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Common Law Preclusion and Environmental Citizen Suits: Are Citizen Groups Losing Their Standing?

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COMMON LAW PRECLUSION AND ENVIRONMENTAL CITIZEN SUITS: ARE CITIZEN GROUPS LOSING THEIR STANDING?

ALEXIS E. APPLIGATE*

Abstract: The citizen suit provision of the Clean Air Act (CAA) gives standing to citizen groups to bring suits against private actors for violations of the Act. Congress and the courts have established limitations on a citizen's ability to bring a claim. These include notification of intent to file, a bar when the EPA or state has already "commenced and is diligently prosecuting" an action, or where the claim is barred by common law preclusion doctrines. In a divided decision, the Tenth Circuit held that the doctrine of issue preclusion barred the filing of a CAA citizen suit in *Sierra Club v. Two Elk Generation Partners*. The court found that the Sierra Club, the citizen group, was barred from filing a claim even though it was not a party to the previous administrative action. Through an expansive interpretation of the *parens patriae* doctrine, the Tenth Circuit circumvented the true purpose of the CAA's citizen suit provision.

INTRODUCTION

The citizen protests of the sixties and seventies spawned an environmental movement that spurred Congress to create an enforcement scheme that included a role for citizens.¹ Congress included these enforcement mechanisms in virtually all major federal environmental statutes.² Citizen suits supplement government enforcement by having the citizen act as a private attorney general and ensure effective implementation of environmental statutes.³ These citizen suit provisions give legal standing to individuals and citizen groups to bring suit against

* Staff Writer, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW, 2011-12.

¹ See DANIEL RIESEL, ENVIRONMENTAL ENFORCEMENT: CIVIL AND CRIMINAL § 15.02[1] (2011).

² *Id.* § 15.02[2].

³ *Id.* § 15.02[1]; see *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987) (interpreting the Clean Water Act (CWA) citizen suit provision as a way to supplement government action).

federal and state agencies as well as private actors who violate provisions of the statute.⁴

Like many citizen suit provisions, the Clean Air Act (CAA) provision includes limitations on a person's ability to bring a claim.⁵ For example, the CAA precludes a citizen from filing a suit if the "[s]tate has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance" with the statute.⁶ Several courts have also gone outside the language of the statute and applied the common law doctrines of issue and claim preclusion to the filing of citizen suits.⁷

Recently, a divided Tenth Circuit affirmed the dismissal of a CAA citizen suit based on the doctrine of issue preclusion.⁸ In *Sierra Club v. Two Elk Generation Partners* the court held that the Sierra Club could not file suit against a private party to enforce the provisions of a CAA permit.⁹ The court first determined that the CAA citizen suit commencement bar was not the only manner in which a citizen suit could be precluded.¹⁰ The court held that a previous state court decision pertaining to one of the permit provisions precluded the filing of the citizen suit when all elements of issue preclusion were satisfied.¹¹

The majority then reviewed the preclusive effect of decisions regarding the permit by the Wyoming Environmental Quality Council (Council).¹² The Tenth Circuit utilized an expansive interpretation of the *parens patriae* doctrine to establish privity between the state environmental agency and the Sierra Club, who was not a party in the administrative proceeding before the Council.¹³ With privity established and the other factors of issue preclusion satisfied, the majority pre-

⁴ 42 U.S.C. § 7604 (2006); see RIESEL, *supra* note 1, § 15.02[1]; Will Reisinger et al., *Environmental Enforcement and the Limits of Cooperative Federalism: Will Courts Allow Citizen Suits to Pick Up the Slack?*, 20 DUKE ENVTL. L. & POL'Y F. 1, 2-3 (2010).

⁵ See RIESEL, *supra* note 1, § 15.02[2][b] (citing 42 U.S.C. § 7604(b)).

⁶ 42 U.S.C. § 7604(b)(1)(B).

⁷ See, e.g., *Sierra Club v. Two Elk Generation Partners*, 646 F.3d 1258 (10th Cir. 2011) (finding a CAA citizen suit action precluded under the common law doctrine of issue preclusion); *Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewerage Dist.*, 382 F.3d 743 (7th Cir. 2004) (considering the doctrine of claim preclusion in a CWA citizen suit action); *EPA v. City of Green Forest*, 921 F.2d 1394 (8th Cir. 1990) (finding that the doctrines of claim and issue preclusion precluded citizens from filing a CWA action).

⁸ *Two Elk*, 646 F.3d at 1260-61.

⁹ *Id.*

¹⁰ *Id.* at 1263-64.

¹¹ *Id.* at 1264-66.

¹² *Id.* at 1266-70.

¹³ See *id.* at 1267-70.

cluded the Sierra Club from filing this portion of the suit as well.¹⁴ The majority and dissent's conflicting interpretations of the same case law discussing citizen suits, privity, and the doctrines of issue preclusion and *parens patriae* display the unsettled nature of the law.¹⁵ Despite this uncertainty, the majority decision may lead many state actions to preclude citizen suits in the future.

This Comment argues that the majority in *Two Elk* misapplied its own test for privity and misinterpreted the tests of other courts.¹⁶ The Tenth Circuit's expansion of the doctrine of *parens patriae* allows the court to extend the application of privity beyond its proper bounds.¹⁷ In order to avoid sidestepping the CAA citizen suit provision, a state must articulate that it is acting on behalf of its citizens to protect particular "quasi-sovereign" interests.¹⁸ And, the state must have diligently prosecuted the previous action to ensure the citizens' interests were adequately represented.¹⁹ Without these limitations on privity, citizen enforcement actions are at risk of being precluded in every instance that a state appears as a party.²⁰

I. FACTS AND PROCEDURAL HISTORY

The decision in this case followed an intricate path through administrative and court proceedings at both the state and federal levels.²¹ In 1996, Two Elk Generation Partners (Two Elk) applied for a CAA Prevention of Significant Deterioration (PSD) permit with the Wyoming Department of Environmental Quality (DEQ) to construct a coal-fired power plant.²² In February 1998, DEQ issued the first version of the permit.²³ After two years without any construction on the power plant, DEQ issued a revised permit requiring Two Elk to begin construction by February 2002.²⁴

¹⁴ *Two Elk*, 643 F.3d at 1269–70.

¹⁵ Compare *id.* at 1264–70, with *id.* at 1273–80 (Lucero, J., dissenting).

¹⁶ See *infra* notes 81–132.

¹⁷ See *infra* notes 125–132.

¹⁸ See *infra* notes 103–112.

¹⁹ See *infra* notes 117–132.

²⁰ See *Two Elk*, 643 F.3d at 1275 (Lucerno, J., dissenting).

²¹ See *Sierra Club v. Two Elk Generation Partners*, 646 F.3d 1258, 1261–63 (10th Cir. 2011).

²² *Id.* at 1260–61. Pursuant to Wyoming's air quality regulations, the Wyoming DEQ issues PSD permits to new and modified major sources of air pollution which provide specific requirements for the emitter. See *id.*

²³ *Id.* at 1261.

²⁴ *Id.* Two Elk later received an extension on this permit until August of 2002. *Id.*

In September 2002, DEQ invalidated the revised permit due to Two Elk's failure to begin construction.²⁵ Pursuant to Wyoming administrative procedure, Two Elk appealed DEQ's decision to the Wyoming Environmental Quality Council (Council).²⁶ The parties entered into a joint stipulation that resulted in the final iteration of the permit.²⁷ This version of the permit, which the Council approved on May 29, 2003, required Two Elk to begin construction on the power plant by May 29, 2005 and not halt construction for any period of time longer than twenty-four months.²⁸ On July 18, 2005, the Council issued its order (2005 Order) finding that Two Elk had begun construction pursuant to the provision of the permit.²⁹ After issuance of the 2005 Order, the Council ended the case and terminated their jurisdiction over the matter.³⁰ On August 22, 2007, however, DEQ notified Two Elk via letter that the permit was again invalid due to Two Elk's discontinuation of construction on the plant for a period longer than twenty-four months.³¹ Two Elk appealed to the Council once again, and after providing confidential business information to DEQ, the parties reached a settlement agreement.³² After being presented with the parties' settlement agreement, the Council issued another order (2007 Order) approving the settlement and dismissing Two Elk's appeal.³³

Soon after the Council's 2007 dismissal, Sierra Club attempted to intervene in the Council's proceedings.³⁴ The Council dismissed Sierra Club's motion because it no longer had jurisdiction.³⁵ Simultaneously, Sierra Club filed suit in state court seeking review of the Council's 2007 Order.³⁶ They argued that no facts in the settlement agreement supported the determination that there was continuous construction.³⁷ On March 12, 2009, the court affirmed the 2007 Order, and Sierra Club appealed to the Wyoming Supreme Court.³⁸

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Two Elk*, 646 F.3d at 1261.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 1261-62.

³³ *Two Elk*, 646 F.3d at 1261-62.

³⁴ *Id.* at 1262.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* Sierra Club voluntarily withdrew this petition. *Id.*

While the state court decision was pending, Sierra Club filed an action in the United States District Court for the District of Wyoming pursuant to the citizen suit provision of the CAA.³⁹ Sierra Club asserted claims similar to those in their state court action.⁴⁰ The federal district court dismissed the complaint after determining that the Council's 2005 and 2007 Orders precluded Sierra Club's citizen suit.⁴¹ With slightly different reasoning, the Tenth Circuit affirmed the district court's holding that issue preclusion barred Sierra Club's citizen suit in federal court.⁴²

II. LEGAL BACKGROUND

Before determining whether state court or administrative decisions preclude a citizen suit action, courts have reviewed the commencement bar provisions of the relevant Acts.⁴³ The CAA's section 7604(b)(1)(B) bars a citizen suit if the government "has commenced and is diligently prosecuting" an enforcement action.⁴⁴ In addition, many courts have considered other manners in which a citizen suit may be precluded.⁴⁵

The full faith and credit statute requires that state court proceedings "have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken."⁴⁶ In *Sierra Club v. Two Elk Generation Partners*, the state court simply affirmed the decision of an administrative body.⁴⁷ Under federal and state precedent, an affirmance of an agency decision is entitled to preclusive effect.⁴⁸ In determining which

³⁹ *Two Elk*, 646 F.3d at 1262.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 1264.

⁴³ *See, e.g.*, *Sierra Club v. Two Elk Generation Partners*, 646 F.3d 1258, 1263–64 (10th Cir. 2011); *Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewerage Dist.*, 382 F.3d 743, 752 (7th Cir. 2004).

⁴⁴ 42 U.S.C. § 7604 (b)(1)(B) (2006).

⁴⁵ *See, e.g.*, *Two Elk*, 646 F.3d at 1263–64; *Ellis v. Gallatin Steel Co.*, 390 F.3d 461, 473–74 (6th Cir. 2004); *Friends*, 382 F.3d at 757–65; *EPA v. City of Green Forest*, 921 F.2d 1394, 1403–05 (8th Cir. 1990); *Wilder v. Thomas*, 854 F.2d 605, 616–21 (2nd Cir. 1988).

⁴⁶ 28 U.S.C. § 1738 (2006).

⁴⁷ 646 F.3d at 1262.

⁴⁸ *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 480 n.21 (1982); *Goodman v. Voss*, 248 P.3d 1120, 1126–27 (Wyo. 2011).

preclusion principles apply, the federal court must look to the preclusion law of the state where the decision was issued.⁴⁹

Similarly, the federal court also must determine whether state courts in that jurisdiction would give a state *administrative* decision preclusive effect.⁵⁰ Wyoming courts use a four-part test to determine whether a party is precluded from filing an action under the doctrine of issue preclusion:

- (1) whether the issue decided in the prior adjudication was identical with the issue presented in the present action;
- (2) whether the prior adjudication resulted in a judgment on the merits;
- (3) whether the party against whom [issue preclusion] is asserted was a party or in privity to the prior adjudication;
- and (4) whether the party against whom [issue preclusion] is asserted had a full and fair opportunity to litigate the issue in the prior proceeding.⁵¹

In *Slavens v. Board of County Commissioners*, the plaintiffs brought a wrongful termination suit in state court after foregoing their opportunity to appeal an administrative hearing decision on the same issue.⁵² The Wyoming Supreme Court determined that issue preclusion applied to “final adjudicative determinations by administrative tribunals.”⁵³ Therefore, after the court found that all four factors of the test were satisfied, it determined that the previous administrative proceeding precluded the state court action.⁵⁴

When evaluating the first element, the issue in the present action must be identical to either a previous court decision or a final administrative determination.⁵⁵ In *Slavens*, the first element was satisfied because the plaintiffs sought review of whether the county had wrongfully taken disciplinary action against them, which was the identical issue decided in the administrative proceeding.⁵⁶ Additionally, the second element was satisfied because the administrative hearing resulted in a

⁴⁹ *Brady v. UBS Fin. Servs., Inc.*, 538 F.3d 1319, 1327 (10th Cir. 2008) (quoting *Marse v. Am. Acad. of Orthopedic Surgeons*, 470 U.S. 373, 380 (1985)).

⁵⁰ *Brockman v. Wyo. Dep’t of Family Servs.*, 342 F.3d 1159, 1165 (10th Cir. 2003) (citing *Univ. of Tenn. v. Elliott*, 478 U.S. 788, 799 (1986)).

⁵¹ *Id.* at 1166 (quoting *Kahrs v. Bd. of Trs. for Platte Cnty. Sch. Dist. No. 1,901 P.2d 404, 406* (Wyo. 1995)).

⁵² 854 P.2d 683,684–85 (Wyo. 1993).

⁵³ *Id.* at 685.

⁵⁴ *Id.* at 686.

⁵⁵ *Id.* at 685–86.

⁵⁶ *Id.*

judgment on the merits.⁵⁷ In *Slavens* and similar cases, the fact that the parties were identical in both proceedings satisfies the third element of the test for issue preclusion.⁵⁸ When the parties are identical, the court can move to the fourth element and evaluate whether the previous proceeding was before an independent body that gave the parties a full and fair opportunity to litigate the issues.⁵⁹

If the parties are not identical between the two proceedings, a determination must be made as to whether a nonparty was in privity with the previous party.⁶⁰ In this instance, the federal court must look to state common law regarding privity.⁶¹ If no state law exists, the court must predict whether the state's highest court would find the parties in privity.⁶² The Wyoming Supreme Court follows federal precedent in analyzing privity.⁶³

When the party to the initial proceeding was a state and the nonparty a citizen group, courts have considered whether privity could be established when the state was acting in its *parens patriae* capacity.⁶⁴ The courts have recognized that states retain the right “to sue as *parens patriae* to prevent or repair harm to its ‘quasi-sovereign’ interests.”⁶⁵ As recognized in *Massachusetts v. EPA*, a state is entitled to “special solicitude” when it seeks to protect these quasi-sovereign interests.⁶⁶ *Parens patriae*, however, is only appropriate where the government articulates a quasi-sovereign interest apart from private interests.⁶⁷

Several courts have discussed the doctrine of *parens patriae* and its role in determining privity.⁶⁸ In *Satsky v. Paramount Communications*,

⁵⁷ *Id.*

⁵⁸ *Slavens*, 854 P.2d at 686.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Brockman v. Wyo. Dep’t of Family Servs.*, 342 F.3d 1159, 1165 (10th Cir. 2003).

⁶² *See TMJ Implants, Inc. v. Aetna, Inc.*, 498 F.3d 1175, 1180 (10th Cir. 2007).

⁶³ *Worman v. Carver*, 44 P.3d 82, 89 (Wyo. 2002).

⁶⁴ *See Two Elk*, 646 F.3d at 1268–69; *Satsky v. Paramount Commc’ns, Inc.*, 7 F.3d 1464, 1469 (10th Cir. 1993); *see also Friends*, 382 F.3d at 758–59 (7th Cir. 2004); *City of Green Forest*, 921 F.2d at 1403–04.

⁶⁵ *See Satsky*, 7 F.3d at 1469 (quoting *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 258 (1972)).

⁶⁶ 548 U.S. 497, 520 (2007). However, the Supreme Court has been somewhat unclear about what is encompassed within the definition of a quasi-sovereign interest. *See Satsky*, 7 F.3d at 1469.

⁶⁷ *See Satsky*, 7 F.3d at 1469 (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982)).

⁶⁸ *See Two Elk*, 646 F.3d at 1268–69; *Friends*, 382 F.3d at 758–59; *Satsky*, 7 F.3d at 1469; *City of Green Forest*, 921 F.2d at 1403–04.

Inc., the plaintiffs asserted a number of common law claims.⁶⁹ The Tenth Circuit reversed the lower court's finding that the plaintiff's claims were barred by a previous consent decree under the doctrine of claim preclusion.⁷⁰ The court found that there was no privity between the citizens and the state through the doctrine of *parens patriae* because the state had no standing to represent the citizens' private interests.⁷¹

In *EPA v. City of Green Forest*, appellants filed suit under the citizen suit provision of the Clean Water Act (CWA) against Tyson Foods and the City of Green Forest prior to EPA's filing its enforcement action.⁷² The Eighth Circuit Court of Appeals reasoned that "as a practical matter there was little left to be done" by the citizens once the EPA filed its enforcement action and settled with Tyson Foods.⁷³ Although the court described the use of *parens patriae* generally, it focused its reasoning on the "preeminent role that government actions must play in the CWA enforcement scheme" when deciding that there was no longer a need for the citizen suit.⁷⁴

In *Friends of Milwaukee's Rivers v. Milwaukee Metropolitan Sewerage District*, plaintiffs filed a citizen suit under the CWA for ongoing sewer discharges.⁷⁵ Wisconsin also filed suit against the sewerage district and reached a settlement.⁷⁶ The Seventh Circuit Court of Appeals agreed that privity between a state and citizen groups could be established when the state has the legal authority to represent citizen interests.⁷⁷ However, the court established a more stringent standard for such a determination.⁷⁸ The Seventh Circuit held that the citizen group could not be precluded if the state "failed to prosecute or defend the action with due diligence and reasonable prudence."⁷⁹ Privity can only be established if the judicial action sought by the State is "capable of requiring compliance with the Act and is calculated to do so."⁸⁰ The array

⁶⁹ 7 F.3d at 1467.

⁷⁰ *Id.* at 1466.

⁷¹ *See id.* at 1469.

⁷² 921 F.2d at 1397.

⁷³ *Id.* at 1404.

⁷⁴ *See id.*

⁷⁵ 382 F.3d at 748.

⁷⁶ *Id.*

⁷⁷ *Id.* at 758–59.

⁷⁸ *Sierra Club v. Two Elk Generation Partners*, 646 F.3d 1258, 1269 (10th Cir. 2011); *see Friends*, 382 F.3d at 759.

⁷⁹ *Friends*, 382 F.3d at 759 (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 42(1)(e) (1982)).

⁸⁰ *Id.* (internal quotation marks omitted).

of standards for the doctrine of *parens patriae* capacity and the creation of privity display the unsettled nature of the law.

III. ANALYSIS

In *Sierra Club v. Two Elk Generation Partners*, the Tenth Circuit Court of Appeals held that the citizen group, Sierra Club, could not file suit for enforcement of a CAA permit.⁸¹ The court first denied Sierra Club's argument that the CAA citizen suit commencement bar was the only way to preclude a citizen suit.⁸² The court next decided that a state court affirmance of the Wyoming Environmental Quality Council's (Council) 2007 Order pertaining to one of the permit provisions precluded the filing of the citizen suit on that provision.⁸³ The majority then held that the Council's 2005 Order that ruled on the other provision of the CAA permit precluded the filing of Sierra Club's citizen suit.⁸⁴

The court first reviewed the Wyoming state court's March 12, 2009 affirmance of the Council's 2007 Order regarding the second part of the CAA permit.⁸⁵ It determined that the judicial affirmance of the administrative decision should be treated as a final judicial determination entitled to preclusive effect under the full faith and credit statute.⁸⁶ The court recognized that under the full faith and credit statute the federal court is required to apply the preclusion law of the state where the decision was rendered.⁸⁷ The court evaluated the facts under Wyoming's four factors for establishing issue preclusion, and held that all four factors of the test were satisfied, thus precluding the litigation of the second provision of the permit.⁸⁸

⁸¹ 646 F.3d 1260–61 (10th Cir. 2011).

⁸² *Id.* at 1263–64. Although several courts have applied common law preclusion doctrines in CAA and CWA citizen suits, they have presumed that this is the proper application of the law of preclusion without any further analysis or discussion. *Id.* at 1272 n.1 (Lucerno, J., dissenting). “It is far from clear that common-law preemption survives 42 U.S.C. § 7604(b)(1)(B) intact.” *Id.* (citing Jeffrey G. Miller, *Theme and Variations in Statutory Preclusions Against Successive Environmental Enforcement Actions by EPA and Citizens*, 28 HARV. ENVTL. L. REV. 401, 416–25 (2004)).

⁸³ *Two Elk*, 646 F.3d. at 1264–66.

⁸⁴ *Id.* at 1266–72.

⁸⁵ *Id.* at 1264.

⁸⁶ *Id.* (citing 28 U.S.C. § 1738 (2006); *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 480 n.21 (1982); see *Goodman v. Voss*, 248 P.3d 1120, 1126–27 (Wyo. 2011)).

⁸⁷ *Two Elk*, 646 F.3d. at 1264 (quoting *Marrese v. Am. Acad. of Orthopedic Surgeons*, 470 U.S. 373, 380 (1985)) (citing 28 U.S.C. § 1738; *Brady v. UBS Fin. Servs., Inc.*, 538 F.3d 1319, 1327 (10th Cir. 2008)).

⁸⁸ *Id.* at 1264–66.

The court then turned to the Council's 2005 Order, which reviewed the first part of the CAA permit.⁸⁹ The Wyoming Supreme Court gives administrative decisions preclusive effect as long as the decision resulted from a review of disputed issues of fact in an adversarial proceeding.⁹⁰ After reasoning that Wyoming courts give preclusive effect to administrative agencies, the court determined that the Council's 2005 order could preclude Sierra Club's action.⁹¹

The court then evaluated Wyoming's four factors for issue preclusion.⁹² The issue decided in the Council's 2005 Order—whether Two Elk commenced construction by March 29, 2005—was identical to the issue presented by Sierra Club in its federal action.⁹³ According to the majority, the administrative proceedings before the Council resulted in a judgment on the merits, dismissal of the proceedings, and termination of the Council's jurisdiction over the matter.⁹⁴ In addition, the majority found that these administrative proceedings satisfied the fourth factor because they presented the parties with full and fair opportunity to litigate the issue.⁹⁵ Because Sierra Club was not a party to the previous proceedings, however, the more difficult question became whether the members of the citizen group were in privity with the DEQ, a state environmental agency.⁹⁶

In this case, the state environmental agency—under the majority's interpretation of *parens patriae*—represented the interests of all Wyoming citizens in the proceeding to enforce the CAA permit.⁹⁷ Therefore, the majority concluded that the DEQ and Sierra Club were representing the same citizen interests and were in privity with one another.⁹⁸ The majority reviewed the Tenth Circuit's decision in *Satsky v. Paramount Communications, Inc.*, to determine what is required to establish a *parens patriae* relationship between the state and its citizens.⁹⁹ Although the court in *Satsky* did not find that such a relationship existed under the facts of its case, it did note that *parens patriae* is only

⁸⁹ *Id.* at 1266.

⁹⁰ *Id.* at 1267 (citing *Elliott v. State*, 247 P.3d 501, 503 (Wyo. 2011)); *Slavens v. Bd. of Cnty. Comm'rs*, 854 P.2d 683, 685 (Wyo. 1993).

⁹¹ *Two Elk*, 646 F.3d at 1266–67.

⁹² *Id.* at 1267–70.

⁹³ *Id.* at 1267.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 1267–70.

⁹⁷ *Two Elk*, 646 F.3d at 1269–70.

⁹⁸ *Id.*

⁹⁹ *Id.* at 1268 (citing *Satsky v. Paramount Commc'ns, Inc.*, 7 F.3d 1464, 1469 (10th Cir. 1993)).

appropriate where the state or federal governments articulate the desire to protect a specific quasi-sovereign interest.¹⁰⁰ In the present case, the majority determined that privity was established under *parens patriae* despite the fact that the state agency never articulated its intent to protect a quasi-sovereign interest.¹⁰¹ Therefore, with all four factors satisfied, the majority found that the 2005 Order precluded Sierra Club from filing a federal citizen suit relating to its first provision of the CAA permit.¹⁰²

Although it is possible to establish privity between the government and a citizen group when the government is acting in its *parens patriae* capacity, the majority broadened the doctrine well beyond its own decision in *Satsky* as well as decisions from other courts.¹⁰³ As discussed by the Tenth Circuit in *Satsky*, a state must articulate a specific harm to its quasi-sovereign interests to maintain that it is acting in its *parens patriae* capacity.¹⁰⁴ It is clear that a state bringing an action to prevent the pollution of its air or waters is protecting a quasi-sovereign interest.¹⁰⁵ It is not clear, however, that the DEQ actually sought to protect a quasi-sovereign interest.¹⁰⁶ It merely defended a letter revoking a single permit provision for one site where construction had not been completed and then relinquished its right to sue through a settlement.¹⁰⁷

In addition, during its defense of the appeal before the Council, the DEQ never actually articulated that it was acting to protect the state's quasi-sovereign interest or that it was acting within its *parens patriae* capacity.¹⁰⁸ In fact, the DEQ was not even the party that brought the appeal before the Council.¹⁰⁹ It is also unclear whether the "special solicitude" normally afforded to Wyoming in a federal action should

¹⁰⁰ *Satsky*, 7 F.3d at 1469.

¹⁰¹ *Two Elk*, 646 F.3d at 1274–75 (Lucerno, J., dissenting).

¹⁰² *Id.* at 1269–70 (majority opinion).

¹⁰³ *Id.* at 1272 (Lucerno, J., dissenting); see *Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewerage Dist.*, 382 F.3d 743, 759 (7th Cir. 2004) (requiring a judicial action with diligent prosecution of the matter before it before preclusion law can apply); *Satsky*, 7 F.3d at 1469 (discussing that a state only acts within its *parens patriae* capacity when it articulates that it is protecting a quasi-sovereign interest and therefore representing all Wyoming citizens); *EPA v. City of Green Forest*, 921 F.2d 1394, 1404 (8th Cir. 1990) (describing *parens patriae* in a very general sense but applying a different reasoning for preclusion of a citizen suit).

¹⁰⁴ *Satsky*, 7 F.3d at 1469 (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel. Barez*, 458 U.S. 592, 607 (1982)).

¹⁰⁵ *Id.*

¹⁰⁶ See *Two Elk*, 646 F.3d at 1275 (Lucerno, J., dissenting); *Satsky*, 7 F.3d at 1469.

¹⁰⁷ See *Two Elk*, 646 F.3d at 1275 (Lucerno, J., dissenting).

¹⁰⁸ See *id.*

¹⁰⁹ *Id.* at 1275–76.

extend to this situation because the DEQ did not articulate a harm to Wyoming's quasi-sovereign interest.¹¹⁰ If this solicitude applied, a federal court would have to give preclusive effect to an administrative action that the state merely defended on appeal.¹¹¹ This takes *parens patriae* and the special solicitude afforded to states too far.¹¹²

Although the majority used precedent of other circuits to justify its findings,¹¹³ it misapplied these decisions to come to its conclusion.¹¹⁴ For example, the majority in the present case failed to note that the previous action in *Satsky* was before a federal court where the attorney general had claimed that he was acting on behalf of all of its citizens.¹¹⁵ In *EPA v. City of Green Forest*, the Eighth Circuit Court of Appeals discussed a broad standard for the doctrine of *parens patriae*, but it did not apply this standard and instead focused on the fact that there was little left to be done through the citizen suit after EPA's enforcement action.¹¹⁶

Of the privity analyses considered by the majority, the framework presented in *Friends of Milwaukee's Rivers v. Milwaukee Metropolitan Sewerage District* most adequately addresses the concerns of the state as well as those of Congress in their creation of citizen suit provisions.¹¹⁷ In that case, the Seventh Circuit Court of Appeals applied a stricter privity standard, which recognized that a third party cannot be precluded through privity when the representative party did not diligently prosecute the previous case.¹¹⁸ The court reviewed the language of the commencement bar of the statute to determine the meaning of "diligent prosecution."¹¹⁹ The court reasoned that a diligent prosecution is a judicial action that can achieve compliance with the statute and is "calculated to do so."¹²⁰

In reviewing the Seventh Circuit's framework, it is difficult to understand the broad interpretation applied by the majority in the present case.¹²¹ Even assuming that the Council's administrative proceed-

¹¹⁰ *See id.* (citing *Massachusetts v. EPA*, 549 U.S. 497, 518–20 (2007)).

¹¹¹ *Id.* at 1276.

¹¹² *See id.*

¹¹³ *Two Elk*, 646 F.3d at 1268–70.

¹¹⁴ *Id.* at 1275–79 (Lucerno, J., dissenting).

¹¹⁵ *Id.* at 1275–76.

¹¹⁶ 921 F.2d at 1404.

¹¹⁷ *See Two Elk*, 646 F.3d at 1277–79 (Lucerno, J., dissenting).

¹¹⁸ *See Friends*, 382 F.3d at 759.

¹¹⁹ *Id.*

¹²⁰ *Id.* (internal quotation marks omitted).

¹²¹ *Compare Two Elk*, 646 F.3d at 1269, *with Friends*, 382 F.3d at 759.

ing qualifies as a “judicial action” under the Seventh Circuit’s framework, there was never an actual prosecution of Two Elk before the Council.¹²² Instead, Two Elk appealed DEQ’s notification letter before the Council, which resulted in a settlement.¹²³ Sending a notification letter and relinquishing the right to sue is not a prosecution, much less a diligent one.¹²⁴

In addition to the misapplication of other federal courts’ *parens patriae* analyses, the majority decided not to apply the U.S. Supreme Court’s recent privity analysis in *Taylor v. Sturgell*.¹²⁵ The majority in the present case is correct that the Supreme Court did not specifically refer to the doctrine of *parens patriae* in its discussion of privity and virtual representation.¹²⁶ The Supreme Court, however, did discuss the possibility of establishing privity in limited circumstances such as class actions and suits brought by trustees, guardians, or other fiduciaries where the initial party “adequately represents” the interests of the nonparty.¹²⁷ The Court recognized the factors that must be considered in order to afford due process to the individuals being adequately represented.¹²⁸

A party’s representation of a nonparty is ‘adequate’ for preclusion purposes only if, at a minimum: (1) the interests of the nonparty and her representative are aligned¹²⁹ and (2) either the party understood herself to be acting in a representative capacity or the original court took care to protect the interests of the nonparty.¹³⁰

¹²² See *Two Elk*, 646 F.3d at 1279 (Lucerno, J., dissenting).

¹²³ *Id.* at 1261–62 (majority opinion).

¹²⁴ See *id.* at 1279 (Lucerno, J., dissenting). The Seventh Circuit even noted that a letter should not qualify as commencing or prosecuting an action. *Friends*, 382 F.3d at 756. Further supporting the Seventh Circuit’s narrower interpretation of *parens patriae* in *Friends*, is their recent decision in *Adkins v. VIM Recycling, Inc.* See 644 F.3d 483, 486, 496–507 (7th Cir. 2011). Although *Adkins* did not contemplate *parens patriae*, it did interpret two abstention doctrines very narrowly so as to allow a citizen suit to proceed. See *id.*

¹²⁵ See *Two Elk*, 646 F.3d at 1267–68 (discussing *Taylor v. Sturgell*, 553 U.S. 880 (2008)). Although the majority in *Two Elk* utilized federal precedent in its privity analysis, it claimed that the reasoning in *Taylor* should not be followed because the Wyoming Supreme Court did not adopt *Taylor* in its most recent privity decision. *Two Elk*, 646 F.3d at 1267–68 (citing *Elliott*, 247 P.3d at 503–04).

¹²⁶ *Two Elk*, 646 F.3d at 1267–68.

¹²⁷ *Taylor*, 553 U.S. at 894–95.

¹²⁸ *Id.* at 900–01.

¹²⁹ *Id.* at 900 (citing *Hansberry v. Lee*, 311 U.S. 32, 43 (1940)).

¹³⁰ *Id.* (citing *Richards v. Jefferson Cnty.*, 517 U.S. 793, 801–02 (1996)).

In *Two Elk*, DEQ did not articulate an understanding that they were acting in their representative capacity under the doctrine of *parens patriae*, and it is not clear that the interests of the state and the citizens were aligned.¹³¹ By adopting this expansive view of *parens patriae*, the majority in the present case seems to be extending the concept of privity beyond the bounds recognized by the Supreme Court.¹³²

CONCLUSION

The majority in *Sierra Club v. Two Elk Generation Partners* misapplied the Tenth Circuit's own test for privity as well as those of other courts through its relaxed use of the doctrine of *parens patriae*.¹³³ The Tenth Circuit expanded the doctrine of *parens patriae* to decide that a state agency represented the interests of all of the state's citizenry, thereby circumventing the true purpose of the CAA citizen suit provisions.¹³⁴ Congress created the citizen suit provisions to supplement and better ensure effective enforcement of the CAA, and the Tenth Circuit's decision failed to give effect to that end.¹³⁵

¹³¹ See *Two Elk*, 646 F.3d at 1275–76 (Lucerno, J., dissenting).

¹³² See *Taylor*, 553 U.S. at 904; *Two Elk*, 646 F.3d at 1276 (Lucerno, J., dissenting).

¹³³ See *supra* notes 113–132.

¹³⁴ See *supra* notes 103–112.

¹³⁵ See *supra* notes 1–7.