# Does State Enforcement Action Really Protect a Regulated Entity from Citizen Suit Liability? Fourth Circuit Decision Casts Doubt.


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A frequently noted adage in cases involving environmental citizen suits is that such actions are meant to "supplement, rather than supplant" governmental enforcement action. The dissent in the recently filed *Naturaland Trust v. Dakota Finance LLC* decision out of the Fourth Circuit questions whether that hierarchy remains, at least with respect to citizen suits brought under the Clean Water Act.

The defendants in *Naturaland Trust* were property owners that intended to prepare property for agricultural operations. The property owners, believing their activities to be exempt from permitting requirements, failed to obtain state and local NPDES permits for construction activity and storm-water control before beginning construction activities. Their construction activities allegedly resulted in significant discharges of sediment. The South Carolina Department of Health and Environmental Control ("DHEC") and local county regulators both inspected the property and determined that Clean Water Act permits were required for the activities on the property, and the property owners were directed to cease activity until permits were obtained.

In September of 2019, DHEC issued a Notice of Alleged Violation/Notice of Enforcement Conference ("NOAV") to Arabella Farm. In November of the same year, Naturaland Trust and Trout Unlimited both sent a sixty-day notice of intent to sue as required under citizen suit provisions of the Clean Water Act. After the sixty-day notice elapsed, the organizations filed a complaint in federal court seeking injunctive relief

and civil penalties. A month after the complaint was filed in federal court, the property owners entered into an administrative consent order with DHEC imposing civil penalties, requiring the owners to obtain a permit, submit storm-water management plans, and conduct a stream assessment and any recommended remediation that followed from that assessment.

The Clean Water Act provides that a violation shall not "be the subject of a civil penalty action under [the citizen suit provision]" if a state regulator "has commenced and is diligently prosecuting an action under a State law comparable to" the federal civil penalty process. Whether DHEC had in fact triggered this "commencement" provision, and thus barred any citizen suit action for civil penalties, was the principal question on appeal. The district court dismissed the complaint, in part because the court concluded DHEC, by issuing the NOAV, had commenced and was diligently prosecuting an administrative action for the same violations at the time the complaint was filed. On appeal, the Fourth Circuit reversed in a split decision.

The majority determined that the NOAV was not enough "to commence and action that was comparable to one brought under federal law. The majority did not view the NOAV as sufficiently "adversarial" to commence an "action" as that term is commonly understood, characterizing the NOAV as more akin to a demand letter before litigation commences that the filing of a complaint in court. The majority also cited several sister circuit decisions it viewed as supporting the proposition that a state enforcement action is not "commenced" within the meaning of the Clean Water Act until the rights of members of the public, to both notice and judicial review, have attached.

The dissenting judge criticized the majority's focus on the nature of the "action" and the failure to even address the commonly understood meaning of "commence." In his view, "commencement," as that term is commonly understood is the "start" of an action, and DHEC policy makes clear that an NOAV is the initial step that must be taken in all administrative enforcement actions. The dissent also took issue with the majority's characterization of the NOAV as an invitation to an "informal, voluntary, private conference with [DHEC] to discuss allegedly unauthorized discharges." The dissent noted that the NOAV memorialized multiple field inspections by regulators, accused the property owners of specific violations of environmental law, and made clear that the owners must attend an enforcement conference or risk the imposition of a unilateral order imposing monetary penalties. Far from being the "informal invitation" the majority viewed it as, the dissent viewed the NOAV as the initiation – or "commencement" – of an adversarial administrative process.

The dissent urged that states should be afforded deference and latitude in "selecting the specific mechanisms of their enforcement program" and would have upheld much of the district court decision, remanding only the injunctive relief claims made by plaintiffs, while commenting that those claims had a steep burden to meet so as to not be barred by the state enforcement action. The dissent also distinguished some cases the majority relied on from this case and concluded South Carolina's more robust enforcement process satisfied many issues that existed in those cases. The dissent determined that both the public notice and participation requirements were satisfied by operation of the various public notices, appellate process and operation of South Carolina's Freedom of Information Act, finding them "comparable" to the public notice and participation provided in the EPA procedures.

The principal enforcement mechanism for federal environmental protections is through administrative enforcement by government agencies – most frequently through state regulators that have been delegated that authority by the EPA. Citizen suits allow third parties to bring federal court actions for injunctive relief and civil penalties against alleged violators of environmental laws, but only after the required notice period has given regulators the opportunity to take appropriate action to correct violations. Thus, the potential for third party citizen suit liability is a significant motivating factor for many regulated entities to enter into voluntary compliance agreements and orders with state regulators. These orders frequently include monetary penalties and often have the effect of resolving ongoing environmental impacts more speedily than would be achieved through unilateral enforcement actions. The *Naturaland Trust* opinion can be read to implicitly require public participation in the formulation of enforcement remedies, and calls into question the degree and timing of citizen suit protection parties gain through state enforcement proceedings. The *Naturaland Trust* opinion has the potential to make bilateral enforcement resolutions less common, and consequently lengthen the time required to resolve environmental violations.

Both the majority and dissent discussed that the circuits are split with respect to the several legal questions presented by this case. This majority opinion differs from prior precedent set in 4$^{th}$ Circuit opinions, which they observed was partly the result of applying recent Supreme Court decisions on jurisdiction questions.