Same Means Same: Tenth Circuit Limits the Reach of the Clean Air Act's Citizen Suit Shield

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On August 3, 2026, the U.S. Court of Appeals for the Tenth Circuit issued its decision in *GreenLatinos v. Suncor Energy (U.S.A.), Inc.*,[1] reversing the district court's dismissal of a citizen suit brought under the Clean Air Act (CAA) against the owner of petroleum refineries. In doing so, the Tenth Circuit clarified the textual requirements of the CAA's diligent prosecution bar and rejected the district court's application of a "substantially similar" standard for determining when government enforcement actions preclude citizen suits. The decision may have significant implications for regulated entities that have relied on existing government consent decrees as a shield against private enforcement actions, as well as for companies evaluating their exposure to citizen suit litigation under the CAA.

Background

Over 20 years ago, the U.S. Environmental Protection Agency (EPA) entered into consent decrees with energy companies as part of the EPA's national Petroleum Refinery Initiative — a nationwide enforcement campaign that resulted in 37 settlements covering over 95% of the nation's petroleum refining capacity.[2] Those consent decrees covered refinery plants in Commerce City, Colorado, which are now owned and operated by Suncor Energy (U.S.A.), Inc.

In August 2024, three environmental organizations filed a citizen suit under 42 U.S.C. § 7604(a)(1), alleging 28 claims for various violations of the CAA and its implementing regulations, as well as violations of the federal consent decrees. Suncor Energy moved to dismiss the claims, arguing that the environmental organizations lacked standing and that their claims were precluded by the CAA's diligent prosecution bar under 42 U.S.C. § 7604(b)(1)(B). The district court rejected the standing challenge but granted Suncor Energy's motion

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to dismiss under Rule 12(b)(6), finding that the consent decrees, compliance orders, compliance advisories, and a notice of violation collectively constituted "ongoing enforcement actions" and that the citizen suit consisted of "identical or substantially similar allegations."[3]

Tenth Circuit's Decision

On appeal, the Tenth Circuit reversed and remanded, holding that the district court departed from the text Congress enacted in the CAA. The court's analysis addressed three key issues.

Diligent Prosecution Bar Is Not Jurisdictional

As a threshold matter, the court held that the diligent prosecution bar is not a jurisdictional issue — meaning, it can be waived or forfeited if not asserted in a timely manner. In so holding, the Tenth Circuit joined the First, Third, Fourth, Seventh, and Eleventh Circuits in reaching this conclusion.[4]

Only Judicial Actions Trigger the Bar

The court held that only a civil action presently being enforced in a judicial forum can trigger the diligent prosecution bar. Indeed, the plain text of the CAA indicates that the diligent prosecution bar is triggered when the EPA or a state "has commenced and is diligently prosecuting a civil action in a court."[5] As such, administrative actions — such as compliance orders, compliance advisories, and notices of violation — cannot independently trigger the bar, although they may be relevant to determining whether a judicial action is being diligently prosecuted. In the context of consent decrees, the court held that they, at least in some circumstances, can satisfy the present enforcement requirement because consent decrees are judicial orders subject to continuing court oversight.

"Sameness" Requirement

Perhaps most significantly, the court held that the emission standards and limitations at issue in the citizen suit must be the

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same as those enforced in the proffered governmental action. The court rejected the district court's application of the bar to claims that were merely "substantially similar" to those in the consent decrees.[6] The court rooted its holding in the plain language of the statute; by using the word "the" before "standard, limitation, or order," Congress made clear that the bar only applies when a citizen suit targets the very same standard or limitation already being enforced by the government.[7] In doing so, the Tenth Circuit expressly rejected the Third Circuit's interpretive methodology in *Group Against Smog & Pollution, Inc. (GASP) v. Shenango Inc.*,[8] which had declined to apply "a literal, inflexible, or grammatical interpretation" of the bar in favor of a more deferential, purpose-driven approach. While the standards at issue in *GASP* were ultimately the same, the Third Circuit's flexible methodology places greater emphasis on the objectives of the governmental enforcement action than on strict identity between the standards at issue, a result the Tenth Circuit's textual approach would not authorize.[9]

Guidance on Remand

While the court reversed on the sameness issue and remanded for the district court to apply the correct standard, it also provided guidance on the diligence inquiry. The court confirmed that diligent prosecution is presumed and that courts should be deferential in evaluating the EPA's enforcement strategy.[10] Moreover, while the Tenth Circuit indicated that the district court's inquiry includes the administrative actions taken by Colorado and the EPA after the entry of the consent decrees, it further specified that the district court should grant appropriate weight to those actions that impose actual consequences for violating the consent decrees (like stipulated penalties), as opposed to merely threatening consequences, and that the district court should disregard entirely those actions that are unrelated to violations of the consent decrees.[11]

Key Takeaways

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The *GreenLatinos* decision may carry significant practical implications for companies operating under existing consent decrees and those facing potential citizen suit exposure under the CAA:

- **Consent decrees do not provide blanket protection.** Companies that have historically relied on government consent decrees to insulate themselves from citizen suit liability should reassess that assumption. Under the Tenth Circuit's framework, the diligent prosecution bar will only preclude citizen suits that seek to enforce the *same* standards or limitations contained in the consent decree — not related or similar ones. This means that any emission standard or regulatory requirement not specifically addressed in an existing consent decree remains fair game for citizen enforcement.
- **Companies should carefully evaluate the scope of consent decrees.** For companies negotiating consent decrees with the EPA or state agencies, *GreenLatinos* reinforces the importance of ensuring that the standards and limitations covered by the decree are drafted broadly. The narrower the consent decree's coverage, the greater the company's potential exposure is to citizen suits.
- **Administrative enforcement actions do not provide a defense.** Companies cannot rely on compliance orders, compliance advisories, or notices of violation — even those issued by the EPA — as a basis for invoking the diligent prosecution bar. Only a civil action pending in a judicial court qualifies. This is particularly important for companies that have engaged in cooperative administrative enforcement processes with state or federal regulators.
- **The bar is not a jurisdictional issue — meaning it can be waived.** Because the Tenth Circuit held that the diligent prosecution bar is not jurisdictional, a defendant's failure to timely raise the defense may result in a waiver. This means that the defense should be raised in a motion to dismiss under Rule 12(b)(6) or an answer if a motion to dismiss is not filed.

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- **A methodological divide has emerged among the circuits.** The Tenth Circuit held that the diligent prosecution bar applies only where the governmental action and citizen suit concern the same standard, limitation, or order. In doing so, it expressly rejected the Third Circuit's reasoning in *GASP*, which approached the bar through a more purpose-driven lens. Although the cases are factually distinguishable because *GASP* involved governmental enforcement of the same standards challenged in the citizen suit, the courts, nonetheless, adopted fundamentally different interpretive frameworks. As a result, future cases involving overlapping but not identical standards or limitations may produce different outcomes depending on the jurisdiction.

For more information about this decision and its potential implications for your business, please contact the authors or any member of our **Environmental** practice group.

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[1] No. 25-1243, 2026 WL 2220583, at *2 (10th Cir. Aug. 3, 2026) (pending publication).

[2] *Id.* at *2.

[3] *Id.* at *4.

[4] *Id.* at *5–6.

[5] 42 U.S.C. § 7604(b)(1)(B).

[6] *GreenLatinos*, 2026 WL 2220583, at *11.

[7] *Id.* at *10–11.

[8] 810 F.3d 116, 129 (3d Cir. 2016).

[9] The Ninth Circuit had previously adopted a similar textual approach to the sameness requirement but never directly addressed or rejected the Third Circuit's contrary reasoning. *See In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, 894 F.3d 1030, 1039 (9th Cir. 2018).

[10] *GreenLatinos*, 2026 WL 2220583, at *14.

[11] *Id.* at *14.

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