UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA

GROUP AGAINST SMOG AND POLLUTION,	)	
Plaintiff,	)	CIVIL ACTION NO. 2:14-cv-00595-CB
v.	)	JURY TRIAL DEMANDED
SHENANGO INCORPORATED,	)	
Defendant.	)	

PLAINTIFF GROUP AGAINST SMOG AND POLLUTON'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

FACTUAL BACKGROUND

By its claims in this action, Plaintiff Group Against Smog and Pollution ("GASP") seeks injunctive and other relief requiring Defendant Shenango, Inc. ("Shenango") to comply with limitations on visible emissions from its coke oven doors[1] and battery combustion stack.[2] Shenango has violated those limitations on numerous occasions since November 6, 2012, when a Consent Decree (the "2012 Consent Decree") between Shenango (on the one hand) and the United States, the Pennsylvania Department of Environmental Protection, and Allegheny County (on the other) became effective.[3]

The measures required by the 2012 Consent Decree – including the repair of end flues and oven walls in Shenango's coke oven battery, Shenango's implementation of an "Elevated

---

[1] Article XXI of ACHD's Rules and Regulations ("Article XXI" or "Art. XXI"), § 2105.21.b.1. Article XXI implements requirements of the Clean Air Act in Allegheny County, Pennsylvania. *See* 40 C.F.R. § 52.2020(c)(2). Article XXI is available at: http://www.achd.net/air/pubs/pdf/Article21.pdf.

[2] Art. XXI, §§ 2105.21.f.3 and 2105.21.f.4.

[3] The 2012 Consent Decree is attached to GASP's First Amended Complaint as Exhibit D. The 2012 Consent Decree resolved an enforcement action that was docketed at number 2:12-cv-01029-GLL (W.D. Pa.) (the "2012 Enforcement Action").

Opacity Response Protocol," "Battery Heating Protocol," and "Coke Oven Proactive Maintenance Program"[4] – failed to ensure Shenango's compliance with those limitations. Between November 6, 2012 and March 31, 2014, Shenango violated the limitations on visible emissions from its battery combustion stack at least one time on each of 369 days (more or less) out of 511 days,[5] and also violated the limitation on visible emissions from its coke oven door areas at least one time on each of 39 days.[6] In its First Amended Complaint, GASP alleges that Shenango has continued to violate those limitations.[7]

By letter dated February 6, 2014, GASP provided Shenango (as well as the Allegheny County Health Department ("ACHD") and certain federal and Pennsylvania officials) with 60 days' prior notice of its intent to sue under the Clean Air Act and/or Article XXI,[8] as required by section 304(b)(1)(A) of the Clean Air Act[9] and Section 2109.11.d of Article XXI. Fifty-nine days later, on April 7, 2014, ACHD filed an action against Shenango in the Court of Common Pleas of Allegheny County, Pennsylvania at General Docket No. GD-14-6299 (the "2014 Enforcement Action"),[10] which purported to seek relief from Shenango for its violations of the limitation on visible emissions from coke oven door areas,[11] and other violations identified in GASP's February 6, 2014 notice of intent to sue. The 2014 Enforcement Action did not,

---

4 2012 Consent Decree, § IV and Appendices 2, 3, and 4.

5 First Amended Complaint, ¶ 40.

6 *Id.*, ¶ 37.

7 *Id.*, ¶ 38 (alleging that violations of the limitation on visible emissions from the coke oven door areas "are likely to recur"); ¶ 41 (alleging that "Shenango has violated the applicable limitations on visible emissions from combustion stack for the Facility's battery of coke ovens on an intermittent basis since March 31, 2014"); ¶ 45 (alleging that Shenango has repeatedly violated the limitation on visible emissions from coke oven door areas siiolatednce November 6, 2012); ¶ 49 (alleging that Shenango has repeatedly violated the limitation on visible emissions from its battery combustion stack in Art. XXI, § .2105.21.f.3); ¶ 50 (alleging that Shenango has repeatedly violated the limitation on visible emissions from its battery combustion stack in Art. XXI, § .2105.21.f.4).

8 Article XXI implements the requirements of the Clean Air Act in Allegheny County, Pennsylvania. *See* 40 C.F.R. § 52.2020(c).

9 42 U.S.C. § 7604(b)(1)(A).

10 A copy of ACHD's Complaint in the 2014 Enforcement Action (the "2014 Complaint") is attached to GASP's First Amended Complaint as Exhibit E.

11 2014 Complaint, at ¶¶ 26-33.

however, address Shenango's violations of the limitations on visible emissions from the battery combustion stack. Also on April 7, 2014, Shenango and ACHD entered into a Consent Order and Agreement (the "2014 COA") that purports to resolve the claims ACHD made in the 2014 Complaint.[12] The 2014 COA was approved by Judge Christine A. Ward of the Allegheny County Court of Common Pleas, also on April 7, 2014.[13]

The 2014 COA states that Shenango's "[c]ompliance with requirements pertaining to emissions from the Facility's battery combustion stack are covered by the 2012 Consent Decree that remains in effect," notwithstanding Shenango's almost-daily violation of the limitations on visible emissions from its battery combustion stack since the 2012 Consent Decree was lodged. The 2014 COA does not impose any measures on Shenango aimed at requiring compliance with the limitations on visible emissions from the battery combustion stack.

Although the 2014 COA lists a number of operational changes that Shenango purportedly made to reduce violations of the limitation on visible emissions from its coke oven door areas,[14] it does not require Shenango to continue those practices or undertake any new measures aimed at requiring compliance with that limitation.

On May 8, 2014, GASP filed its Complaint in the instant action. GASP amended its Complaint pursuant to Federal Rule of Civil Procedure 15(a) on July 7, 2014. Shenango has moved to dismiss GASP's First Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) and Federal Rule of Civil Procedure 12(b)(6).

---

[12] 2014 COA, at § II.A. The 2014 COA is attached to GASP's First Amended Complaint as Ex. F.

[13] *See id.*

[14] 2014 COA, ¶ 18 (stating "[t]he following steps have been taken by Shenango to enhance the control of charging, soaking, and coke oven door emissions …").

ARGUMENT

I. STANDARD OF REVIEW

A motion to dismiss pursuant to Rule 12(b)(1) is either a "facial" or a "factual" attack on the court's subject matter jurisdiction.[15] "A factual jurisdictional proceeding cannot occur until plaintiff's allegations have been controverted."[16] Accordingly, "[w]hen a motion to dismiss pursuant to Rule 12(b)(1) is filed prior to the defendant filing an answer to the complaint, it is, by definition, a facial attack" on the court's jurisdiction.[17]

> In a facial attack, the defendant contests the sufficiency of the well-pleaded allegations insofar as they provide a basis for the court's exercise of subject-matter jurisdiction; as under Rule 12(b)(6) the court must treat the complaint's well-pleaded jurisdictional facts as true and view them in the light most favorable to the plaintiff. Dismissal pursuant to a facial attack "is proper only when the claim clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or is wholly insubstantial and frivolous."[18]

The plaintiff bears the burden of establishing jurisdiction, but the court's review is limited to the allegations of the complaint and any documents referenced in the complaint.[19]

A motion to dismiss pursuant to Rule 12(b)(6) tests whether the complaint contains sufficient factual matter "to state a claim to relief that is plausible on its face."[20] "To determine the complaint's legal sufficiency, the court must accept as true all of the facts, but not the legal conclusions, alleged, draw all reasonable inferences in the plaintiff's favor, and confirm that the accepted-as-true facts actually give rise to a claim that would entitle the plaintiff to relief."[21]

---

15 *See Mortenson v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977)

16 *Id.*, at 892 n.17.

17 *Zubik v. Sebelius*, 911 F. Supp.2d 314, 322-23 (W.D. Pa. 2012).

18 *Arrington v. ColorTyme, Inc.*, 972 F. Supp.2d 733, 739 (W.D. Pa. 2013) (quoting *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1408-9 (3d Cir. 1991)).

19 *Zubik*, 911 F. Supp.2d at 323.

20 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), quoted in *Arrington*, 972 F. Supp.2d at 746.

21 *Arrington*, 972 F. Supp.2d at 746.

II. CLEAN AIR ACT SECTION 304(b)(1)(B)'S "DILIGENT PROSECUTION" BAR

By its motion to dismiss pursuant to Rule 12(b)(1), Shenango contends that the "diligent prosecution" bar is Section 304(b)(1)(B) deprives this Court of jurisdiction over GASP's claims.

Clean Air Act Section 304(a)(1) authorizes citizens to bring civil suits to enforce any "emission standard or limitation under [the Clean Air Act],"[22] including, by statutory definition, standards and limitations that are incorporated into State Implementation Plans that have been approved by the United States Environmental Protection Agency and Title V Operating Permits. A citizen's suit brought under Section 304 is barred, however:

> if the Administrator or a State has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the standard, limitation, or order [that the plaintiff in the citizen suit alleges was violated].[23]

Courts have recognized that the "central purpose" of a citizen suit provision[24] is "to permit[] citizens to abate pollution when the government cannot or will not command compliance."[25] Thus, a Court "is simply not authorized to defer to the State's discretion in certain, select cases by denying citizens their right to enforce … limitations where the government has failed to do so."[26]

---

22 42 U.S.C. § 7604(a)(1).

23 42 U.S.C. § 7604(b)(1)(B).

24 Other environmental statutes, including the Clean Water Act ("CWA") and Resource Conservation and Recovery Act ("RCRA"), also include provisions that authorize citizen suits but bar them when a government enforcement action to enforce the same limitation has been commenced and is being prosecuted diligently. *See* 33 U.S.C. § 1365(b)(1)(B) (CWA); 42 U.S.C. § 6972(b)(1)(B) (RCRA); *see also* 33 U.S.C. § 1319(g)(6)(A)(ii) (barring a citizen suit if a state "has commenced and is diligently prosecuting an action under state law comparable to this subsection"). Because such provisions are modeled on Section 304 of the Clean Air Act, courts freely use precedent and legislative history from one to guide their interpretations and applications of the others. *E.g., Friends of the Earth v. Consolidated Rail Corp.*, 768 F.2d 57, 63 (2d Cir. 1985) (using the legislative history of Section 304(b)(1)(B) to interpret CWA Section 505(b)(1)(B)); *Glazer* v. *American Ecology Envtl. Servs. Corp.*, 894 F. Supp. 1029, 1035-37 (E.D. Tex. 1995) (interpreting the diligent prosecution bars in the Clean Air Act and RCRA according to cases decided under the CWA); 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 HARVARD ENVTL. L. REV. 401, 417-18 (2004) (stating that "the citizen suit provisions in the different statutes are so nearly alike that courts commonly interpret one of them by comparing and contrasting its wording with the wordings of the others and by using legislative history and precedent from the others").

25 *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found. Inc.*, 484 U.S. 49, 62 (1987).

26 *Frilling v. Village of Anna*, 924 F. Supp. 821, 844 (S.D. Ohio 1996).

To decide a motion to dismiss based on a "diligent prosecution bar," a court must undertake a "two-part inquiry."[27] **First**, the court must determine whether a state commenced a court action "to require compliance with the standard, limitation, or order" at issue in the citizen suit.[28] **Second**, if the enforcement action and the citizen suit both seek to require compliance with the same standard, limitation, or order, the court must determine whether the state "is diligently prosecuting" its enforcement action.[29]

If a state has commenced an enforcement action, a diligent prosecution bar does not apply unless the action seeks to "require compliance with the standard, limitation, or order" at issue in the citizen's suit. To determine whether a citizen's suit seeks to require compliance with the same standard, limitation, or order as a state enforcement action, a court should compare the pleadings in the two actions, as well as any settlement or final judgment in the state's enforcement action.[30] When a state enforcement action does not seek to require compliance with

---

[27] *Glazer*, at 1035.

[28] *Glazer*, at 1035.

[29] Based on Section 304(b)(1)(B)'s use of the present tense verb phrase "is diligently prosecuting," a number of courts, including the United States Court of Appeals for the Ninth Circuit, have determined that a diligent prosecution bar does not apply if the state enforcement action concluded before the citizen suit was filed. "[T]he statutory provision does not state that a citizen suit is barred if a state *has* prosecuted an action with respect to [the alleged] violations, although Congress could have easily so provided." *Public Interest Research Group v. GAF Corp.*, 770 F. Supp. 943, 949 (D.N.J. 1991) (discussing the diligent prosecution bar in CWA Section 309(g) (33 U.S.C. § 1319(g))) (emphasis in original). *accord Knee Deep Cattle Co. v. Bindana Inv. Co.*, 94 F.3d 514, 516 (9th Cir. 1996) (determining that the state was not "diligently prosecuting" an action within the meaning of CWA Section 309(g)) when an order concluding the enforcement action was entered into before the plaintiff filed its citizen's suit); *Citizens for a Better Envt. v. Union Oil Co.*, 83 F.3d 1111, 1118 (9th Cir. 1996)(same); *Glazer*, 894 F. Supp. at 1035 (stating that the diligent prosecution bars in Section 304 of the Clean Air Act and Section 6972 of RCRA (42 U.S.C. § 6972) could not apply unless an enforcement action "was pending in state court on the date this citizen suit was commenced"); *Connecticut Fund for the Envt. v. L&W Indus., Inc.*, 631 F. Supp. 1289, 1291 (D. Conn. 1986) (determining that the diligent prosecution bar in CWA Section 505 (33 U.S.C. § 1365(b)(1)(B)) did not apply because a stipulated judgment was entered in the state's enforcement action before the citizen suit was filed).

Other courts have accepted this interpretation of Section 304(b)(1)(B), but have nevertheless applied the same "diligently prosecuting" test to determine whether final judgments in government enforcement actions barred subsequently-filed citizen suits under res judicata in cases where enforcement actions were concluded before citizen suits were filed. In such cases, courts have determined that a citizen suit is not barred by res judicata when the enforcement action was not "diligently prosecuted," but is barred by res judicata when the government's prosecution was diligent. *See Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewerage Dist.*, 382 F.3d 743, 758-66 (7th Cir. 2004), *cert. denied*, 544 U.S. 913 (2005); *St. Bernard Citizens for Envtl. Quality, Inc. v. Chalmette Ref., L.L.C.*, 500 F. Supp. 2d 592, 605-6 (E.D. La. 2007).

[30] *See Adkins v. VIM Recycling, Inc.*, 644 F.3d 483, 494 (7th Cir. 2011) (stating ["[w]e look to the plaintiffs' federal complaint and we take judicial notice of matters within the public record" to determine whether a citizen suit was brought to enforce the same standard as a prior enforcement action); *Frilling*, 924 F. Supp. at 837 (determining

a particular limitation, Section 304(b)(1)(B) does not bar an action brought by a citizen to enforce the standard.[31]

When a state's enforcement action and a citizen suit both seek to require compliance with a particular limitation, the citizen suit is barred if the state's prosecution of its enforcement action is "diligent." "A diligent prosecution analysis requires more than mere acceptance at face value of the potentially self-serving statements of a state agency and the violator with whom it settled regarding their intent with respect to the effect of the settlement."[32] Thus, when a court examines a settlement of an enforcement action to determine whether the action was diligently prosecuted, it must analyze the likelihood that the settlement "is capable of requiring compliance with the Act and is in good faith calculated to do so."[33] In this context, "[c]ompliance means an *end* to violations, not merely a reduction in the number or size of them."[34]

---

that a citizen's claims to enforce standards established under the Clean Water Act were not barred based on a comparison of the complaint and consent order filed in the state's enforcement action on one hand and the complaint in the citizen suit on the other); *Glazer,* 894 F. Supp. at 1035 (comparing the petition and agreed final judgment in the state enforcement action to the complaint in the citizen suit).

[31] *Maryland Waste Coalition v. SCM Corp*., 616 F. Supp. 1474, 1483 (D. Md. 1985) (stating "[T]he intent of the preemption clause [in Section 304(b)(1)] is to bar private actions seeking to force compliance with the *same standards, limitations or orders* which are already the subject of state or federal compliance actions"); *accord Adkins*, 644 F.3d at 494 (determining that claims brought under RCRA's citizen suit provision regarding violations of requirements for handling "A" and "B" grade waste were not barred by an earlier enforcement action to enforce requirements for handling "C" grade waste); *Frilling*, 924 F. Supp. at 836 (stating "a citizen suit to enforce a particular standard, limitation, or order will be barred only if the State commences a civil action to require compliance with *the same standard, limitation, or order* referenced in the plaintiff's 60-day notice letter, which provides the basis for the plaintiff's suit"); *Glazer*, 894 F. Supp. at 1035 (determining that a citizen's claim to require compliance with New Source Performance Standards ("NSPS") and National Emissions Standards for Hazardous Air Pollutants ("NESHAPs") established under the Clean Air Act were not barred by Section 304(b)(1) when the state enforcement action did not include claims to enforce such standards).

[32] *Friends of Milwaukee's Rivers*, 382 F.3d at 760.

[33] *Id.,* at 760; *see Pennsylvania Envtl. Def. Fund v. Borough of North East*, 1997 U.S. Dist. LEXIS 23865, *33-34 (W.D. Pa. 1997) (stating that the diligence of settlement depends on whether it "will produce future compliance"). Copies of the unreported decisions cited in this Brief are attached in Exhibit H.

[34] *Friends of Milwaukee's Rivers*, 382 F.3d at 764 (emphasis in original); *see Atlantic States Legal Found., Inc. v. Eastman Kodak Co.*, 933 F.2d 124, 128 (2d Cir. 1991) (determining that the diligent prosecution bar in CWA section 505(b)(1)(B) would not apply without a showing that the settlement between the state and the defendant "has caused the violations alleged by [the citizen suit plaintiff] to cease and eliminated any realistic prospect of their recurrence").

Accordingly, although diligence on the part of the state is often said to be presumed,[35] courts do not apply diligent prosecution bars when state enforcement actions have proven incapable of requiring compliance[36] or when an enforcement action simply fails to address the cause of a particular violation.[37] By way of contrast, courts follow the presumption of diligence and bar citizen suits when enforcement actions require measures to ensure compliance, but such measures have yet to be implemented.[38]

As explained below, the 2014 Enforcement Action is not a diligent prosecution of Shenango's violations of the limitation on visible emissions from coke oven door areas for two reasons. First, the 2014 COA did not impose any measures on Shenango to ensure that Shenango would comply with that limitation. Second, the public was not given an opportunity to intervene in the 2014 Enforcement Action or to comment on the 2014 COA. Further, the 2012

---

[35] *Friends of Milwaukee's Rivers*, 382 F.3d at 760. The presumption of diligence does not hold in the absence of "persuasive evidence that the state has engaged in a pattern of conduct that could be considered dilatory, collusive, or otherwise in bad faith." *Connecticut Fund for the Envt. v. Connecticut Plating Co.*, 631 F. Supp. 1291, 1293 (D. Conn. 1986).

[36] *See Friends of Milwaukee's Rivers*, 382 F.3d at 763-65 (determining that a state's prosecutions of CWA violations were not diligent where violations continued after the enforcement action); *Jones v. City of Lakeland*, 224 F.3d 518, 522-23 (6th Cir. 2000) (determining that a diligent prosecution bar did not apply because the state's enforcement effort, which continued for ten years, did not ensure compliance); *Atlantic States Legal Found.*, 933 F.2d at 128 (determining that a diligent prosecution bar would not apply because violations continued or "a realistic prospect of continuing violations exists" following a settlement between the state and the defendant); *Love v. New York State Dep't of Envtl. Conservation*, 529 F. Supp. 832, 844 (S.D.N.Y. 1981) (determining that a diligent prosecution bar did not because violations continued after the entry of a consent order).

[37] *See Ohio Valley Envtl. Coalition, Inc. Hobet Mining, LLC*, 723 F. Supp. 2d 886, 908 (S.D. W.Va 2010) (determining that a consent order was not a diligent prosecution because it did not provide "a meaningful schedule or remedial plan for compliance" and included a stipulated penalty provision that was not sufficient to deter violations); *Culbertson v. Coats Am., Inc.*, 913 F. Supp. 1572, 1579 (N.D. Ga. 1995) (determining that a diligent prosecution bar did not apply because enforcement efforts did not require compliance with CWA permit limits).

[38] *See Citizens for Clean Power v. Indian River Power, LLC*, 636 F. Supp.2d 351, 358 (D. Del. 2009) (determining that a citizen's suit brought to abate a power plant's violation of opacity limitations was barred by Section 304(b)(1)(B) where a consent order in the state's enforcement action required the eventual shut down of two of the plant's generation units and would require the remaining two generation units to decrease their emissions over time, setting a fixed date in the future for full compliance); *Community of Cambridge Envtl. Health & Dev. Group v. City of Cambridge*, 115 F. Supp.2d 550, 556-57 (D. Md. 2000) (determining that the state diligently prosecuted a city's violations of the CWA when the city was in the process of installing new storm and sanitary sewers pursuant to a consent order when the citizen suit was filed); *Pennsylvania Envtl. Def. Fund*, 1997 U.S. Dist. LEXIS 23865, *34 (determining that the state diligently prosecuted violations of the CWA because the state's consent decree with the defendant required the implementation of interim measures to reduce violations and of capital improvements designed to eliminate the violations).

Enforcement Action[39] is not a diligent prosecution of Shenango's violations of the limitations on visible emissions from its battery combustion stack because the measures purportedly required by the 2012 Consent Decree to address such violations have been implemented but have failed to ensure Shenango's compliance with those limitations – between November 6, 2012 and March 31, 2014, Shenango violated the limitations on visible emissions from its battery combustion stacks at least one time on more than 350 (out of 511) days.

III. GASP's ACTION IS NOT BARRED BY CLEAN AIR ACT SECTION 304(b)(1)(B)

A. The 2014 Enforcement Action And COA Are Not A Diligent Prosecution Of Shenango's Violations Of The Limitation On Visible Emissions From Coke Oven Door Areas

1. The 2014 COA Does Not Require Shenango To Implement Measures to Ensure Compliance With The Limitation On Visible Emissions From Coke Oven Door Areas

When a settlement, consent order, or final judgment that concludes a state's enforcement action does not include a "legally binding agreement to resolve the violations" at issue in a citizen suit, a diligent prosecution bar does not preclude the citizen suit.[40] If the state does not obtain a "legally-binding agreement to resolve the violations," its enforcement does not "**require** compliance" with the applicable limitation, as it must for the diligent prosecution bar in Section 304(b)(1)(B) to apply.[41] Similarly, if the state settles an enforcement action without obtaining an agreement that ensures the defendant's compliance with a specific limitation, its prosecution of the defendants' violations was not "diligent,"[42] at least with respect to that limitation.[43] A

---

[39] Shenango does not contend that the 2014 Enforcement Action was a diligent prosecution of its violations of the limitations on visible emissions from its battery combustion stack.

[40] *Friends of Milwaukee's Rivers*, 382 F.3d at 754 (determining that a stipulation between the state and defendant that was intended to address the violations at issue in the citizen suit did not qualify as a "diligent prosecution" because the stipulation had been rescinded and thus lacked "any legally binding effect").

[41] *See Frilling v. Village of Anna*, 924 F. Supp. 821, 837-39 (S.D. Ohio 1996) (determining that a diligent prosecution bar did not apply to a citizen suit seeking compliance with certain CWA permit limitations when the state enforcement action did not seek to require compliance with those limitations).

[42] "Diligent" means "having or showing care and conscientiousness in one's work or duties." THE NEW OXFORD DICTIONARY 478 (2001).

settlement of a state enforcement action that, without explanation, fails to resolve one of the state's claims cannot reasonably be said to be a product of diligence.

Article XXI, Section 2105.21.b.1 makes it illegal for a coke oven battery in Allegheny County to have visible emissions from more than five percent of the door areas of ovens operating in the battery at any time. Count I of GASP's First Amended Complaint seeks (among other relief) an order enjoining Shenango from continuing to violate that limitation.[44] ACHD's Complaint in the 2014 Enforcement Action included a claim against Shenango based on violations of Section 2105.21.b.1.[45] However, when ACHD settled the 2014 Enforcement Action, it failed to obtain from Shenango any written agreement to undertake measures to require compliance with Section 2105.21.b.1 – the 2014 COA lists measures that Shenango purportedly has taken to address such violations, but does not **require** Shenango to continue such measures (or even require Shenango to comply with Section 2105.21.b.1). Measures that Shenango has implemented voluntarily, even if intended to achieve compliance, cannot qualify as a diligent prosecution by ACHD.

Shenango's contention that the "Supplemental Environmental Project" required by the 2014 COA is intended to resolve its violations of Section 2105.21.b.1[46] must be rejected. Recital 18 of the 2014 COA lists steps that Shenango purportedly has taken "to enhance the control of charging, soaking, and coke oven door emissions," including the modification of "jamb cleaning equipment design" and the implementation of a door change-out program, but not including any changes planned to the quench tower.[47] The 2014 COA also states that the Supplemental Environmental Project is "designed to enhance particulate collection efficiency **at the Battery S-**

---

43 *See New York Coastal Fishermen's Ass'n v. New York City Dep't of Sanitation*, 772 F. Supp. 162, 167 (S.D.N.Y. 1991).

44 First Amended Complaint, prayer for relief following ¶ 47.

45 ACHD's Complaint in the 2014 Enforcement Action, ¶¶ 26-33. ACHD's Complaint in the 2014 Enforcement Action is attached to GASP's First Amended Complaint as Exhibit E.

46 Brief in Support of Motion to Dismiss, at 13.

47 2014 COA, Recital 18.

1 quench tower,"[48] but not to reduce or eliminate emissions from the coke oven door areas. In fact, Shenango's battery of coke ovens and its quench tower are distinct sources of emissions within its plant.[49] Thus, although the Supplemental Environmental Project may reduce emissions from Shenango's quench tower, there is no proof to suggest that the Project will reduce visible emissions from the doors in Shenango's coke oven battery.

The $300,000 penalty that ACHD imposed on Shenango pursuant to the 2014 COA also does not establish that the 2014 COA was a diligent prosecution of Shenango's violations of Section 2105.21.b.1. Despite Shenango's contention to the contrary,[50] the mere imposition of penalties is not sufficient to establish a diligent prosecution.[51] To constitute a diligent prosecution of a defendant's violations, a penalty, by itself, must be sufficiently high to deter the violations. In order to have a deterrent effect, the "penalty must be high enough that the violator would find it less expensive to take whatever actions are necessary to comply than to continue violating."[52] Further, the penalty must apply to future violations if it is to be a "diligent prosecution." The fact that Shenango was subjected to a $300,000 penalty in April 2014 does not make it any more expensive for Shenango to forego necessary compliance measures now or

---

48 *Id.*, § VI.A (emphasis added).

49 *See* ACHD Major Source Title V Operating Permit #0025, at 4 (identifying facility processes and emission controls). A copy of the first five pages of Shenango's Title V Operating Permit is attached to this Brief as Exhibit G.

50 *See* Shenango's Brief in Support of its Motion to Dismiss, at 13.

51 In each of the two cases that Shenango cites in support of its contention, the state enforcement actions required the defendant to implement measures designed to bring its facility into compliance in addition to paying a penalty. *See Hudson River Sloop Clearwater v. Conrail,* 591 F. Supp. 345, 352 (N.D.N.Y. 1984) (noting that the state enforcement action "precipitated [the defendant's] construction of a $2 million treatment facility" that the court found would effect compliance), *vacated*, 768 F.2d 57 (2d Cir. 1985); *Clean Air Council v. Sunoco, Inc.*, 2003 U.S. Dist. LEXIS 5346, *16 (D. Del. 2003) (noting that the final judgment in the enforcement action required the defendant to implement both immediate and long-term measures intended, respectively, to reduce and eliminate violations). Copies of the unreported decisions cited in this Brief are attached in Exhibit H.

52 *Friends of Milwaukee's Rivers*, 382 F.3d at 762 (stating "penalties are by no means a requirement for compliance to be assured. Repeated violations due to the same underlying systemic causes are likely to continue until a … remedial project addressing those underlying causes is completed (assuming the … project will successfully and permanently abate the conditions causing the violation)"); *Friends of the Earth v. Laidlaw Envt. Servs. (TOC),* 890 F. Supp. 470, 491 (D.S.C. 1995) ("A penalty serves as a successful deterrent only if potential violators believe that they will be worse off by not complying with the applicable requirements") (citation omitted), *vacated,* 143 F.3d 303 (4th Cir. 1998), *reversed,* 528 U.S. 167 (2000).

in the future in the way stipulated penalties for future violations might. In any event, because Shenango has apparently violated Section 2105.21.b.1 since the $300,000 penalty was imposed by the 2014 COA in April 2014,[53] the amount of that penalty was not high enough to coerce Shenango's compliance with that limitation.

Thus, the 2014 COA does not require Shenango to comply with Section 2105.21.b.1, whether by an explicit requirement to undertake measures that would end Shenango's violations of that regulation, or implicitly, by the threat of a coercive penalty. Consequently, the 2014 COA does not qualify as a diligent prosecution of Shenango's violations of Section 2105.21.b.1.[54]

2. There Was No Opportunity For Citizens to Intervene In The 2014 Enforcement Action Or Comment On The 2014 COA

"Congress made clear that citizen groups are not to be treated as nuisances or troublemakers but rather as welcomed participants in the vindication of interests" under the Clean Air Act.[55] Accordingly, the Act provides private citizens with significant opportunities to participate in government enforcement efforts in addition to the citizen suits authorized by Section 304. Section 113(g) of the Act provides the public with a right to receive notice of, and submit comments regarding, proposed consent orders and settlement agreements reached in enforcement actions to which the United States is a party; the Administrator of the EPA and the Attorney General may withhold consent to a proposed order or agreement based on issues raised by public comments.[56] Further, Section 304(b)(1)(B) explicitly provides citizens with an

---

[53] *See* Affidavit of Dean DeLuca, ¶¶ 6 and 8 (describing violations of § 2105.21.b.1 by Shenango that occurred between January 1, 2014 and June 30, 2014). A copy of the DeLuca Affidavit is attached to Shenango's Brief in Support of its Motion to Dismiss as Exhibit 4. If Shenango were in compliance with Section 2105.21.b.1, it presumably would have brought that fact to the Court's attention.

[54] *Cf. Friends of Milwaukee's Rivers*, 382 F.2d at 754 (stating that "[a] judicial action that never resulted in any legally binding agreement to resolve the violations alleged by the plaintiffs … is not a diligent prosecution").

[55] *Friends of the Earth v. Carey*, 535 F.2d 165, 172 (2d Cir. 1976).

[56] 42 U.S.C. § 7413(g).

unqualified right to intervene in enforcement actions that are being diligently prosecuted in federal court;[57] Article XXI's citizen suit provision creates a similarly broad right for citizens to intervene in enforcement actions that ACHD brings in federal or state court.[58] Courts "have found that denial of a citizen's right to intervene indicates that the action was not diligently prosecuted."[59]

By settling its enforcement action against Shenango on the same day the action was filed, ACHD denied the public an opportunity to intervene in the action. ACHD also provided no opportunity for the public to comment on the 2014 COA before it was entered as a final judgment. Had citizens been given an opportunity to intervene in the 2014 Enforcement Action or to comment on the 2014 COA before it was approved, they would have recognized the 2014 COA's omission of any binding agreement by Shenango to undertake measures to achieve compliance with Section 2015.21.b.1's limitations on visible emissions from coke oven door areas, and taken steps to have such measures incorporated into a final judgment.

ACHD's failure to require Shenango to implement measures to ensure compliance with Section 2105.21.b.1's limitations on visible emissions from coke oven door areas, as well as its denial of the public's opportunity to be heard on the merits of the 2014 COA, compel the determination that the 2014 COA was not a diligent prosecution of Shenango's violations of Section 2105.21.b.1.

---

[57] *See* 42 U.S.C. § 7604(b)(1)(B) (stating "in any such action in a court of the United States any person may intervene as a matter of right").

[58] *See* Art. XXI, § 2109.11.c (stating "in any such action in a Federal or State court, any person having or representing an interest which is or may be adversely affected may intervene as a matter of right without posting bond").

[59] *See Frilling v. Village of Anna*, 924 F. Supp. 821, 841 (S.D. Ohio 1996) (citing *Friends of the Earth v. Laidlaw Envtl. Servs.*, 890 F. Supp. at 490, and *Love v. New York State Dep't of Envtl. Conservation*, 529 F. Supp. 832, 844 (S.D.N.Y. 1981)); *cf. Sierra Club v. SCM Corp.*, 572 F. Supp. 828, 831 (W.D.N.Y. 1983) (stating "where settlement of permit violations is achieved as a result of enforcement proceedings in which plaintiffs, as interested members of the public, lacked the opportunity to be heard on the merits of proposed consent order, a citizen suit … may properly be entertained by a federal district court").

B. GASP's Claim Based On Shenango's Violations Of The Opacity Standards That Apply To Emissions From Shenango's Battery Combustion Stack Is Not Barred By Section 304(b)(1)(B)

In Count II of its Complaint, GASP seeks an order requiring Shenango to comply with limitations on visible emissions from its battery combustion stack. Such limitations are codified at Article XXI, §§ 2015.21.f.3[60] and 2105.21.f.4.[61] In its First Amended Complaint, GASP alleges that Shenango violated one or the other of the limitations on visible emissions from the battery combustion stack on 369 days (more or less) between November 6, 2012 (when the 2012 Consent Decree was entered by the Court and became effective) and March 31, 2014.[62] GASP further alleges that such violations have continued to occur since March 31, 2014.[63]

Shenango does not argue that the 2014 Enforcement Action was a diligent prosecution of its continuing violations of the limitations imposed by Sections 2105.21.f.3 and 2105.21.f.4. Instead, Shenango contends that the 2012 Consent Decree was a diligent prosecution of such violations, notwithstanding the fact that the violations at issue in GASP's First Amended Complaint have all occurred since the 2012 Consent Decree became effective.

The 2012 Consent Decree require Shenango to undertake a continuing maintenance and operating program that presumably was designed to eliminate or reduce violations of Sections 2105.21.f.3 and 2105.21.f.4.[64] Notably, there is no remedial measure required by the 2012

---

[60] Article XXI, § 2015.21.f.3 prohibits visible emissions from the battery combustion stack from equaling or exceeding 20% opacity "for a period or periods in excess of three (3) minutes in any 60 minute period." By way of explanation, "[o]pacity is not a pollutant but rather can serve as a proxy for pollutants: It measures the degree to which … emissions block the transmission of light." *Utility Air Regulatory Group v. Environmental Prot. Agency*, 744 F.3d 741, 744 (D.C. Cir. 2014). Accordingly, an emissions plume having 20% opacity blocks 20% of the light passing through the plume.

[61] Article XXI, § 2105.21.f.4 prohibits visible emissions from the battery combustion stack from equaling or exceeding 60% opacity at any time.

[62] First Amended Complaint, ¶ 40.

[63] *Id.*, at ¶ 41 (alleging that "Shenango has violated the applicable limitations on visible emissions from combustion stack for the Facility's battery of coke ovens on an intermittent basis since March 31, 2014"); ¶ 49 (alleging that Shenango has repeatedly violated the limitation in Art. XXI, § .2105.21.f.3 on visible emissions from its battery combustion stack); ¶ 50 (alleging that Shenango has repeatedly violated the limitation in Art. XXI, § .2105.21.f.4 on visible emissions from its battery combustion stack)

[64] 2012 Consent Decree, § IV.A.

Consent Decree related to emissions from Shenango's battery combustion stack that Shenango is not yet obligated to implement.

When the measures required by a settlement of a state enforcement action have been performed, and it is readily apparent that they are not sufficient to require compliance because violations have in fact occurred, the action was not diligently prosecuted:

> the [government enforcement action and settlement] cannot constitute diligent prosecution of violations that have occurred (or continued to occur) after all work done under the [settlement] had been completed. If the violations alleged by the plaintiffs occurred because of lingering problems that the [settlement] failed to resolve, the [settlement] cannot have been a diligent prosecution of the circumstances causing those violations. If, on the other hand, the violations alleged by the plaintiffs occurred because of circumstances unrelated to those that the [settlement] was intended to comprehensively address, then the [enforcement action] cannot possibly have been a diligent prosecution of violations due to circumstances unknown and unlitigated at that time.[65]

Such is the situation presented by GASP's claim: because numerous violations of Sections 2105.21.f.3 and 2105.21.f.4 have occurred since the 2012 Consent Decree became effective, either there are problems with the 2012 Consent Decree that have prevented Shenango from complying with Sections 2105.21.f.3 and 2105.21.f.4, or that circumstances unrelated to those addressed by the 2012 Consent Decree have prevented Shenango's compliance with those regulations.

The situation presented by GASP's claims is distinguishable from cases in which citizens filed suit after state enforcement actions were settled or litigated to final judgment, but before the implementation of remedial measures required by the settlements or final judgments.[66] In such

---

[65] *Friends of Milwaukee's Rivers*, 382 F.3d at 752-53. *See Love v. Department of Envtl. Conservation,* 529 F. Supp. 832, 844 (S.D.N.Y. 1981) (determining that a state enforcement action was not "diligently prosecuted" when violations continued after the entry of a consent order); *cf. Gwaltney of Smithfield, Ltd., v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 66-67 (1987) (stating that the mootness doctrine would not bar a citizen suit despite defendant's post-suit compliance, unless the defendant were able to demonstrate with absolute clarity that the violations "could not reasonably be expected to recur").

[66] *Clean Air Council v. Sunoco, Inc.*, 2003 U.S. Dist. LEXIS 53446 (D. Del. 2003), is such a case. In *Clean Air Council*, the final judgment in the state enforcement action required the defendant to implement immediate, interim measures to minimize violations at issue in the citizen suit as well as "long-term" measures that were intended to eliminate such violations. The judgment gave the defendant eighteen months to design the "long-term" measures and submit them to the state for its approval, and four years to implement the measures after receiving approval for them. *Id.*, at *3-5. The plaintiff filed the citizen suit before the defendant was required to have

cases, it will not be readily apparent that the future measures are insufficient to ensure compliance, and a court's deference to the expertise of the state enforcement agency in selecting and implementing remedial measures will generally be proper.[67]

There is no justification for such deference in the instant case. Shenango's numerous violations of the limitations on visible emissions from its battery combustion stack since the 2012 Consent Decree became effective preclude a determination that the 2012 Consent Decree is a "diligent prosecution" of those violations.

IV. GASP IS NOT REQUIRED TO PLEAD THAT ANY REGULATOR ENGAGED IN DILATORY, COLLUSIVE, OR BAD FAITH CONDUCT WITH RESPECT TO SHENANGO'S VIOLATIONS TO STATE A CLAIM FOR VIOLATIONS OF THE CLEAN AIR ACT

"In order to maintain a citizen suit under [Section 304 of the Clean Air Act] plaintiffs must allege a violation of a strategy of an applicable implementation plan."[68] GASP has alleged that Sections 2105.21.b.1, 2105.21.f.3, and 2105.21.f.4 of Article XXI have been incorporated into Pennsylvania's State Implementation Plan,[69] and that Shenango has violated, and continues to violate, the limitations in those regulations.[70] As the party asserting that Section 304(b)(1)(B)'s diligent prosecution bar precludes this Court's exercise of jurisdiction over

---

submitted its design proposal to the state for its approval. *Id.*, at *1. The court determined that the diligent prosecution bar applied because the violations were "already being addressed." *Id.*, at *16.

67 *See Citizens for Clean Power v. Indian River Power, LLC*, 636 F. Supp.2d 351, 358 (D. Del. 2009) (determining that a citizen's suit brought to abate a power plant's violation of opacity limitations was barred by Section 304(b)(1)(B) where a consent order in the state's enforcement action required the eventual shut down of two of the plant's generation units and would require the remaining two generation units to decrease their emissions over time, setting a fixed date in the future for full compliance); *Community of Cambridge Envtl. Health & Dev. Group v. City of Cambridge*, 115 F. Supp.2d 550, 556-57 (D. Md. 2000) (determining that the state diligently prosecuted a city's violations of the CWA when the city was in the process of installing new storm and sanitary sewers pursuant to a consent order when the citizen suit was filed); *Pennsylvania Envtl. Def. Fund v. Borough of North East*, 1997 U.S. Dist. LEXIS 23865, *34 (W.D. Pa. 1997) (stating that "[i]n some situations, a State may choose to forgo heavy penalties and immediate compliance in lieu of requiring costly long-term improvements to a polluter's facilities. Such a choice is properly left to the State's discretion").

68 *Council of Commuter Orgs. v. Metropolitan Trans. Auth.*, 683 F.2d 663, 668-69 (2d Cir. 1982).

69 First Amended Complaint, ¶ 20.

70 *Id.*, ¶¶ 45, 49, and 50.

GASP's claims, Shenango bears the burden of showing that its violations of Sections 2105.21.b.1, 2105.21.f.3, and 2105.21.f.4 have been "diligently prosecuted."[71]

In the first nineteen pages of its Brief, Shenango unsuccessfully attempted to satisfy that burden. On the last page of the Brief, Shenango attempts to shift the burden to GASP, contending that GASP must prove (and therefore plead) dilatory, collusive, or bad faith conduct by the regulatory agencies that oversee Shenango's operations in order to maintain its action.

Shenango's contention is incorrect and must be rejected. Although some courts have stated that a state's prosecution of violations of an environmental law is presumed to have been "diligent" for the purpose of determining the applicability of a diligent prosecution bar, a prosecution is not "*ipso facto* 'diligent:' … the same courts that profess deference toward state and federal enforcement decisions have nevertheless decided for themselves whether the claims at issue were diligently prosecuted."[72] Because the touchstone of a court's diligent prosecution analysis is whether the state's prosecution "is capable of requiring compliance with the Clean Air Act and is in good faith calculated to do so,"[73] courts have determined that state prosecutions that did not (or would not) ensure compliance with environmental laws were not diligent, even in the absence of evidence of fraud, collusion, or bad faith between a state and a defendant.[74]

---

[71] *Cf. Merry v. Westinghouse Elec. Co.*, 697 F. Supp. 180, 182 (M.D. Pa. 1988) (stating that a defendant moving for summary judgment based on RCRA's diligent prosecution bar "has the burden of showing diligence on the part of the EPA").

[72] *Citizens Legal Envt. Action Network v. Premium Std. Farms, Inc*., 2000 U.S. Dist. LEXIS 1990, *44 (W.D. Mo. 2000). Copies of the unreported decisions cited in this Brief are attached in Exhibit H.

[73] *St. Bernard Citizens for Envtl. Quality, Inc. v. Chalmette Ref., L.L.C.*, 500 F. Supp.2d 592, 606 (E.D. La. 2007); *see Friends of Milwaukee's Rivers*, 382 F.3d at 760 (applying same analysis to prosecutions of CWA violations).

[74] *See Friends of the Earth v. Laidlaw Envtl. Servs. (TOC)*, 890 F. Supp. 470, 489 (D.S.C. 1995) (finding that the state's enforcement action against the defendant was not "the product of fraud or collusion," and stating "[s]uch a finding does not, however, mean that [the state's] action was diligent prosecution"), *vacated,* 143 F.3d 303 (4th Cir. 1998), *rev'd,* 528 U.S. 167 (2000); *see also, e.g.*, *Friends of Milwaukee's Rivers*, 382 F.3d at 763-65 (determining that a state's prosecutions of CWA violations were not diligent, even though they were undertaken "in good faith," because they did not ensure compliance); *Jones v. City of Lakeland*, 224 F.3d 518, 522-23 (6th Cir. 2000) (determining that a diligent prosecution bar did not apply because the state's enforcement effort, which continued for ten years, did not ensure compliance); *Atlantic States Legal Found. v. Eastman Kodak Co.*, 933 F.2d 124, 128 (2d Cir. 1991) (determining that a diligent prosecution bar would not apply because violations continued or "a realistic prospect of continuing violations exists" following a settlement between the state and the defendant); *Ohio Valley Envtl. Coalition, Inc. Hobet Mining, LLC*, 723 F. Supp. 2d 886, 907-8 (S.D. W.Va 2010) (determining diligent prosecution bars would not apply because the state's consent order would not require compliance and

Even the unreported decision that Shenango cites in support of its contention that GASP must prove (and therefore plead) dilatory, collusive, or bad faith conduct on the part of the regulatory agencies in order to overcome Section 304(b)(1)(B)'s diligent prosecution bar did not end its diligent prosecution analysis with the plaintiff's failure to show that the state and defendant had colluded to have a consent order entered,[75] as it presumably would have had collusion (or lack the thereof) been a dispositive factor. Rather, the court acknowledged that "the inquiry into whether a consent decree **is reasonably designed to require a polluter's compliance with applicable standards** is part and parcel of the inquiry into whether state authorities have diligently prosecuted an action against the polluter."[76]

Accordingly, there is no requirement that GASP plead, or prove, that the agencies that regulate Shenango have acted fraudulently, collusively, or in bad faith for this Court to exercise jurisdiction over GASP's claims. Any pleading obligations that GASP has as a result of Section 304(b)(1)(B) are satisfied by the averments in Paragraphs 30-42 of its First Amended Complaint, which allege that efforts by EPA and ACHD to require Shenango's compliance with the limitations in Sections 2105.21.b.1, 2105.21.f.3, and 2105.21.f.4 of Article XXI have failed, and that Shenango continues to violate those limitations.

---

penalties were insufficient to deter violations); *Culbertson v. Coats Am., Inc.*, 913 F. Supp. 1572, 1579 (N.D. Ga. 1995) (determining that a diligent prosecution bar did not apply because enforcement efforts did not require compliance with CWA permit limits); *Love v. New York State Dep't of Envtl. Conservation*, 529 F. Supp. 832, (S.D.N.Y. 1981) (determining that a diligent prosecution bar did not because violations continued after the entry of a consent order).

[75] *See Environmental Integrity Proj. v. Mirant Corp.*, 2007 U.S. Dist. LEXIS 1219, *9-13 (rejecting the plaintiff's argument that the consent order was not likely to require compliance). Copies of the unreported decisions cited in this Brief are attached in Exhibit H.

[76] *Id.,* at *10 (emphasis added).

CONCLUSION

For the foregoing reasons, Shenango's Motion to Dismiss should be denied.

Respectfully submitted,

s/ John K. Baillie

John K. Baillie, Esq.
PA ID # 66903
john@gasp-pgh.org
Joseph Osborne, Esq.
PA ID # 210024
joe@gasp-pgh.org

Group Against Smog and Pollution, Inc.
5135 Penn Avenue
Pittsburgh, PA 15224
Phone: 412-924-0604
Fax: 412-924-0606

Attorneys for Plaintiff Group Against Smog and Pollution, Inc.

CERTIFICATE OF SERVICE

I certify that I caused Plaintiff Group Against Smog and Pollution's Opposition to Defendant's Motion to Dismiss to be served on all parties and counsel of record, as identified below, by filing it with this Court's ECF system on August 7, 2014:

Chester W. Babst, III, Esq.
James D. Miller, Esq.
Varun Shekhar, Esq.
Babst, Calland, Clements and Zomnir, P.C.
Two Gateway Center, 8th Floor
Pittsburgh, PA 15222
cbabst@babstcalland.com
jmiller@babstcalland.com
vshekhar@babstcalland.com
Counsel for Defendant Shenango, Inc.

/s/ John K. Baillie