicting interests. Three circuit courts recently spoke to this balance by significantly restricting the use of abstention. State governments must take heed of this trend and realize that the power of abstention lies in their hands. Taking a close look at the purposes of RCRA, courts should still maintain the availability of abstention when the state itself steps forward to assert its primacy in enforcement. Further, states can protect this option by opening up their adjudication decision making to public participation and requiring

229. While beyond the scope of this Note, courts should reconsider the deferential nature of the “how diligent is enough” statutory bar to more effectively encourage state agencies to act.
230. See Raritan Baykeeper v. NL Indus., Inc., 660 F.3d 686, 695 (3d Cir. 2011).
agencies to listen and respond to citizen concerns before filing suit. By engaging citizens prior to judicial action decisions, state agencies put themselves in a stronger position against polluters. At the same time, state agencies will gain credibility in the eyes of courts by restricting requests for abstention to cases of real conflict between citizen demands and implementation of important state policy.

We welcome responses to this Note. If you are interested in submitting a response for our online companion journal, Ecology Law Currents, please contact ecologylawcurrents@boalt.org. Responses to articles may be viewed at our website, http://www.boalt.org/elq.