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Is the Clean Water Act's Diligent Prosecution Bar Jurisdictional? A Journey into Discovering Congressional Intent

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A Journey into Discovering Congressional Intent

I. INTRODUCTION

During heavy rainfall, a municipality's outfalls discharged storm water and raw sewage onto three Puerto Rican beaches, producing a foul odor that forced surfers to abandon the beaches altogether.[1] In Louisiana, a city's wastewater treatment plants were polluting the Mississippi River, resulting in untreated raw sewage contaminating private property.[2] In another case, a farm illegally dumped poultry manure into a river, resulting in bacteria traveling in the river from the farm to someone else's property.[3] All of these recent cases involve an illegal discharge of pollutants into the waters of the United States, and all polluters were brought to court not by government agencies, but by private citizens seeking relief under the Clean Water Act ("CWA").[4]

While all the aforementioned cases were heard on their merits, not all citizen suits make it that far because a case is often dismissed in its early stages for lack of jurisdiction over parties to a suit or over the claims alleged. There are several preliminary hurdles that a litigant must pass before a federal judge will hear a case. Firstly, a court must be able to enforce its ruling on the parties to the suit. In general, a citizen-plaintiff seeking relief under the CWA must have constitutional standing[5] to bring a justiciable[6] case in a federal court

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1. Water Quality Prot. Coal. v. Municipality of Arecibo, 858 F. Supp. 2d 203, 206 (D.P.R. 2012).

2. La. Envtl. Action Network v. City of Baton Rouge, 677 F.3d 737 (5th Cir. 2012).

3. Assateague Coastkeeper v. Alan & Kristin Hudson Farm, 727 F. Supp. 2d 433, 434 (D. Md. 2010).

4. *See supra* notes 1–3.

5. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (holding that a plaintiff must show an injury in fact that is fairly traceable to a defendant's challenged action, which a favorable judicial decision will likely prevent or redress). Generally, courts also adhere to prudential standing requirements in addition to the constitutional requirements stated above. The CWA includes a provision that statutorily extends standing to the outer boundaries of Article III, so there is no need for a separate prudential standing inquiry. This provision says that citizen suits are authorized by "any citizen . . . on his own behalf . . . where there is alleged a

that has personal jurisdiction over the defendant.[7] Secondly, the court must have subject-matter jurisdiction[8] to hear the case; in other words, it must have the power to hear the claim.[9] Constitutional and statutory elements of jurisdiction are an "essential ingredient of separation and equilibrium of powers," and when a court makes any pronouncements on the merits of a case when it has no jurisdiction to hear it, it is acting ultra vires.[10] Indeed, if the court lacks any of these jurisdictional elements, the case will be dismissed regardless of the strength of its merits.[11]

Thus, courts address jurisdictional attacks before addressing an attack on the merits[12] to avoid wasting time and expense on hearing a case that will have to be subsequently dismissed for lack of jurisdiction. Once the jurisdictional threshold has been met, the defendant still has the means to prevent the suit from going forward. For example, a defendant can file a motion to dismiss for failure to state a claim upon which relief may be granted[13]—this is a motion on a case's merits. As the Supreme Court held in *Twombly*, to survive a motion to dismiss, a plaintiff's complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face."[14] Factual plausibility means that the court is able to draw, based on the plaintiff's pleadings, a reasonable

failure of the [EPA] Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator." 33 U.S.C. § 1365(a), (a)(2) (2012). *See, e.g.*, Ecol. Rights Found. v. Pac. Lumber Co., 230 F.3d 1141, 1147 (9th Cir. 2000).

6. *See* Scott B. Garrison, *Subject Matter Jurisdiction, Standing, and Citizen Suits: The Effect of* Gwaltney of Smithfield v. Chesapeake Bay Found., Inc., 48 MD. L. REV. 403, 425 ("Justiciability questions the substantiality of the controversy, the issue's ripeness for adjudication, and whether it is a political question reserved to the other branches of government.").

7. *See, e.g.*, J. McIntyre Machinery, Ltd. v. Nicastro, 131 S. Ct. 2780, 2787 (2011).

8. 28 U.S.C. § 1331 (2012); 33 U.S.C. § 1365(a) (2012).

9. United States v. Cotton, 535 U.S. 625, 630 (2002).

10. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 101 (1998).

11. In 2004, the Supreme Court granted certiorari to hear a case about an atheist father suing his child's school for requiring the children to recite the Pledge of Allegiance—including the words "under God." Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 5 (2004). While the issue may have been strong on its merits, the Court infamously dismissed the complaint for the father's lack of prudential standing to bring the case to federal court. *Id.* at 17. This case, which had received widespread media coverage, demonstrates the importance of a court's power to declare the law.

12. *Steel Co.*, 523 U.S. at 94–95.

13. FED. R. CIV. P. 12(b)(6).

14. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2009).

inference that the defendant is liable.[15] A court must assume the veracity of well-pleaded factual allegations.[16] Thus, it is very important for a plaintiff to be able to properly assert a court's subject-matter jurisdiction, because once such an assertion is made, the plaintiff's claims are presumed to be true, and the case can move forward in court.

According to Article III, § 1 of the United States Constitution, only Congress may determine a federal court's subject-matter jurisdiction.[17] Thus, courts are entrusted with the task of ascertaining Congress's intent about the jurisdictionality of a provision or rule. If the statute clearly says that a provision is jurisdictional, then the courts must defer to this and refuse to hear the case, and if the statute is silent, courts must treat it as non-jurisdictional,[18] unless intent can be discerned from the provision's text, context, and relevant historical treatment.[19] Many statutes include a litany of requirements that must be fulfilled before a court will hear a case, such as deadlines for filing an appeal to an administrative agency,[20] deadlines for filing an appeal to a federal court,[21] filing mandates on courts,[22] and limitations on numerosity.[23] In the CWA, for example, a case will be dismissed unless the citizen-plaintiff gives sixty days' notice to the Environmental Protection Agency, the state, and the alleged polluter ("sixty-day notice provision"), and a case will also be dismissed if the state has "diligently prosecuted" a claim ("diligent prosecution bar").[24] There has been great confusion among the courts as to whether Congress intended these CWA rules to speak to a court's subject-matter jurisdiction to hear a case. In other words, when citizen-plaintiffs fall short of meeting these statutory requirements, can a defendant successfully file to dismiss the entire suit for that

15. *Id.* at 556.
16. Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009).
17. Kontrick v. Ryan, 540 U.S. 443, 453 (2004) (citing U.S. CONST. art. III, § 1).
18. Arbaugh v. Y&H Corp., 546 U.S. 500, 515–16 (2006).
19. Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 168 (2010).
20. *See, e.g.*, Sebelius v. Auburn Reg'l Med. Ctr., 133 S. Ct. 817 (2013).
21. *See, e.g.*, Bowles v. Russell, 551 U.S. 205 (2007).
22. *See, e.g.*, United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260 (2010).
23. *See, e.g.*, *Arbaugh*, 546 U.S. 500.
24. 33 U.S.C. § 1365 (2012).

reason alone?[25] Or, did Congress intend these jurisdictional provisions to be merely stepping stones that plaintiffs should meet before filing a suit, which, if deficient, may be cured in the process of litigation?[26]

While traditionally courts have recognized only these two types of rules[27]—jurisdictional and non-jurisdictional—this strict dichotomy is a legal fallacy. This Comment argues that Congress intended the diligent prosecution bar to be something in-between a mandate and a stepping stone—i.e., the bar was intended to impose mandatory conditions on citizen-plaintiffs that, while not entirely removing subject-matter jurisdiction, often acquires jurisdictional characteristics. Part II will explain the two types of rules, explore the Supreme Court's understanding of the distinction between the two, and introduce the concept of quasi-jurisdictionality. Part III provides background into the CWA, and discusses a recent Fifth Circuit decision, *Louisiana Environmental Action Network v. City of Baton Rouge* ("*LEAN*"),[28] which held that the diligent prosecution bar possessed no jurisdictional qualities. Part IV rebuts the reasoning used in the Fifth Circuit in *LEAN* by explaining that Congress really intended the diligent prosecution bar to be a mandatory, quasi-jurisdictional rule, and articulates reasons why this alternate interpretation is correct. Finally, Part V concludes.

II. JURISDICTIONAL RULES, THE SUPREME COURT, AND BEYOND

Traditionally, legal issues have been categorized as either jurisdictional or non-jurisdictional,[29] but this Comment argues that this dichotomy is fallacious in the citizen suit context. Part II.A will explain jurisdictionality under the traditional dichotomy and Part II.B will describe some of the Supreme Court's recent holdings on

25. If a provision speaks to a court's subject-matter jurisdiction, it is a "jurisdictional" rule. *See infra* Part II.A.

26. If a provision does not speak to a court's subject-matter jurisdiction, it is a "non-jurisdictional" rule. *See infra* Part II.A.

27. Scott Dodson, *Mandatory Rules*, 61 STAN. L. REV. 1, 1 (2008) ("[J]urisdictional rigidity has led courts and commentators to overlook the fact that non[-]jurisdictional rules need not be the mirror inverse but may instead have attributes commonly associated with jurisdictionality.").

28. 677 F.3d 737 (5th Cir. 2012).

29. Perry Dane, *Jurisdictionality, Time, and the Legal Imagination*, 23 HOFSTRA L. REV. 1, 4 (1994).

the issue, signifying a general shift in the understanding of jurisdictionality. Part II.C rejects the traditional dichotomy of jurisdictionality and refines the Supreme Court's rulings on the matter, ultimately setting the stage for Part IV, which will argue that the diligent prosecution bar is quasi-jurisdictional.

A. Jurisdictional Rules vs. Non-jurisdictional Rules

Before delving into its central thesis, this Comment will explain basic concepts of jurisdictionality under the assumption that rules are either jurisdictional or non-jurisdictional. Most courts adhere to this view, including the Supreme Court, albeit incorrectly. Indeed, whether or not a rule is jurisdictional can have "drastic" consequences for a case.[30] If a rule is jurisdictional, it applies to the "prescriptions delineating . . . classes of cases . . . falling within a court's adjudicatory authority."[31] If a jurisdictional rule is violated, the court lacks subject-matter jurisdiction to hear the case. Further, a motion to dismiss for lack of subject-matter jurisdiction[32] can be raised sua sponte, which means the motion can be raised by the court or any party at any point in the litigation—even in the middle of a case or after a ruling has been declared.[33] Even if a party has acknowledged the court's subject-matter jurisdiction during a case, the party can object to it at a later time.[34] Practically, this means that "if the trial court lacked jurisdiction, many months of work on the part of the attorneys and the court may be wasted."[35] Additionally, a jurisdictional rule is not subject to principles of equity, such as waiver, forfeiture, consent, or estoppel.[36] In other words, if the court lacks subject-matter jurisdiction, the court does not have the discretion to hold that the case can be heard, even if the litigating parties wish to waive the application of the rule.

On the other hand, non-jurisdictional rules speak to the rights or obligations of parties instead of to the power of the court. Non-jurisdictionality is concerned with "matters of procedure and

30. Henderson *ex rel.* Henderson v. Shinseki, 131 S. Ct. 1197, 1202 (2011).

31. Kontrick v. Ryan, 540 U.S. 443, 455 (2004).

32. An objection to subject-matter jurisdiction is filed as a Federal Rule of Civil Procedure ["FRCP"] 12(b)(1) Motion to Dismiss for Lack of Subject-Matter Jurisdiction.

33. Gonzalez v. Thaler, 132 S. Ct. 641, 648 (2012).

34. *Henderson*, 131 S. Ct. at 1202.

35. *Id.*

36. Dodson, *supra* note 27, at 3.

substance"[37] over which parties have control. Parties can choose which non-jurisdictional rules to litigate, and courts have discretion to "inject fairness and equity" if the situation warrants it; in other words, these rules can be waived, forfeited, consented to, and are subject to equitable exceptions.[38] While jurisdictional rules can be raised sua sponte, non-jurisdictional rules will be forfeited if the party asserting the rule waits too long to raise the point.[39]

There are two basic types of non-jurisdictional rules: "claim-processing rules" and "substantive-merits rules." Claim-processing rules "seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times."[40] Examples of claim-processing rules include time constraints on filing a complaint to Bankruptcy Court,[41] a 120-day limit for seeking review from the Veterans Court,[42] or a time limit on a criminal defendant moving for a new trial.[43] The second type of non-jurisdictional rule, the substantive-merits rule, asks whether the plaintiff's allegations entitle him to relief.[44] A substantive-merits rule determines "the validity and success of a substantive claim of right on its merits."[45] Another way to look at it is asking whether "the legal rule sued under establishes a right in the plaintiff and imposes a duty on the defendant."[46] An example is the provision in Title VII that requires an employer to have fifteen employees.[47] If the employer does not have more than fifteen employees, it is not regulated by Title VII, and thus, a plaintiff does not have the right to sue under this statute. One way to explain the difference between a claim-processing rule and a substantive-merits rule is that the former is about "the rights and obligations within . . . litigation,"

37. Scott Dodson, *Hybridizing Jurisdiction*, 99 CALIF. L. REV. 1439, 1445 (2011).

38. *Id.*

39. Kontrick v. Ryan, 540 U.S. 443, 456 (2004).

40. *Henderson*, 131 S. Ct. at 1203.

41. *Kontrick*, 540 U.S. at 456.

42. *Henderson*, 131 S. Ct. at 1204.

43. Eberhart v. United States, 546 U.S. 12, 13 (2005).

44. Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2877 (2010).

45. Howard M. Wasserman, *The Demise of "Drive-by Jurisdictional Rulings,"* 105 NW. U. L. REV. 947, 948–49 (2011).

46. *Id.* at 950.

47. *See* 42 U.S.C. § 2000(e)(b) (2012); Arbaugh v. Y & H Corp., 546 U.S. 500, 504 (2006).

while the latter is about "real-world rights and duties outside the four walls of the courtroom."[48]

B. The Supreme Court on Jurisdictional Rules

While the distinction between jurisdictional and non-jurisdictional rules may be simple in theory, it is far from clear in practice.[49] There has been "rampant confusion and overuse" concerning the concept of jurisdictionality.[50] Even the Supreme Court recognized that it can be confusing to distinguish between jurisdictional and non-jurisdictional rules.[51] The Court has nicknamed this confusion "drive-by jurisdictional rulings," wherein courts assume rules assumed to be jurisdictional with no further discussion or precedential effect.[52]

To address the problem of drive-by jurisdictional rulings, the Supreme Court has, in recent years, endeavored to "bring some discipline to the use" of the term "jurisdictional" by effectively limiting the number of rules that can be considered as such.[53] The Court has encouraged lower "courts and litigants to 'facilitat[e]' clarity by using the term 'jurisdictional' only when it is apposite.".[54] This encouragement has been a welcome turn of events for several reasons. Courts misinterpreting rules to be jurisdictional are defying Congress's intent, albeit unintentionally, because only Congress has authority to deem a provision jurisdictional. Moreover, legislatures and courts should maintain clear and sharp lines between issues, and success or failure on the merits or procedure should not affect whether the court has subject-matter jurisdiction to hear the case.[55] Plaintiffs are especially hurt when courts dismiss cases this way. Courts generally resolve disputes of facts that apply to subject-matter jurisdiction, but juries are the fact-finder for substantive-merits issues.[56] If too many rules are mislabeled as jurisdictional, the fact-finding responsibility will be shifted from the jury to the

48. Wasserman, *supra* note 45, at 958.
49. Scott Dodson, *The Complexity of Jurisdictional Clarity*, 97 VA. L. REV. 1, 4, 55 (2011).
50. Wasserman, *supra* note 45, at 948.
51. Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 161 (2010).
52. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 91 (1998).
53. Henderson *ex rel.* Henderson v. Shinseki, 131 S. Ct. 1197, 1202 (2011).
54. *Reed*, 559 U.S. at 161 (quoting Kontrick v. Ryan, 540 U.S. 443, 455 (2004)).
55. Wasserman, *supra* note 45, at 949.
56. *Id.* at 954.

court,[57] and plaintiffs' claims will therefore fail to be heard by a jury. Finally, there would be disastrous effects on judicial economy, especially since courts would be obliged to raise issues sua sponte, and parties would be able to challenge holdings even after the court has ruled on the merits.

With all this in mind, the Court decided *Kontrick v. Ryan*,[58] the first case in the so-called shift in Supreme Court understanding of the jurisdiction doctrine. In *Kontrick*, a debtor filed for bankruptcy and the creditor objected, claiming that the debtor had transferred property with the intent to defraud creditors, and thus did not qualify for discharge under the bankruptcy law.[59] After the bankruptcy court held in favor of the creditor, the debtor urged that one of the creditor's claims was untimely under certain provisions of the Federal Rules of Bankruptcy Procedure.[60] The debtor claimed that these rules established a mandatory, unalterable time limit that was jurisdictional.[61] The Court disagreed, holding that the filing deadlines were non-jurisdictional claim-processing rules because they did not delineate which cases the bankruptcy courts were competent to adjudicate.[62]

Two years later, the Court again decided whether a rule is jurisdictional in *Arbaugh v. Y&H Corp.*[63] In this case, a waitress filed a Title VII action against her former employer, charging sexual harassment.[64] Two weeks after the trial court entered judgment, the defendant employer moved to dismiss the entire action for lack of subject-matter jurisdiction because the defendant had fewer than fifteen employees, and Title VII was therefore not applicable.[65] The Court held that the employee-numerosity requirement was non-jurisdictional because it appeared in a provision that did not speak in jurisdictional terms, and, importantly, because this provision was separate from Title VII's jurisdictional provision.[66] The Court

57. *Id.*
58. 540 U.S. 443 (2004).
59. *Id.* at 449.
60. *Id.* at 451.
61. *Id.*
62. *Id.* at 454.
63. 546 U.S. 500 (2006).
64. *Id.* at 504.
65. *Id.*
66. *Id.* at 515.

asserted that when Congress does not explicitly state that a statutory limitation is jurisdictional, then courts must treat the limitation as non-jurisdictional in character.[67]

In a third case, *Reed Elsevier, Inc. v. Muchnick*,[68] the Court interpreted whether a provision of the copyright laws was jurisdictional. The Copyright Act specifies that anyone who violated the rights of a copyright owner was an infringer of the copyright, and when this occurred, the owner was entitled, subject to the requirements of section 411, to proceed with an action of copyright infringement.[69] Section 411 provided that no civil action could be instituted until preregistration or registration of the copyright claim was made.[70] The Court held that the statute did not clearly state that the registration requirement was jurisdictional, as the requirement was located in a provision separate from those granting the courts subject-matter jurisdiction.[71] Additionally, the Court found that there were no factors suggesting that section 411 could be read to speak in jurisdictional terms.[72] Factors indicating that Congress may have meant a statute to be jurisdictional include the rule's text, context, and relevant historical treatment.[73]

Not all recent holdings have construed jurisdictionality so narrowly. In *Bowles v. Russell*,[74] a man was sentenced to life in prison and filed a habeas corpus application but was denied relief.[75] He failed to file notice of appeal within the thirty-day required period, and later moved for a Federal Rule of Appellate Procedure 4(a)(1)(A) fourteen-day extension.[76] Instead of extending the time by the fourteen days, the district court inexplicably extended the time allowed for notice of appeal by seventeen days.[77] The Sixth Circuit held that the requirement of filing a timely notice of appeal was jurisdictional and since the man failed to file notice within

67. *Id.* at 516.
68. 559 U.S. 154 (2010).
69. *Id.* at 157.
70. *Id.*
71. *Id.*
72. *Id.* at 165.
73. *Id.*
74. 551 U.S. 205 (2007).
75. *Id.* at 207.
76. *Id.*
77. *Id.*

fourteen days, the court lacked subject-matter jurisdiction to hear the case.[78] The Supreme Court agreed. The Court said that despite the new understanding of the importance of the distinction between jurisdictional and claim-processing rules, the statutory time limit for filing an appeal is different[79] because the time limit had long been treated by the Court itself as jurisdictional.[80] *Bowles* remains something of an enigma because it is the only recent Supreme Court decision to hold that a provision is jurisdictional. In *Reed*, which was decided three years later, Justice Thomas clarified that the reason why the statute in *Bowles* was jurisdictional was not because the statute itself had long been labeled jurisdictional; rather, the provision represented a type of limitation that was properly designated as jurisdictional.[81]

In fact, the Supreme Court limited its own holding in *Bowles* in a subsequent case on filing deadlines in *Henderson v. Shinseki*.[82] In *Henderson*, a Korean War veteran suffering from paranoid schizophrenia applied for supplemental disability benefits based on his need for additional care.[83] He missed the 120-day filing deadline by 15 days, and the Veterans Court, interpreting *Bowles* to compel jurisdictional treatment of the filing deadline, dismissed the veteran's untimely appeal.[84] The Supreme Court reversed, holding that the 120-day filing deadline was a "quintessential claim-processing rule."[85] The Court held that *Bowles* was inapplicable because that holding was limited to appeals from one court to another and did not extend to appeals from administrative to judicial courts.[86] The Court added that the language of the filing deadline provision of the Veterans' Judicial Review Act provided no clear indication that Congress wanted the provision to be treated as having jurisdictional attributes, thus failing the bright-line rule

78. *Id.* at 207–08.
79. *Id.* at 210.
80. *Id.* at 212–13.
81. Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 167 (2010).
82. Henderson *ex rel.* Henderson v. Shinseki, 131 S. Ct. 1197 (2011).
83. *Id.* at 1201.
84. *Id.* at 1201–02.
85. *Id.* at 1203.
86. *Id.* at 1203–04.

established in *Arbaugh*.[87]

Moreover, the provision was placed in a subchapter entitled "Procedure," demonstrating Congress's intent that the deadline was a claim-processing rule.[88] Notably, Congress did not place the 120-day limit in the subchapter entitled, "Organization and Jurisdiction."[89] A provision in the "Procedure" subchapter included some limits to the court's review, such as precluding review of the disability ratings schedule, but nothing addressed the time limit for seeking review.[90] One final argument the Court addressed was the context of the provision. Congress has had a tradition of enacting laws that favor veterans in the course of administrative and judicial review of veterans' affairs.[91] Thus, there was a "dramatic" distinction between ordinary civil litigation, such as that seen in *Bowles*, and the adjudication of veterans' benefits claims.[92]

C. A Pitch for Quasi-jurisdictional Rules

Perhaps some of the confusion in this area of the law stems from the faultiness of the fundamental assumption that a rule must be either jurisdictional or non-jurisdictional. This dichotomy is misleading because it "obscures a middle path that may be more accurate."[93] Sometimes, a rule will be classified as non-jurisdictional but will have jurisdictional qualities—a rule this Comment will call "quasi-jurisdictional."[94] While few courts have explicitly used the quasi-jurisdictional label, many, including the Supreme Court, have hinted at its existence. For example, in *John R. Sand & Gravel Co. v.*

87. *Id.* at 1205.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 1206.

93. Dodson, *supra* note 27, at 6.

94. There is no uniform nomenclature for rules that are non-jurisdictional but have jurisdictional qualities. Some commentators refer to such rules as quasi-jurisdictional. *See, e.g.*, Kevin M. Clermont, *Sequencing the Issues for Judicial Decisionmaking: Limitations from Jurisidictional Primacy and Intrasuit Preclusion*, 63 FLA. L. REV. 301, 315 n.59 (2011); Scott C. Idleman, *The Emergence of Jurisdictional Resequencing in the Federal Courts*, 87 CORNELL L. REV. 1, 96 n.532 (2001). The term "quasi-jurisdictional" is used throughout this Comment, although an alternative label, such as a "hybridized jurisdiction," would also be appropriate. *See, e.g.*, Dodson, *supra* note 37, at 1444, 1457.

United States,[95] the special six-year statute of limitations governing suits against the United States in the Court of Federal Claims was described as a "more absolute" limitations period.[96] Unlike other statute of limitations defenses that are subject to equitable considerations, the statute in *John R. Sand & Gravel Co.* forbade courts from such considerations.[97] Certain rules of criminal procedure may be classified as non-jurisdictional, but are "admittedly inflexible."[98] Similarly, state sovereign immunity can be waived by defendants, although courts cannot refuse to apply it once properly invoked.[99] In *Hallstrom v. Tillamook County*, a case that will be further explored below,[100] a provision requiring plaintiffs to give notice to violators of the CWA before filing suit was described as being a "mandatory . . . condition precedent" to suit, with none of the equitable considerations being applicable.[101] In all of these cases, the Court has fallen short of labeling the rule as jurisdictional, but it has firmly hinted that certain rules, while not jurisdictional, still impose mandatory conditions on litigants, much as a jurisdictional rule would.

Another argument for recognizing an alternative to the jurisdictionality dichotomy is that the concept of quasi-jurisdictionality is in conformity with the recently developed doctrine of resequencing.[102] Traditionally, issues of jurisdiction had to be resolved at the outset of litigation while the later phases of litigation focused on the merits of the case.[103] In recent cases, the Supreme Court has departed from this formal understanding.[104] While subject-matter jurisdiction is still always decided in the first phase, other procedural considerations have sometimes taken precedence. One example is resequencing, wherein the Court allows a case to be dismissed by a procedural doctrine without first establishing that the Court has subject-matter jurisdiction over the

95. 552 U.S. 130 (2008).
96. *Id.* at 134.
97. *Id.* at 133–35.
98. Eberhart v. United States, 546 U.S. 12, 19 (2005).
99. Dodson, *supra* note 37, at 1441.
100. *See infra* Part IV.A.1.
101. Hallstrom v. Tillamook Cnty., 493 U.S. 20, 26 (1989).
102. Dodson, *supra* note 38, at 1455.
103. *Id.*
104. *Id.*

case.[105] Resequencing is a bit odd, especially when considered alongside the Court's renewed interest in jurisdictionality, which is often interpreted strictly. However, recognizing quasi-jurisdictionality neatly resolves this seeming contradiction. A rule need not preclude subject-matter jurisdiction but can still place mandatory restrictions on a lawsuit; thus, a court can theoretically dismiss a case based on another doctrine that is less "jurisdictional."

Indeed, there are many other advantages of a quasi-jurisdictional rule. One type of quasi-jurisdictional rule is the mandatory rule, which is subject to the principles of equity—such as waiver, consent, and forfeiture—but is "immune to equitable excuses for noncompliance."[106] Under the mandatory rule, principles of equity allow parties to designate which issues require the court's attention and which issues can be foregone.[107] Courts are relieved from the duty of policing the rule sua sponte, and may address the issue only if it has been properly raised by the parties.[108] This conserves judicial resources and promotes flexibility.[109] Moreover, the fact that such a rule precludes "equitable excuses incentivizes compliance," and "constrains judicial discretion and thus promotes fairness."[110] The CWA diligent prosecution bar fits neatly into this category, and this argument will be further developed following an overview of the history of the bar's jurisdictionality.

III. THE JURISDICTIONALITY OF THE DILIGENT PROSECUTION BAR

In 2012, the Fifth Circuit issued a groundbreaking ruling in *Louisiana Environmental Action Network ("LEAN") v. City of Baton Rouge*,[111] holding that the diligent prosecution bar was a non-jurisdictional claim-processing rule.[112] Lower courts had almost consistently held, without much analysis, that this was a jurisdictional provision—a prime example of a drive-by jurisdictional ruling. Part III.A will begin by providing background information to

105. *Id.* (citing Sinochem Int'l Co. v. Malay Int'l Shipping Corp., 549 U.S. 422, 431 (2007)).

106. Dodson, *supra* note 28, at 4.

107. *Id.* at 10.

108. *Id.*

109. *Id.*

110. *Id.*

111. 677 F.3d 737 (5th Cir. 2012).

112. *Id.* at 749.

the CWA and the diligent prosecution bar, and by giving examples of drive-by jurisdictional rulings. Part III.B will explain the facts of *LEAN*, and will introduce the Fifth Circuit's analysis.

A. Citizen Suits and the Diligent Prosecution Bar

The CWA was enacted for the restoration and maintenance of "the chemical, physical and biological integrity of the Nation's waters."[113] The CWA prohibits "the discharge of any pollutant" into navigable waters of the United States without a permit.[114] The National Pollutant Discharge Elimination System ("NPDES") permits contain limitations on the amount of pollutants that a source can discharge, and contain monitoring and reporting requirements.[115] Point sources that discharge without a permit or those that violate sections of a NPDES permit are subject to administrative, civil, and criminal penalties.[116]

While local and state governments, along with the Environmental Protection Agency, are the primary enforcers of the CWA, "Congress has increasingly come to rely upon private law enforcement as a means of attaining public objectives."[117] Private citizens and environmental groups act as "private attorneys general,"[118] assisting in "enforcement efforts where Federal and State authorities appear unwilling to act."[119] The citizen suit provision of the CWA states:

> (a) Authorization; jurisdiction
>
> . . . [A]ny citizen may commence a civil action on his own behalf—
>
> (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation

113. 33 U.S.C. § 1251(a) (2012).

114. *Id.* § 1311(a).

115. Jeffrey M. Gaba, *Generally Illegal: NPDES General Permits Under the Clean Water Act*, 31 HARV. ENVTL. L. REV. 409, 410 (2007).

116. *Id.* at 418.

117. Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 TUL. L. REV. 339, 339 (1990).

118. *Id.* at 340.

119. N. & S. Rivers Watershed Ass'n v. Scituate, 949 F.2d 552, 555 (1st Cir. 1991).

> under this chapter or (B) an order issued by the administrator or a State with respect to such a standard or limitation, or
>
> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator . . .
>
> The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties . . . .[120]

The authority given to citizen-plaintiffs, however, is not endless. Congress wanted to provide some limitation on the range of potential plaintiffs[121] because the more enforcers that exist, the more potential there is for "successive, possibly disruptive and conflicting, enforcement."[122] Hence, there are two notice limitations in the CWA that preclude a citizen suit:

> (b) Notice
>
> No action may be commenced—
>
> (1) under subsection (a)(1) of this section—
>
> (A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or
>
> (B) if the Administrator or 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 with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.[123]

These two notice limitations avoid burdening courts with excessive numbers of citizen suits and give alleged violators an

120. 33 U.S.C. § 1365(a)(1–2) (2006).

121. *Id.*

122. Jeffrey G. Miller, *Overlooked Issues in the "Diligent Prosecution" Citizen Suit Preclusion,* 10 WIDENER L. REV. 63, 66 (2003).

123. 33 U.S.C. § 1365(b)(1)(A–B) (2006).

opportunity to bring themselves into compliance with the CWA and render a citizen suit unnecessary.[124]

This Comment will focus on the second notice limitation, often referred to as the "diligent prosecution bar." While citizen-plaintiffs—private attorneys general—play an important role in the enforcement of the CWA, ultimately, Congress has reserved the primary responsibility of enforcement to state and local governments;[125] indeed, citizen suits are meant to "supplement rather than to supplant governmental action."[126] Once the government diligently prosecutes a violation, the need for a citizen suit disappears.[127] Generally, a government action is presumed to be diligent as long as it is calculated in good faith to require compliance with the CWA.[128] The CWA directs regulatory bodies to either issue a compliance order or to initiate a civil enforcement action in order to bring the violator into compliance.[129] Deference to agencies and governments is not unlimited, and courts examine the context of the enforcement actions to determine whether they were diligent.[130] Some of the factors courts consider are the time spent enforcing administrative compliance orders and other mandates, whether or not actions required of violators were "mandatory and ongoing," and whether the government is capable of requiring compliance in the future.[131]

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124. Hallstrom v. Tillamook Cnty., 493 U.S. 28, 29 (1989) (quoting Gwaltney of Smithfield v. Chesapeake Bay Found., Inc., 484 U.S. 49, 60 (1987)).

125. *Id.*

126. *Gwaltney*, 484 U.S. at 60.

127. *Id.* at 60–61.

128. Ohio Valley Envtl. Coal. v. Maple Coal Co., 808 F. Supp. 2d 868, 884 (S.D.W. Va. 2011).

129. Sackett v. E.P.A., 132 S. Ct. 1367, 1370 (2012) (holding that a compliance order is a final agency action for which there is no adequate remedy other than judicial review).

130. *Id.*

131. *See., e.g.*, N. & S. Rivers Watershed Ass'n v. Scituate, 949 F.2d 552, 557 (1st Cir. 1991) (holding that a state diligently prosecuted a town even though it did not assess penalties because the compliance order was analogous to the citizen action and should be favored by a court); *Ohio Valley*, 808 F. Supp. 2d at 884 (holding that the state was diligently prosecuting a town because it imposed mandatory and ongoing responsibilities on the polluter, such as requiring the polluter to submit regular test results from groundwater monitoring wells, to spend close to one million dollars to build a new treatment facility, and to enforce a new sewer hookup moratorium); Newburgh v. Sarna, 690 F. Supp. 2d 136, 155 (S.D.N.Y. 2010) (holding that a state was diligently prosecuting a development project when the state issued civil penalties and an order compelling the project to take certain remedial measures); N.Y. Coastal Fishermen's Ass'n v. New York City, 772 F. Supp. 162, 168–69 (S.D.N.Y. 1991) (holding that

The Supreme Court has not yet spoken on whether the CWA's diligent prosecution bar is jurisdictional or not. For most appellate courts that have addressed the issue—including the Third,[132] Fourth,[133] Seventh,[134] and Ninth[135] Circuits—it has not even been a question that the diligent prosecution bar confers subject-matter jurisdiction. For example, in *Knee Deep Cattle Co. v. Bindana Investment Co.*, a cattle feeder operation appealed from a district court's grant of an investment company's motion to dismiss for lack of subject-matter jurisdiction because of the diligent prosecution bar.[136] The

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the city's two administrative compliance orders did not constitute diligent prosecution because these enforcement measures took too long to rectify an environmental issue and the court was not satisfied that the state would enforce its demands).

132. In *Student Public Interest Research Group v. Fritzsche, Dodge & Olcott, Inc.*, a citizen group sued a manufacturer of fragrances for violations of its NPDES permit. 759 F.2d 1131 (3d Cir. 1985). The court ultimately dismissed the case for other reasons, but it was very clear on this matter: the court did not have jurisdiction to entertain a citizen suit under the CWA if the proceeding was being diligently prosecuted. *Id.* at 1134. The court explained that the diligent prosecution bar was an exception to the jurisdiction granted in subsection (a) of section 505. *Id.* at 1135.

133. In *Chesapeake Bay Foundation v. American Recovery*, two citizen groups gave notice to the defendant state of Maryland that they would sue for the state's violations of effluent discharge permits. 769 F.2d 207 (4th Cir. 1985). The citizen groups filed suit, and the Environmental Protection Agency filed its suit later that same day. *Id.* at 208. The defendant state responded to the citizen groups' suit with a motion to dismiss, on the grounds that it was duplicative of the government suit, which the court granted. *Id.* The Fourth Circuit reversed, holding that the motion to dismiss should not have been granted because the CWA citizen suit provision granted that citizens could proceed with their suit unless the state had commenced its own enforcement action beforehand. *Id.* This was not the case here; the citizens filed their suit on the same day as the government, but three hours earlier, so they met section 505's timeliness requirements. *Id.* Thus, had the government filed its suit before the citizen groups, the case would have been properly dismissed for lack of subject-matter jurisdiction. *Id.* While this case is a few decades old, the principle that the diligent prosecution bar is an exception to section 505 jurisdiction has recently been affirmed by this circuit in *Piney Run Preservation Ass'n v. Carroll County*. 523 F.3d 453 (4th Cir. 2008).

134. In *Friends of Milwaukee Rivers v. Milwaukee Metropolitan Sewerage District*, a citizen group filed suit against the Milwaukee Sewerage District alleging CWA permit violations. 556 F.3d 603, 605 (7th Cir. 2009). After giving notice, the group filed suit in the district court, and later that day, the state of Wisconsin also filed suit. *Id.* The state and the Sewerage District reached a settlement imposing mandatory and ongoing obligations on the violator, which then moved to dismiss the citizen suit for lack of subject-matter jurisdiction because the violator was diligently prosecuted. *Id.* The Seventh Circuit found that the CWA did not bar the suit. *Id.* at 606. The court explained, citing section 505, that normally the CWA "strips the courts of subject[-]matter jurisdiction over citizens' suits where the State has timely commenced judicial or administrative enforcement actions," but that the bar did not apply in this case because the citizen suit was filed before the state's suit. *Id.*

135. Knee Deep Cattle Co. v. Bindana Inv. Co., 94 F.3d 514, 515 (9th Cir. 1996).

136. *Id.*

Ninth Circuit reversed and held for the cattle feeder operation, noting that while a district court's factual findings on all jurisdictional issues must be accepted unless they are clearly erroneous[137]—thereby affirming that the diligent prosecution bar was jurisdictional—because no action was being prosecuted at the time of the cattle feeder operation's lawsuit, the diligent prosecution bar did not apply.[138] Thus, the district court erred in granting the motion to dismiss because "a state must have commenced and be diligently prosecuting an action" in order for the CWA's diligent prosecution bar to apply.[139]

B. LEAN v. Baton Rouge

This apparently unanimous understanding was broken with the Fifth Circuit's holding in *LEAN*.[140] In *LEAN*, the city of Baton Rouge and the parish of East Baton Rouge operated three wastewater treatment facilities that discharged treated sanitary wastewater into the Mississippi River.[141] LEAN, an environmental group, claimed that there were ongoing NPDES violations at the three facilities and filed a citizen suit pursuant to CWA section 505.[142] The defendant city filed a motion to dismiss pursuant to FRCP 12(b)(6), arguing that the citizen suit was barred under the diligent prosecution provision.[143] LEAN responded by arguing the inadequacy of the city's enforcement actions, and by contending that the diligent prosecution bar was not jurisdictional.[144]

The Fifth Circuit agreed with LEAN, becoming the first circuit court to expressly hold that the provision is non-jurisdictional. Its first line of reasoning was that according to *Arbaugh*'s "readily administrable bright line rule," a provision is jurisdictional only if Congress clearly states that it is, and when Congress is silent, the statute shall be considered non-jurisdictional.[145] Congress was silent in the CWA, so the Fifth Circuit asserted that the presumption

137. *Id.* at 516.
138. *Id.*
139. *Id.*
140. La. Envl. Action Network v. City of Baton Rouge, 677 F.3d 737 (5th Cir. 2012).
141. *Id.* at 740.
142. *Id.* at 742.
143. *Id.*
144. *Id.* at 745.
145. *Id.* at 747.

should be that the provision is non-jurisdictional. Also, the fact that section 505 spoke in mandatory language was not considered relevant.[146]

Next, the court tried to see if there were contextual reasons under *Reed* to hold that the provision was jurisdictional. It looked at the positioning of the diligent prosecution bar in the notice section of the CWA.[147] Because the other notice requirement, the sixty-day notice provision, is a typical claim-processing rule, the placement of the diligent prosecution bar beside it suggests that Congress similarly intended it to be non-jurisdictional.[148] The court pointed out that the provision is located separately from the part of section 505 granting federal courts subject-matter jurisdiction over the CWA, in a section that does not pertain to or refer to jurisdiction.[149] The court found that the final *Reed* factor, historical treatment, does not apply either, because no Supreme Court cases have determined that the diligent prosecution bar or any similar provision is jurisdictional.[150] The court ultimately remanded the case to the district court to determine whether there was diligent prosecution precluding LEAN's suit.[151]

This case has sent shockwaves in the environmental law realm,[152] because what was once regarded as a cut-and-dry tenet of environmental law is no longer true. This Comment agrees that the diligent prosecution bar is not purely jurisdictional. The recent Supreme Court cases, with the exceptions of *John R. Sand & Gravel Co.* and the oft-criticized[153] *Bowles*, have all pointed to a trend of

146. *Id.* at 748 (noting that the Supreme Court "has rejected the notion that 'all mandatory prescriptions, however emphatic, are . . . properly typed 'jurisdictional'" (quoting Henderson *ex rel.* Henderson v. Shinseki, 131 S. Ct. 1197, 1205 (2011))).

147. *Id.*

148. *Id.*

149. *Id.* at 748–49.

150. *Id.*

151. *Id.* at 750.

152. David G. Samuels, Note, Louisiana Environmental Action Network v. City of Baton Rouge*: Fifth Circuit Rules Clean Water Act's Diligent Prosecution Bar to Citizen Suits Is Nonjurisdictional?*, 26 TUL. ENVTL. L.J. 111, 118 (2012) ("The Fifth Circuit's determination . . . marks a watershed moment for citizen enforcement suits brought under CWA and similar laws.").

153. *See, e.g.*, Paul Carrington, *A Critical Assessment of the Cultural and Institutional Roles of Appellate Courts*, 9 J. APP. PRAC. & PROCESS 231, 233 (2007) (book review) (asserting that it must be the aim of professional education to "demean such disgraceful nonsense as that expressed in the majority opinion" in *Bowles*); Scott Dodson, *The Failure of* Bowles v. Russell, 43 TULSA L.

recognizing fewer rules as jurisdictional. The CWA does not state that the diligent prosecution bar should be jurisdictional. Context-based arguments are weak, too. While both *Bowles* and *John R. Sand & Gravel Co.* had strong stare decisis reasons to uphold special statute of limitations rules to be jurisdictional, this simply does not exist for the diligent prosecution bar. The drive-by jurisdictional appellate court holdings are easily distinguishable from the decades and even centuries-old precedents from these two Supreme Court cases. The author has found no examples of cases where the diligent prosecution bar was brought up by an appellate court sua sponte, or any cases where an appellate court vacated a decision it made on the merits because it lacked subject-matter jurisdiction in the first place. Thus, *LEAN* arrived at the proper conclusion—that the diligent prosecution bar is non-jurisdictional; however, it did so for the wrong reasons.

IV. THE DILIGENT PROSECUTION BAR IS QUASI-JURISDICTIONAL—AND PROUD OF IT

The *LEAN* court falsely stated that Congress did not intend for the diligent prosecution bar to be treated as having jurisdictional attributes.[154] Congress intended the diligent prosecution bar to be non-jurisdictional in certain respects, while also possessing jurisdictional qualities; therefore, it was meant to be quasi-jurisdictional. Part IV.A will explain why the Fifth Circuit was wrong in its analysis. Part IV.B will argue that Congress's true intention was for the diligent prosecution bar to be quasi-jurisdictional.

A. LEAN Was Incorrectly Decided

LEAN was incorrectly decided for two reasons: (1) under Supreme Court precedent, neither the diligent prosecution bar nor the sixty-day notice provision is meant to be a purely non-jurisdictional claim-processing rule or a substantive-merits rule; (2) the Fifth Circuit failed to recognize a glaring internal inconsistency in the Seventh Circuit precedent cited for support of its holding.

REV. 631 (2008); Vincent Pavlish, Bowles v. Russell*: They Got Me on a Technicality*, 70 MONT. L. REV. 147 (2009).

154. La. Envtl. Action v. City of Baton Rouge, 677 F.3d 737, 748 (5th Cir. 2012).

1. Under Supreme Court precedent, neither the diligent prosecution bar nor the sixty-day notice provision is meant to be a purely non-jurisdictional claim-processing rule or a substantive-merits rule

The *LEAN* court not only held that the diligent prosecution bar is non-jurisdictional, but it implied that it was a claim-processing rule. It quoted Supreme Court cases that interpreted claim-processing rules for evidence that the provision was non-jurisdictional. It cited the Court's dicta in *Reed*, acknowledging that "the distinction between jurisdictional conditions and claim-processing rules can be confusing in practice."[155] In the following paragraph, the *LEAN* court lamented about the practice of mischaracterizing claim-processing and jurisdictional rules. In a later section, the CWA sixty-day notice provision was characterized as a "typical 'claim-processing rule.'"[156] Citing *Henderson*, the Fifth Circuit reasoned that placement of the diligent prosecution bar next to the sixty-day notice provision, a "typical 'claim-processing rule,'"[157] meant that it too was non-jurisdictional. Additionally, the fact that the bar is separate from a provision granting jurisdiction meant that the rule was merely procedural.[158] The Fifth Circuit correctly stated that the "title of a statute or section can aid in resolving an ambiguity in the legislation's text,"[159] and that a provision placed in a subchapter with a procedural title alongside a claim-processing rule is likely also procedural.[160]

However, the "notice" provisions are not claim-processing rules. This much has already been decided by the Supreme Court in *Hallstrom v. Tillamook County*,[161] a case upon which the Fifth Circuit should have relied much more extensively. In *Hallstrom*, owners of a dairy farm commenced an action against a landfill operation alleging Resource Conservation and Recovery Act[162] ("RCRA") violations.[163] The landfill operation moved to dismiss the suit on the grounds that

155. *Id.* at 746 (quoting Reed Elsevier, Inc. v. Muchnick, 130 S. Ct. 1237, 1244 (2010)).
156. *Id.* at 748.
157. *Id.* (quoting Henderson *ex rel.* Henderson v. Shinseki, 131 S. Ct. 1197, 1203 (2011)).
158. *Id.*
159. *Id.* (quoting *Henderson*, 131 S. Ct. at 1205).
160. *Id.*
161. 493 U.S. 20 (1989).
162. 42 U.S.C. § 6901 *et seq.* (2006).
163. *Hallstrom*, 439 U.S. at 23.

the plaintiffs had failed to notify the state enforcement agency of their intent to sue as required by RCRA.[164] The Ninth Circuit concluded that the failure to comply with the sixty-day notice provision deprived the district court of subject-matter jurisdiction.[165] On appeal, the Supreme Court agreed that if an action is barred by the terms of the statute, it must be dismissed, stating that "compliance with the 60-day notice provision is a mandatory, not optional, condition precedent for suit."[166]

The most important and relevant principle to be gleaned from *Hallstrom* is that unlike a purely non-jurisdictional rule, the notice provision must be interpreted strictly and without equitable considerations. The Court held that because RCRA's notice requirement did not operate as a statute of limitations that is subject to equitable tolling, and because plaintiffs have full control over the timing of their RCRA suit,[167] it was "not unfair to require strict compliance with statutory conditions precedent to suit."[168] Interestingly, the Court affirmed the reasoning used by those circuit courts that held that the provision was jurisdictional. These courts focused on the plain language of the statute, while the other courts promoted a "pragmatic approach," holding that strict compliance with the notice requirement was not necessary as long as the sixty days elapsed before the district court took action.[169] This latter, rejected approach supposedly focused more on the role of the citizen in enforcing the environmental statutes.[170] The dissent, on the other hand, accepted the pragmatic approach arguments and argued that Congress's primary purpose was to encourage citizen suits.[171]

Despite its rejection of the pragmatic approach, the Court expressly refused to answer whether RCRA's notice provision was jurisdictional, despite an even 4-4 circuit split regarding the issue.[172]

164. *Id.* at 23–24.

165. *Id.* at 24.

166. *Id.* at 26.

167. *Id.*

168. *Id.* at 28.

169. *See* Samuels, *supra* note 153, at 112–13.

170. Hallstrom v. Tillamook Cnty., 844 F.2d 598, 600 (9th Cir. 1987) (overturned by Hallstrom v. Tillamook Cnty., 493 U.S. 20 (1989)).

171. *Hallstrom*, 493 U.S. at 33–37 (Marshall, J., dissenting).

172. The First, Sixth, Seventh, and Ninth Circuits, for example, held that the provision was jurisdictional. *See* Garcia v. Cecos Intern., Inc., 761 F.2d 76, 78 (1st Cir. 1985) ("We find that there is no federal jurisdiction here because the plaintiffs failed to follow the procedures

The Court recognized that the "parties have framed the question presented in this case as whether the notice provision is jurisdictional or procedural," but dismissed this concern, saying that "[i]n light of our literal interpretation of the statutory requirement, we need not determine whether [the notice provision] is jurisdictional in the strict sense of the term."[173] The Court explained simply, "if an action is barred by the terms of a statute, it must be dismissed."[174] It quoted an earlier case, *Fair Assessment in Real Estate Ass'n v. McNary*,[175] for the presumption that a requirement to exhaust state administrative remedies was a "mandatory condition[] precedent" to file a suit, and was therefore, in a sense, a jurisdictional precedent.[176] The notice provision, similarly a "mandatory condition[] precedent," allows parties to move to dismiss an action even *after* a court has determined a case on its merits[177]—a result permitted only under a FRCP Rule 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction. In the aftermath of *Hallstrom*, most federal appellate courts (the First,[178]

required for suits by private citizens under the statute."); Walls v. Waste Res. Corp., 761 F.2d 311, 316 (6th Cir. 1985) ("We agree with the District Court in holding that compliance with the sixty day notice requirement is a jurisdictional prerequisite to bringing a suit against private defendants under the citizen suit provisions of RCRA . . . ."); City of Highland Park v. Train, 519 F.2d 681, 690–91 (7th Cir. 1975) (agreeing with the district court that failure of notice was fatal to jurisdiction under Clean Air Act); *Hallstrom*, 844 F.2d at 599 ("We hold that proper notice is a precondition of the district court's jurisdiction.").

On the other hand, the Second, Third, Eighth, and D.C. Circuits held that the provision was not jurisdictional. *See* Natural Res. Def. Council, Inc. v. Callaway, 524 F.2d 79, 83 (2d Cir. 1975) (holding that the notice requirement is not the exclusive jurisdictional basis for suit, and jurisdiction can therefore exist under either the general federal question statute, or the Administrative Procedure Act); Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor, 619 F.2d 231, 243 (3d Cir. 1980) ("We agree . . . that reading section 505(b) to require dismissal and refiling of premature suits would be excessively formalistic."); Hempstead Cnty. & Nevada Cnty. Project v. U.S. E.P.A., 700 F.2d 459, 463 (8th Cir. 1983) (holding that "the purpose of such notice" had been satisfied in the case, so the notice requirement in RCRA was not jurisdictional); Natural Res. Def. Council v. Train, 510 F.2d 692, 702, app. A at 721 (D.C. Cir. 1974) ("The limitations" in subsections (a) and (b) of the CWA "do not cut back on federal court jurisdiction over actions that would be maintainable" under section (e), which states that "[n]othing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief . . . .").

173. *Hallstrom*, 493 U.S. at 31.

174. *Id.*

175. 454 U.S. 100, 137 (1981) (Brennan, J., concurring).

176. *Hallstrom*, 493 U.S. at 31.

177. *Id.* at 32.

178. Francisco Sanchez v. Esso Standard Oil Co., 572 F.3d 1, 9 (1st Cir. 2009) ("Accepting

Third,[179] Sixth,[180] Seventh,[181] Ninth,[182] and Eleventh[183] Circuits) have interpreted the diligent prosecution bar to be jurisdictional, despite the Court's explicit refusal to confirm that it was jurisdictional. Only the Second Circuit explicitly disagreed,[184] and the Fourth Circuit has declined to rule either way, but maintained that the notice provision is a mandatory condition precedent to suit.[185]

2. The Fifth Circuit failed to recognize a glaring internal inconsistency in the Seventh Circuit precedent cited for support of its holding

The *LEAN* court cited a Seventh Circuit RCRA case to support its conclusion that the diligent prosecution bar is not jurisdictional.[186] RCRA is an environmental statute that was enacted around the time that the CWA was passed, and is the primary law governing the disposal of solid and hazardous waste, intended to address the problem of industrial and municipal waste.[187] The

[the notice requirement] would divest us of jurisdiction.").

179. Pub. Interest Research Grp. of N.J. v. Windall, 51 F.3d 1179, 1189 (3d Cir. 1995) (holding that *Hallstrom* stood for the notion that the notice requirement was a jurisdictional prerequisite to suit).

180. Bd. of Trustees of Painesville Twp. v. City of Painesville, 200 F.3d 396, 400 (6th Cir. 1999) ("This circuit has always required plaintiffs to adhere to § 1365's notice provision because compliance with the notice requirement is a jurisdictional prerequisite to recovery under the [CWA].").

181. Friends of Milwaukee's Rivers & Alliance for the Great Lakes v. Milwaukee Metro. Sewerage Dist., 556 F.3d 603 (7th Cir. 2009).

182. Covington v. Jefferson Cnty., 358 F.3d 626, 636 (9th Cir. 2004) (determining that RCRA notice provisions are jurisdictional under *Hallstrom*, and without compliance with a required notice provision, the court lacks subject-matter jurisdiction).

183. Black Warrior Riverkeeper, Inc. v. Cherokee Mining, LLC, 548 F.3d 986, 992 (11th Cir. 2008) (court assumed that because notice and filing requirements were met, a non-profit environmental organization's suit will not be otherwise dismissed for lack of subject matter jurisdiction).

184. Bldg. & Const. Trades Council of Buffalo v. Downtown Dev., Inc., 448 F.3d 138, 158 n.14 (2d Cir. 2006) ("[W]e assume that non-compliance with the pre-suit . . . provisions of the [RCRA] and the [CWA] does not affect a federal court's subject matter jurisdiction.").

185. Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 629 F.3d 387, 400 (4th Cir. 2011) ("[W]e need not determine whether the mandatory notice requirement of § 1365(b)(1)(A) is 'jurisdictional in the strict sense of the term.'" (quoting Hallstrom v. Tillamook Cnty., 493 U.S. 20, 31 (1989))).

186. La. Envtl. Action Network v. City of Baton Rouge, 677 F.3d 737, 749 (5th Cir. 2012).

187. *History of RCRA*, U.S. ENVTL. PROTECTION AGENCY, http://www.epa.gov/osw/laws-regs/rcrahistory.htm (last updated July 30, 2013).

RCRA case, *Adkins v. VIM Recycling, Inc.*,[188] involved a citizen suit brought by residents in an area near a solid waste dump alleging RCRA violations. The solid waste company moved to dismiss the lawsuit, arguing that the district court did not have federal subject-matter jurisdiction over RCRA.[189] The *Adkins* court rejected the argument that the diligent prosecution bar was jurisdictional, citing the Supreme Court's recent clarifications on the limited scope of the term.[190] *LEAN* cited *Adkins* to be particularly relevant because it correctly pointed out that RCRA's diligent prosecution provision is virtually identical to the CWA's.[191]

However, there seems to be confusion even within the Seventh Circuit about whether the diligent prosecution bar is jurisdictional. While that circuit argued that it was not jurisdictional in Adkins, a few years earlier, in *Friends of Milwaukee Rivers*, that same court argued that it was jurisdictional in the CWA context. Thus, *LEAN*'s reliance on *Adkins* is somewhat puzzling. The Fifth Circuit seems to randomly choose which Seventh Circuit case to cite, and it chooses *Adkins*, a RCRA case, instead of the *Friends of Milwaukee Rivers* case, which arguably might be more on point since it is interpreting the same statute as the LEAN court was interpreting—the CWA. This brings up the second, more perplexing issue, as to why the Seventh Circuit would so clearly deviate from its own precedent in the first place and hold that the diligent prosecution bar is jurisdictional in one context (CWA), and non-jurisdictional in another, very similar context (RCRA). One possibility would be that the internal inconsistency in the Seventh Circuit is indicative of the mischaracterization of claim-processing rules as jurisdictional, but why then would that court suddenly change its view of subject-matter jurisdiction? If the Seventh Circuit was so concerned about the Supreme Court's shifting view of subject-matter jurisdiction, why did it not reflect this concern in *Friends of Milwaukee Rivers*, which was decided in 2009, years after the Court's holdings in cases such as *Kontrick* and *Arbaugh*? The decision of the *LEAN* court to rely on a RCRA case when a CWA case was more on-point is troubling, at best.

188. 644 F.3d 483 (7th Cir. 2011).

189. *Id.* at 490.

190. *Id.* at 491.

191. *La. Envtl. Action Network*, 677 F.3d at 749.

B. Congress Intended the Diligent Prosecution Bar to Be Quasi-jurisdictional

Thus, two of the major arguments relied upon by the Fifth Circuit are simply invalid. Indeed, the *LEAN* court's *Henderson* textual argument that the diligent prosecution bar is non-jurisdictional because it is placed next to a non-jurisdictional provision such as the notice provision fails. Its conclusion must be rejected for the reasons provided in Part IV.A.1, but its reasoning should be adopted. In other words, the diligent prosecution bar is placed next to a quasi-jurisdictional provision, ergo, it must also be quasi-jurisdictional. There is no reason under *Henderson* to treat one notice provision (the sixty-day requirement) differently from another notice provision (the diligent prosecution bar).

When looking at the various court holdings concerning the jurisdictionality of the notice requirements, it becomes evident that these holdings are a hodgepodge of decisions that are inherently inconsistent with each other. *Hallstrom*, the only Supreme Court case in the mix, argues for a quasi-jurisdictional reading, and the Seventh Circuit seemingly cannot make up its mind—in 2009, the provision was jurisdictional, and in 2011, it was not. Only more confusion is in store, and courts ruling on environmental law will continue to contradict their precedent and struggle to understand jurisdictionality.

Clarity is needed, and the answer is not, as the Seventh Circuit would contend, that the provision is non-jurisdictional. The sixty-day notice provision is not a typical claim-processing rule to be treated as having no jurisdictional attributes whatsoever, as the Fifth Circuit held. Neither is the provision a substantive-merits rule, for that matter. Claim-processing rules and substantive-merits rules are subject to equitable exceptions such as waiver, estoppel, and equitable tolling, but the Court in *Hallstrom* held that the notice provision is not subject to such exceptions.[192] Further, the *Hallstrom* opinion maintained that a court must dismiss the action if the notice requirement is not made.[193] These clearly jurisdictional attributes of the notice provision preclude it from being a typical non-jurisdictional rule. The theory of quasi-jurisdictionality is the most convincing way to reconcile *Hallstrom* with the recent Supreme Court

192. Hallstrom v. Tillamook Cnty., 493 U.S. 20, 31 (1989).

193. *Id.* at 32.

movement against drive-by jurisdictional holdings and the concerns articulated by the *LEAN* court. *Hallstrom* was not an example of a drive-by jurisdictional holding lacking in reasoning, and thus it is difficult to imagine that the Court, if the matter of jurisdictionality in these provisions is ever reheard, would assign it to the same fate as the statute in *Arbaugh* or *Reed*. The CWA's notice provision and diligent prosecution bar are more akin to the statute of limitations in *John R. Sand & Gravel Co.*—not quite jurisdictional, not quite non-jurisdictional.

Now that it has been established that Congress meant for the diligent prosecution bar to be quasi-jurisdictional, the next step is to determine what this means. This Comment proposes that Congress meant for the provision to have jurisdictional attributes, specifically, that the rule will impose mandatory conditions and will not be subject to equitable considerations. At the same time, Congress did not intend for courts to be responsible for raising this issue sua sponte, as this has never been done before.

This proposal has many advantages. Firstly, this approach is likely most consistent with Congress's intent, for the reasons given in *Hallstrom*. Secondly, it is logically consistent. Unlike a deadline for filing a suit, for example, it does not make sense to provide equitable considerations to the diligent prosecution bar. Imagine a case where the government is able to consent to the charge that it did not diligently prosecute a case. This is such a central issue that the entire case would fall apart. If the government had diligently prosecuted, the courts would have no reason to intervene, especially in light of the fact that the purpose of citizen suits is to supplement, rather than supplant, government action.[194] Thirdly, rigidity incentivizes compliance with the rule and promotes finality.[195] If the government knew that it could not bring up equitable defenses, the threat of a citizen suit would have more teeth. The government would know that if, in the event of a lawsuit, it did indeed diligently prosecute a polluter, the case would be thrown out at the onset of litigation.

On the flip side of the same coin, the fact that the provision is not purely jurisdictional gives the court flexibility and saves judicial resources because the court is not obligated to bring up the rule sua sponte. Because the rule is quasi-jurisdictional, the court can be

194. *See supra* Part III.A.

195. Dodson, *supra* note 37, at 1449.

flexible in deciding the order in which it will hear claims. The rule will also allow for resequencing; thus, if there are other threshold issues that are less complicated than the question of diligent prosecution,[196] courts are able to dismiss a case for those reasons instead. The fact that the court and the parties are not able to dismiss the case once the case is over (unlike when courts use jurisdictional rules) saves judicial resources and ensures that money is not wasted on pointless litigation.

V. CONCLUSION

The diligent prosecution bar is a quasi-jurisdictional rule that cannot be invoked to dismiss a case for lack of subject-matter jurisdiction, but also imposes mandatory conditions on parties to a case. This conceptualization of jurisdictionality is different from the prevailing thought on the subject, but it is far superior, for reasons explored in this Comment. This "middle path"[197] clears up much confusion that courts have had in addressing the issue of jurisdictionality. This theory reconciles *Hallstrom* with the Fifth Circuit's holding (but not its dicta) that the diligent prosecution bar is non-jurisdictional. Accepting that a rule need not be strictly jurisdictional or non-jurisdictional permits courts to examine the spectrum of permissible characteristics and mold a rule according to their interpretation of Congress's intent.

It is important to stress that citizen suits will not be discouraged if the diligent prosecution bar is held to be quasi-jurisdictional. There might be slightly fewer citizen suits admitted under this theory as opposed to a strictly non-jurisdictional theory, because equitable defenses will be forbidden. In other words, if the defense argues that the government diligently prosecuted a case and the court is persuaded, the court will be required to dismiss the case. However, unlike a jurisdictional rule, the court is not obligated to raise this issue sua sponte.[198] The phrase "slightly fewer citizen suits" will be stressed again; there is no suggestion that such a large number of defendants are seeking equitable defenses that they are not diligently prosecuting a suit. Despite the fact that there will

196. *See* Heather Elliott, *Jurisdictional Resequencing and Restraint*, 43 NEW ENG. L. REV. 725, 743 (2009).

197. Dodson, *supra* note 27, at 6.

198. *See supra* Part II.A.

necessarily be slightly fewer citizen suits, this is nothing to fear. The Supreme Court in *Hallstrom* stressed that the legislative history of environmental laws indicates a congressional intent to strike a balance between encouraging citizen enforcement and avoiding burdening the federal courts with excessive citizen suits.[199] Congress intended that governments act as the primary enforcers of environmental laws, with the need for citizen suits disappearing once the government diligently prosecutes.[200] Thus, Congress *never* intended to allow citizens to bring suits in situations where the government was diligently prosecuting a case. Interpreting the diligent prosecution bar to be quasi-jurisdictional only helps further congressional intent to treat citizen suits as supplementary to government action.

Properly labeling the diligent prosecution bar as quasi-jurisdictional is a revolutionary way of understanding jurisdictionality. This interpretation rejects the strict dichotomy utilized by the Supreme Court and the Fifth Circuit and admits fluidity and accommodation into civil procedure. While this new understanding may complicate matters,[201] it will eliminate the harsh results plaintiffs often suffer when they fail to fulfill the requirements of a rule and their entire case is dismissed regardless of the merits. With this third option, legislative intent for the proper role of citizen suits will be respected, plaintiffs will be ensured that cases decided in their favor cannot later be dismissed for lack of subject-matter jurisdiction, and defendant governments will benefit from a mandatory rule that will require dismissal of cases where they did, in fact, do their job.

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199. Hallstrom v. Tillamook Cnty., 493 U.S. 20, 29 (1989) (citing 116 Cong. Rec. 32927 (1970) (comments of Sen. Muskie)).

200. *See supra* Part III.A.

201. Dodson, *supra* note 37, at 1482.

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