No. 15-2041

IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT

GROUP AGAINST SMOG AND POLLUTION, INC.,
Plaintiffs-Appellants,

v.

SHENANGO, INC.,
Defendant-Appellee.

On appeal from the United States District Court for the Western District of Pennsylvania, No. 2:14-cv-00595-CB (Hon. Cathy Bissoon)

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF SIERRA CLUB, MOUNTAIN WATERSHED ASSOCIATION, CLEAN AIR COUNCIL, THREE RIVERS WATERKEEPER, AND THE CENTER FOR COALFIELD JUSTICE AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS AND IN SUPPORT OF REVERSAL

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*

Amici respectfully move the Court, pursuant to Federal Rule of Appellate Procedure 29(a), for leave to file the attached brief of *amici curiae* in support of Appellant, the Group Against Smog and Pollution ("GASP"). GASP has consented to the filing of the brief, but the Appellee, Shenango, Inc., has not responded to *amici's* request for consent.

I. The Third Circuit interprets Rule 29(b) broadly to err on the side of granting leave to file a brief *amici curiae.*

In determining whether to grant leave to file a brief *amici curiae*, an appellate court must consider the "movant's interest" and "the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case." Fed. R. App. P. 29(b). The Third Circuit has held that the Rule 29(b) requirements should be read broadly to ensure that a court has access to potentially helpful briefs. *Neonatology Associates, P.A. v. C.I.R.*, 293 F.3d 128, 132-133 (2002) (stating that courts should "err on the side of granting leave.").

The reasons that a brief from the *amici curiae* is desirable relates to the interests of *amici* in the application and interpretation of the diligent prosecution limitation on citizen suits in more than just the context of the present case. The diverse experience and backgrounds of the *amici* relate to citizen enforcement in

the context of the diligent prosecution defenses in the Resources Conservation and Recovery Act, 42 U.S.C. § 7002(b)(1)(B); the Clean Water Act, 33 U.S.C. § 1365(b)(1)(B); the Safe Drinking Water Act, 42 U.S.C. § 300j-8(b)(1)(B); the Toxic Substances Control Act, 15 U.S.C. § 2619(b)(1)(B); the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270(b)(1)(B); and The Endangered Species Act, 16 U.S.C. § 1540(g)(2)(A).

II. The identity, experience, and interest of the *amici* make their perspective on the diligent prosecution defense of various environmental laws a desirable and relevant addition to the voices before the court.

Amici curiae are a diverse group of environmental nonprofit organizations that seek to protect the health of people and their environment and, therefore, support the use of citizen suit provisions of environmental laws when government enforcement does not require or achieve compliance with protective standards. *Amici* include a national and several regional nonprofit membership organizations with environmental interests that span the gamut of federal laws that include a diligent prosecution defense to citizen suit enforcement.

The Sierra Club is a national nonprofit organization with 64 chapters and over 650,000 members dedicated to exploring, enjoying, and protecting the wild places of the earth; to practicing and promoting the responsible use of the earth's ecosystems and resources; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful

means to carry out these objectives. The Sierra Club's concerns encompass issues related to human and environmental health, environmental and community justice, and those related issues that its members identify as integral to our mission. The Club is committed to using all lawful means to achieve healthier communities in Pennsylvania. Those means often involved citizen enforcement actions under environmental statutes. The Pennsylvania Chapter of the Sierra Club has approximately 24,500 members in the Commonwealth of Pennsylvania.

Mountain Watershed Association ("MWA") is a nonprofit organization formed in 1994 in response to a deep mine proposal in the Indian Creek Watershed, a sub-basin of the Youghiogheny River in Fayette and Westmoreland Counties, Pennsylvania. After the proposal was defeated through a citizen-led legal challenge, local residents committed to building an organization dedicated to protecting and restoring Indian Creek. In 2003, MWA petitioned the international Waterkeeper Alliance to take on the role of the Youghiogheny Riverkeeper. Shortly after, the Riverkeeper became a program of MWA, which expanded the organization's vision into the larger Youghiogheny River watershed. MWA now serves as the public advocate for the Youghiogheny and its tributaries. Among its efforts as public advocate, MWA regularly conducts extensive water sampling throughout the Youghiogheny watershed, manages several projects that actively improve its quality, and works with regulatory agencies to ensure that all activities

in our watershed fully comply with the law. MWA is also committed to direct legal action when regulatory shortfalls threaten its watershed.

Clean Air Council is a non-profit corporation started in 1967 under the laws of Pennsylvania, with a mission to protect everyone's right to breathe clean air. The Council is a member-supported environmental organization serving the Mid-Atlantic Region that is dedicated to protecting and defending everyone's right to breathe clean air. The Council works through a broad array of related sustainability and public health initiatives, using public education, community action, government oversight, and enforcement of environmental laws.

The Center for Coalfield Justice ("CCJ") is a nonprofit corporation formed in 1994 under the laws of Pennsylvania by individuals organizing against the destruction caused by longwall coal mining. Over the course of the last 20 years, CCJ expanded its mission to include issues related to extractive industries generally in Washington and Greene counties. CCJ has nearly 2,000 members and supporters, most of whom live in those counties. CCJ's mission is to improve policy and regulations for the oversight of fossil fuel extraction and use; to educate, empower, and organize coalfield citizens; and to protect public and environmental health.

Three Rivers Waterkeeper is a Pennsylvania nonprofit corporation dedicated to protecting the water quality of the Monongahela, Allegheny, and Ohio Rivers,

and their respective watersheds. The Waterkeeper is both a scientific and legal advocate for the community, working to ensure that the three rivers are protected and safe to drink, fish, swim and enjoy. To accomplish that objective, Three Rivers Waterkeeper patrols the rivers by boat, monitors water quality, evaluates incidents of pollution, reviews permits, supports community education and engagement on water issues and works to hold polluters accountable to the laws meant to protect the health of people and the rivers through citizen enforcement of environmental laws and other avenues of the legal and administrative process.

The *Amici's* particular interest in this case and the issues which the case concerns stem from the potential of this case to affect citizen enforcement actions under any environmental statute within the Third Circuit in the future.

III. The issues addressed by the proposed Brief *Amici Curiae* discuss the severe implications of a determination: (A) that the diligent prosecution defense is jurisdictional, or (B) that the defendant is entitled to a presumption that the government's action against it is diligent enough to require compliance.

In addition, the *amici* address two important arguments that were not squarely addressed by the parties in the district court or, so far, in the appeal: (1) that the diligent prosecution defense is nonjurisdictional in character, and (2) that the Defendant is not entitled to a "heavy presumption of diligence" that the County's out-of-court enforcement actions act as a bar to a citizen suit in the face of well-pled factual allegations that the Consent Decrees failed to require compliance and

that violations continue. Addressing these issues will allow the Court to fully consider whether the District Court's dismissal for lack of subject matter jurisdiction should be reversed.

Amici respectfully request that the Court grant leave to file the attached Brief of *Amici Curiae*.

Respectfully submitted,

s/ Emily A. Collins

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CORPORATE DISCLOSURE STATEMENT

The undersigned attorney for Sierra Club, Mountain Watershed Association, Clean Air Council, Three Rivers Waterkeeper, the Center for Coalfield Justice certifies that these corporations have no parent companies and have never issued stock.

RULE 29(c)(5) STATEMENT

No party's counsel authored this brief in whole or in part; no party and no party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person other than the *amici curiae* or their members contributed money that was intended to fund preparing or submitting this brief.

Dated: July 6, 2015

s/ Emily A. Collins
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The identity and interests of the *amici curiae* is fully described in the Motion seeking leave to file this brief. Each *amici* sought and obtained the authority to file by and through its applicable litigation committee, board of directors, or executive director.

SUMMARY OF THE ARGUMENT

An erroneous assumption that the "Notice" provision of the Clean Air Act's citizen suit section invokes the District Court's subject matter jurisdiction created reversible error in this case. In its Complaint, the Group Against Smog and Pollution ("GASP") identified violations of opacity standards that occurred at Shenango, Inc.'s ("Shenango") facility despite two concluded enforcement actions taken by the Allegheny County Health Department (the "County") against Shenango related to opacity standard violations. JA 24-28. GASP's Complaint alleges ongoing violations of the standards that were targeted by the County's 2012 Consent Decree entered by the United States District Court for the Western District of Pennsylvania as well as the County's 2014 Consent Order and Agreement, which was entered by the Allegheny County Court of Common Pleas (together referred to below as "County Consent Decrees"). JA 24-25. These County Consent

Decrees constitute the basis for Shenango's defense that it has already been diligently prosecuted to require compliance. The District Court's assumption that the defense is jurisdictional does not comport with recent U.S. Supreme Court and Third Circuit case law on determining whether a statute that "specifies, as a prerequisite to its application, the existence of a particular fact…is 'jurisdictional' or relates to the 'merits'" of the statutory claim. *Arbaugh v. Y&H Corp.,* 546 U.S. 500, 515-516 (2006).

The Supreme Court has provided a bright line rule to determine whether a statutory limitation is jurisdictional: "[i]f the Legislature clearly states that the threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigations will be duly instructed…[b]ut when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character." *Id.* at 515-516.

Congress did not attach a clear jurisdictional statement to the diligent prosecution limitation on citizen suits in any of the environmental statutes containing the diligent prosecution exception to citizen enforcement. The jurisdiction-granting subsection of the citizen suit section is housed in a separate place than the diligent prosecution limitation. As nonjurisdictional in character, the diligent prosecution limitation on citizen suits must be evaluated in a 12(b)(6) framework by the District Court on a motion to dismiss.

As a second point of error, in resolving the factual dispute between GASP and Shenango regarding the diligence of the County's Consent Decrees, the District Court chose to "heavily defer" to the County's enforcement actions rather than consider whether the Consent Decrees were the type of government actions ("in a court") and of the requisite character ("diligent" and "to require compliance") that Congress intended to limit citizen suits according to the plain meaning of the statute. JA 7. Granting such a presumption to the Defendant ignores the plain meaning of the statute and does not comport with applicable standards for review.

ARGUMENT

I. The nonjurisdictional character of the diligent prosecution limitation on citizen suits requires consideration of a 12(b) motion by accepting all well-pled facts as true and construing the facts in the light most favorable to the Plaintiff.

The District Court considered a single question in issuing its Memorandum and Order. Judge Bissoon granted the Defendant's Motion to Dismiss by deciding "whether the Court lacks subject matter jurisdiction over this action because the [County] is already diligently prosecuting GASP's claims." JA 6. In classifying what is otherwise a mere element of a claim or a claim-processing rule as "jurisdictional," courts "alter the normal operation of our adversarial system." *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434 (2011); *Arbaugh*, 56 U.S. at 511.

The term "jurisdiction" is "a word of many, too many, meanings." *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 90 (1998). To curtail the "profligat[ion] in its use" through "drive-by jurisdictional rulings," Justice Ginsburg wrote in a unanimous decision that courts must determine whether a statute that "specifies, as a prerequisite to its application, the existence of a particular fact…is 'jurisdictional' or relates to the 'merits'" of the statutory claim.[1] *Arbaugh* at 513. To make such a finding, the statute must "clearly state" that the limitation on its scope is jurisdictional, or "courts should treat the restriction as nonjurisdictional in character." *Id.* at 515.

Subsequently, as this Court has noted, the Supreme Court has clarified that when an express jurisdictional designation does not appear in a limiting statutory provision, analysis of the text or context, or the "historical treatment of [the] type

[1] In what appears to be a case of overuse and overbroad expression of the term "jurisdictional," the Senate Report to the 1970 Clean Air Act Amendments mentions that courts will have "jurisdiction" to hear a citizen suit in the process of clarifying that the citizen plaintiff and, ultimately, the court, make a judgment about whether the government action is adequately diligent and one that would require compliance with the standard at issue as follows: "…if the citizen believed efforts by the agency to be inadequate, the citizen might choose to file the action. In such case courts would be expected to consider the petition against the background of the agency action and could determine that such action would be adequate to justify suspension, dismissal, or consolidation of the citizen petition. On the other hand, if the court viewed the agency action as inadequate, it would have jurisdiction to consider the citizen action notwithstanding any pending agency action." S. Rep. No. 91-1196, at 37 (1970), *reprinted in* 1 CAA Legislative History, at 401, 437 (1974). Congress did not subsequently locate the diligent prosecution limitation on citizen suits in a provision with a truly jurisdictional character, as discussed in depth below.

of limitation" can provide reason to find that the provision "speak[s] in jurisdictional terms" to invoke a court's adjudicatory authority. *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 168 (2010) (*citing Bowles v. Russell,* 551 U.S. 205 (2007)); *In re Caterbone*, 640 F.3d 108, 113 (3rd Cir. 2011). Present in at least seven of the major federal environmental statutes,[2] the diligent prosecution defense to a citizen suit does not speak in jurisdictional terms in any of them. The Third Circuit has not had an opportunity to evaluate the diligent prosecution limitation of those statutes since the Supreme Court's recent work "'to bring some discipline' to the use of the term 'jurisdictional.'"[3] *Gonzalez v. Thaler*, 132 S.Ct. 641, 648 (2012).

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[2] Similar diligent prosecution defense language to that of the Clean Air Act, 42 U.S.C. § 7604(b)(1)(B), is present in the following federal statutes: Resources Conservation and Recovery Act, 42 U.S.C. § 7002(b)(1)(B); Clean Water Act, 33 U.S.C. § 1365(b)(1)(B); Safe Drinking Water Act, 42 U.S.C. § 300j-8(b)(1)(B); Toxic Substances Control Act, 15 U.S.C. § 2619(b)(1)(B); Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270(b)(1)(B); and The Endangered Species Act, 16 U.S.C. § 1540(g)(2)(A).

[3] The Third Circuit has acknowledged that it had subject matter jurisdiction in the face of a diligent prosecution argument in the following cases: *Baughman v. Bradford Coal Co, Inc.*, 592 F.2d 215, 217 (3rd Cir. 1979) (in evaluating whether the Pennsylvania Environmental Hearing Board is a court for the purpose of the diligent prosecution provision of the CWA, the court disagreed with the defendant-appellant that the court did not have subject matter jurisdiction); *Student Public Interest Research Group of New Jersey, Inc. v. Fritzsche, Dodge & Olcott, Inc.*, 759 F.2d 1131, 1135 (3rd Cir. 1985) (stating that section 505 of the CWA confers jurisdiction over citizen suits and, "under section 505(b)(1)(B), a court does not have jurisdiction to entertain a private suit" where an in court proceeding is being diligently prosecuted.

Upon a 12(b)(6) motion, the 5th Circuit applied the *Arbaugh* clear statement rule to the diligent prosecution language of the Clean Water Act's citizen suit provision. *Louisiana Envt'l Action Network v. City of Baton Rouge*, 677 F.3d 737 (5th Cir. 2012). The Court stated the issue presented as "whether the CWA's 'diligent prosecution' bar is jurisdictional" or whether the "district court is required to accept all well-pleaded facts [in the citizen complaint] as true and view the facts in the light most favorable to [the citizen plaintiff.]" *Id.* at 745. Through a plain meaning analysis of the statutory language, the 5th Circuit held that: the text of the provision, while mandatory, did not clearly refer to the jurisdiction of the district courts; the placement of the diligent prosecution language within the "Notice" subsection shows the character of a claim-processing rule; and subject matter jurisdiction is conferred through federal question jurisdiction and a wholly separate subsection of the citizen suit section. *Id.* at 748-749.

Similarly, in deciding whether the diligent prosecution bar to the Resource Conservation and Recovery Act ("RCRA") citizen suit provision is jurisdictional, which is nearly identical to the Clean Air Act ("CAA") provision,[4] the Seventh Circuit found that RCRA's diligent prosecution provision is not framed in jurisdictional terms and is located separately from RCRA's jurisdiction-granting sections. *Adkins v. VIM Recycling, Inc.*, 644 F.3d 483, 492 (7th Cir. 2011) (finding

[4] *Compare* 42 U.S.C. § 6972(a) *with* 42 U.S.C. § 7604(a).

that subsection (a) of the citizen suit provision provides subject matter jurisdiction while subsection (b) of RCRA's citizen suit section, containing the diligent prosecution limitation, is nonjurisdictional).[5] The court noted that the diligent prosecution bar has the potential to "ebb and flow depending on whether the government agency is 'diligently prosecuting' an earlier lawsuit" and that it is uncharacteristic for a jurisdictional rule to cause a plaintiff's ability to sue to "disappear, return, and disappear again, depending on the government agency's changing approach to its own enforcement action." *Adkins* at 492.

The consequences of a drive-by jurisdictional ruling related to the diligent prosecution limitation can be severe. *Louisiana Envt'l Action Network*, 677 F.3d at 747 (*citing Henderson*, 562 U.S. at 434, and *Gonzalez*, 132 S.Ct. at 648). Once branded jurisdictional, a previously non-diligent prosecution can be raised at any time, *sua sponte* or otherwise, as suddenly diligent. *Gonzalez* at 648, *Arbaugh* at 514, *Henderson* at 1202. In addition, if the diligent prosecution provision is declared to be jurisdictional, when parties contest facts related to diligence or the

[5] The citizen suit provision of the Clean Water Act, at issue in *Louisiana Envt'l Action Network*, and the Clean Air Act, at issue here, have the same subsection structure as RCRA. *Compare* 33 U.S.C. § 1365(a), (b) *with* 42 U.S.C. § 7604(a), (b) *and* 42 U.S.C. § 6972(a), (b). Notably, Congress provided titles to the subsections in the CWA and CAA that are slightly different in RCRA as follows: for the CWA - (a) Authorization; jurisdiction, and (b) Notice; for the CAA – (a) Authority to bring civil action; jurisdiction, and (b) Notice; for RCRA: (a) In general, and (b) Actions prohibited.

adequacy of the result of a civil action, the trial judge will likely "review the evidence and resolve the dispute on her own." *Arbaugh* at 514. If the limitation is *not* jurisdictional and constitutes an essential element of a claim or defense that is contested, "the jury is the proper trier of contested facts."[6] *Id*.

The District Court erred in issuing a drive-by jurisdictional ruling on the diligent prosecution limitation on citizen suits. Like the diligent prosecution limitations of RCRA and the CWA, Congress did not make a clear jurisdictional statement in the "Notice" subsection of the citizen suit provision of the CAA. The jurisdictional statement in the CAA is in a different subsection of the citizen suit section. In addition, the character of the diligent prosecution limitation is nonjurisdictional because of its propensity to otherwise cause a citizen-plaintiff's ability to sue to "disappear, return, and disappear again, depending on the

[6] The District Court ruled only on the 12(b)(1) motion since a 12(b)(6) challenge becomes moot where a court decides that it lacks subject matter jurisdiction. *Bell v. Hood*, 327 U.S. 678, 682 (1946). Yet, the difference between the two motions relates to the consequences of a decision on whether the diligent prosecution limitation is jurisdictional. Namely, when the issue is one of challenging subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), the court may resolve factual disputes by considering evidence outside of the pleadings. *Gould Electronics, Inc. v. U.S.*, 220 F.3rd 169, 176 (3rd Cir. 2000). By contrast, in evaluating a Fed. R. Civ. P. 12(b)(6) motion to dismiss for failure to state a claim on which relief can be granted, a court must accept as true all factual allegations in the complaint and determine whether it is plausible that the plaintiff is entitled to relief. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The requisite facial plausibility exists "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

government agency's changing approach to its own enforcement action." *Adkins*, 644 F.3d at 492. A clear statement and contextual analysis of the diligent prosecution statutory language of the CAA demonstrates the nonjurisdictional character of the restriction. As a nonjurisdictional limitation, the Court should reverse the District Court's decision.

II. If subject to the diligent prosecution bar at all, the County Consent Decrees extending the timeframe to achieve compliance are not entitled to a "heavy presumption of diligence" based on the plain language of the statute.

The District Court afforded the County Consent Decrees a "heavy presumption of diligence" in deciding to dismiss the citizen suit for lack of subject matter jurisdiction.[7] JA 7. Blind deference to already-completed government enforcement bars citizen suits without giving effect to the express statutory

[7] Notably, as in *Laidlaw*, it is the violator that is asking the court to favor the government enforcement over citizen enforcement. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 890 F. Supp. 470, 475-76, 478-82 (D.S.C. 1995) (explaining that the state filed a civil action and consent decree only after the violator drafted the complaint and consent decree, filed the documents with the court, and paid the filing fee for the state). The County did not intervene in the case in the lower court to argue that its Consent Decrees were diligent and require compliance. Yet the lower court offered a heavy presumption of diligence to the violator's case. Such a benefit does not adhere to other prosecutions that courts routinely evaluate for the purpose of deciding whether to enter consent decrees. *See Sierra Club v. Elec. Controls Design, Inc.,* 909 F.2d 1350, 1355 (9th Cir. 1990) *citing Citizens for a Better Env't v. Gorsuch*, 718 F.2d 1117, 1126 (D.C. Cir. 1983) (finding that courts should enter a proposed consent decree if the court decides that it is fair, reasonable and equitable and does not violate the law or public policy.").

requirements that the government action: (1) is "diligently prosecuted," (2) "in a court," and (3) "to require compliance." 42 U.S.C. § 7604(b)(1)(B). Reading a presumption of diligence into the statute ignores the present tense language of the statute and fails to give effect to Congress' purpose in allowing citizen suits to move forward when government action is insufficient to achieve compliance. Rather than any kind of presumption of diligence, Shenango must prove its defense of diligent prosecution by showing ongoing, present tense, diligent enforcement.

GASP alleges that the County filed suit and obtained consent decrees twice in relationship to opacity violations at Shenango's coke plant. JA 24-25 (¶¶ 30-31, 33-34. While a factual dispute likely exists regarding each alleged violation of the opacity limitations applicable to Shenango, GASP's well-pled factual allegations state that the County Consent Decrees do not require compliance and that violations of the opacity limitations have continued. JA 24-28 (¶¶32, 35-42, 45, 49-50). Affording the County Consent Decrees a presumption of diligence, especially after resolution of civil actions that have allegedly failed to achieve compliance, is contrary to the plain meaning of the Clean Air Act, and "ignores the fact that Congress authorized citizen suits precisely because government enforcers were not always diligent and Congress intended court to hear citizen suits where government enforcement was not adequately prosecuted to require compliance." JEFFREY G. MILLER, *Theme and Variations in Statutory Preclusions Against*

Successive Environmental Enforcement Actions by EPA and Citizens, Part One: Statutory Bars in Citizen Suit Provisions, 28 HARV. ENVTL. L. REV. 401, 466 (2004).

The phrases "in a court" and "diligently prosecuting" are written in the present tense. Congress' exacting intent in the diligent prosecution exception to citizen suits reveals a narrow exception: the diligent prosecution bar only applies to present tense prosecution in a court that is here-and-now, ongoing civil court action that is being meaningfully pursued. *Gwaltney of Smithfield, Ltd., v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987) (evaluating the present tense language that Congress used in the CWA's citizen suit section to hold that "wholly past violations" cannot be the subject of a CWA citizen suit). Here, the prosecution event envisioned by the statutory language ended and is no longer in a court. JA 24-25 (¶¶ 30, 34). By its terms, the diligent prosecution exception to citizen suits does not apply to enforcement efforts that are no longer in a court being prosecuted.

To the extent that the Court finds that the County's now out-of-court enforcement efforts should be evaluated as a bar to the citizen suit despite the plain meaning of the statute, Shenango should not be entitled to a heavy presumption of diligence for the County's extrajudicial enforcement strategy and GASP should be allowed to prove its well-pled allegations that the County Consent Decrees do not

require compliance. Beyond the "in a court" element of a diligent prosecution defense, the statutory requirements of "diligence" and "to require compliance" must be evaluated. Within that evaluative framework, "[c]omplete deference to agency enforcement strategy, adopted and implemented internally and beyond public control, requires a degree of faith in bureaucratic energy and effectiveness that would be alien to common experience." *Gardeski v. Colonial Sand & Stone Co.*, Inc., 501 F.Supp. 1159, 1168 (S.D.N.Y. 1980). Instead of deferring to Shenango's claims of diligent prosecution, the District Court should have credited "as true the pleaded assertions in the complaint and [construe] them most favorably on behalf of the plaintiffs." *Jones v. City of Lakeland, Tennessee*, 224 F.3d 518, 522 (6th Cir. 2000) (issue of whether agency's enforcement action to compel city's compliance with National Pollutant Discharge Elimination System (NPDES) permit satisfied requirement of "diligent prosecution" could not be resolved at motion to dismiss stage of riparian landowners' enforcement action); *Ashcroft v. Iqbal*, 556 U.S. 662, 664 (2009) (holding that "[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausible give rise to an entitlement to relief.").

The determination of whether a prosecution is "diligent" is largely a factual inquiry, and generally not properly decided on a motion to dismiss. *See generally Jones* at 522; *Hudson Riverkeeper Fund, Inc. v. Harbor at Hastings Associates*,

917 F. Supp. 251, 256 (S.D.N.Y. 1996) (noting that "the determination of whether a matter has been diligently prosecuted by the state is a question of fact"); *Glazer v. Am. Ecology Envtl. Servs. Corp.*, 894 F. Supp. 1029, 1037 (E.D. Tex. 1995) (finding that "the plaintiffs have not had an adequate opportunity to develop their evidence in response to the motion for summary judgment. Therefore, the issue of diligent prosecution in relation to those claims and violations to which the state action pertained will not be presently addressed").

Indeed, if the County Consent Decrees were designed to require compliance, then Shenango would not have any economic incentive to continue violating opacity limitations and the County could seek to enforce the injunctive relief that it secured during the civil action that it resolved. That violations continue, according to the GASP's well-pled allegations, make a presumption of diligence illogical. Some courts have recognized that an agency is not "diligently prosecuting" an action to achieve compliance when it allows violations to continue. *Jones*, 224 F.3d at 522-523 (enforcement by agency was not diligent "especially in light of the City's ongoing impermissible pollution" of the a creek); *Frilling v. Vill. Of Anna*, 924 F. Supp. 821, 837-838 (S.D. Ohio 1996) (state action did not "require compliance" where the state substituted interim limitations for final limitations).

Similarly, the "to require compliance" language of the statute involves factual questions that cannot be properly decided on a motion to dismiss. Where a

citizen plaintiff pleads ongoing violations after a Consent Decree is entered, the facts related to the economic benefit of noncompliance, which likely could not be identified until completion of discovery, may reveal the reason for continued violations. "If a penalty recovered merely required the polluter to disgorge the benefit it received from noncompliance, then from a purely economic standpoint, a discharger would be indifferent between spending the money necessary to achieve full compliance in a timely manner and ignoring the regulation and simply paying the civil penalty as a cost of doing business." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,* 890 F. Supp. 470, 492 (D.S.C. 1995). As such, Shenango is not entitled to a heavy presumption that the County Consent Decrees that failed to prevent it from violating air pollution standards were "diligent" or "to require compliance."

As the court did in *Jones v. City of Lakeland,* the District Court should have credited "as true the pleaded assertions in the complaint and [construe] them most favorably on behalf of the plaintiffs" rather than heavily defer to the violator's claims of diligent prosecution. 224 F.3d at 522. In doing so, the Court should have denied Shenango's 12(b) motion to dismiss because the Plaintiffs have pled facts sufficient to state a claim upon which relief can be granted.

Finally, even if GASP is up against a "presumption" of diligence, "presumptions are evidentiary standards that should not be applied to motions to

dismiss." *In re Xcel Energy, Inc., Sec., Derivative & "ERISA" Litig*., 312 F. Supp. 2d 1165, 1180 (D. Minn. 2004) (*citing Swierkiewicz v. Sorema N. A.,* 534 U.S. 506, 510-14 (2002)). Indeed, "[u]nder the Federal Rules of Civil Procedure, an evidentiary standard is not a proper measure of whether a complaint fails to state a claim." *Fowler v. UPMC Shadyside*, 578 F.3d 203, 213 (3d Cir. 2009). Where courts have found that prosecutions are "heavily presumed" diligent, they have also noted that "neither are prosecutions *ipso facto* 'diligent.'" *Citizens Legal Envtl. Action Network, Inc. v. Premium Standard Farms, Inc.,* No. 97-6073-CV-SJ-6, 2000 WL 220464, at *12 (W.D. Mo. Feb. 23, 2000). Accordingly, the Plaintiffs should have a chance to move forward with discovery and prove their well-pled allegations regardless of whether or not a presumption applies.

CONCLUSION

Amici urge that the judgment of the district court be reversed. The basis for the District Court's decision rests on erroneous assumptions that the diligent prosecution defense to citizen suits is jurisdictional and that a government enforcement action is entitled to a heavy presumption of diligence.

Respectfully submitted,

s/ Emily A. Collins

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i) and Fed. R. App. P. 29(d) because this brief contains 3,930 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as calculated by the word-counting function of Microsoft Word for Mac 2011.
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word for Mac 2011 in 14-point Times New Roman font.
3. This brief has been scanned for viruses using AVG AntiVirus Version 2015.0 (2015) and is free of viruses.
4. The hard copies of this brief submitted to the Court to be sent today are exact copies of the version submitted electronically.
5. Under Local Rule 46.1, Emily A. Collins is a member in good standing of the bar for the United States Court of Appeals for the Third Circuit.

Dated: July 6, 2015.

s/ Emily A. Collins

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CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2015, I filed the foregoing Motion for Leave to File a Brief *Amicus Curiae* and Brief *Amicus Curiae* using the Court's CM/ECF filing system. I further certify that, to my knowledge, all counsel that have appeared in this case are registered for CM/ECF and will receive service by that means.

Seven (7) copies of the foregoing will be sent to the Office of the Clerk of Court for the United States Court of Appeals for the Third Circuit via Federal Express.

Dated: July 6, 2015

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