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PRIVATE ENFORCEMENT OF FEDERAL ANTI-POLLUTION LAWS THROUGH CITIZEN SUITS: A MODEL

DAVID ALLAN FELLER*

I. INTRODUCTION

At the time of their enactment, the Clean Water Act (CWA)¹ and the Clean Air Act (CAA)² were envisioned as statutory schemes permitting federal agencies and corps of local private attorneys general to work together to conserve and enhance the country's air and water resources through administrative actions and private citizen suits.³ Citizen suit enforcement has not reached its potential to compel compliance with anti-pollution laws. Many complex factors such as financing, sophisticated technology, standing, and discovery present formidable barriers to potential plaintiffs. The need to distribute enforcement responsibilities between the public and private sectors, however, remains undiminished. It is essential, therefore, that citizen suits assume a vital role in the protection of the nation's air and water resources.

As the concept of citizen suits evolved in the 1970's, private enforcement became the principal means for inducing the Environmental Protection Agency to take regulatory or prosecutorial action under anti-pollution laws.⁴ The incidence of reported private suits brought directly against polluters was relatively small in both number and effect; fewer than twenty-five suits were reported between 1970 and 1978 under the CWA and CAA.⁵ Despite the plan by Congress to create a broad-based enforcement scheme,⁶ the private sector never has emerged as an effective auxiliary to EPA's enforcement efforts.

The potential for private enforcement contributions expands and contracts with shifting political fortunes. For example, under the present federal

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1. 33 U.S.C. §§ 1251-1376 (1976 & Supp. V 1981).

2. 42 U.S.C. §§ 7601-7642 (1976 & Supp. V 1981).

3. 33 U.S.C. § 1365(a) (1976 & Supp. V 1981) (CWA's grant of authority to bring citizen suits). *See also* 42 U.S.C. § 7604 (Supp. V 1981) (similar enforcement mechanism in the CAA). For case law application of citizen suits under the CWA, *see City of Evansville v. Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008, 1014-17 (7th Cir. 1979).

4. *See Natural Resources Defense Council, Inc. v. Train*, 510 F.2d 692 (D.C. Cir. 1975) (suit to compel EPA promulgation of effluent limitation guidelines under the CWA).

5. Figure based on applicable statutes analyzed through LEXIS research system.

6. *See S. REP. NO. 414*, 92d Cong., 2d Sess. 79, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 3668. "The Committee has established a provision in the bill that would provide citizen participation in the enforcement of control requirements and regulations. . . ." *Id.* at 3745. *See also* Senate Debate on S. 4358, Sept. 21, 1970, *reprinted in* ENVIRONMENTAL POLICY DIVISION OF CONGRESSIONAL RESEARCH SERVICE, *A Legislative History of The Clean Air Amendments of 1970*, Vol. I (1974). "[C]itizens can be a useful instrument for detecting violations and bringing them to the attention of the enforcement agencies and courts alike." *Id.* at 280 n.35.

administration, EPA's enforcement programs have been substantially restructured because of agency budget reductions. Whereas the total EPA budget for fiscal year 1981 was approximately \$1.4 billion, the 1982 budget was only \$1.16 billion.⁷ During debate over the 1983 fiscal year budget, then EPA Director Anne Burford projected further reductions in agency spending to approximately \$975 million.⁸ It is estimated that these cuts have reduced the actual spending power of the EPA by sixty percent in 1983, taking into account present rates of inflation.⁹ The effects of this budget shrinkage are currently being felt. Agency staff has decreased from 10,381 employees to 8,340 for fiscal year 1983, and EPA staff enforcement attorneys have been cut from 200 to just 30.¹⁰

Budgetary pressure is not the only cause of the EPA's reduced enforcement of water and air quality laws; policy changes also influence enforcement activity. For example, Congress has directed the EPA to focus its attentions on the implementation of the Toxic Substances Control Act (TSCA)¹¹ and the Resource Conservation and Recovery Act (RCRA),¹² which will demand a substantial part of the EPA's enforcement capabilities for the next three years.¹³ The EPA has modified its enforcement policies in other areas. The agency will no longer pursue cases solely for civil money penalties.¹⁴ Thus, although polluters substantially violate a federal pollution standard or emissions permit, the EPA will not bring actions against them unless injunctive relief or cleanup steps are appropriate remedies.¹⁵ The result of these budgetary pressures and policy modifications is a reduced number of referral cases to the Department of Justice for enforcement proceedings. Approximately 100 cases were transferred to the Department of Justice for prosecution in the first eighteen months of the Reagan Administration.¹⁶

Vigorous enforcement of anti-pollution laws in the future will depend upon the initiative of private attorneys general. The purpose of this article is to reexamine the concept of the citizen suit and evaluate its use as an enforcement tool. This process will involve three steps: 1) consideration of the present law governing private suits against polluters; 2) discussion of the practical difficulties facing the development of a widespread private movement to enforce anti-pollution laws in the United States; and 3) examination of one source of potential citizen enforcement litigation in CWA violations.

7. *EPA Hard Hit By Budget Cuts*, SCI. MAG., Oct. 16, 1981, at 306.

8. *The 'Ice Queen' at EPA*, NEWSWEEK, Oct. 19, 1981, at 67-68.

9. *Pollution Is Our Most Important Product*, NATION, Nov. 7, 1981, at 473-75.

10. *E.P.A. Is Prodded Into Toxic Waste Rules*, 68 A.B.A. J. 250, 250 (1982).

11. 15 U.S.C. §§ 2601-2629 (1976 & Supp. V 1981).

12. 42 U.S.C. §§ 6901-6987 (1976 & Supp. V 1981).

13. Interview with James Heenahan, Enforcement Attorney, EPA Region III, in Philadelphia (Mar. 19, 1982) [hereinafter cited as Heenahan Interview]; see also SCI. MAG., *supra* note 7, at 306.

14. LEGAL TIMES OF WASHINGTON, Nov. 30, 1981, at 1, col. 2.

15. *Id.*

16. This figure is approximated from information derived from NEWSWEEK, *supra* note 8, at 67, and Washington Post, June 23, 1982, at A25, col. 3. As those articles reported, approximately 69 cases were referred to the Department of Justice from January 1981 through March 1982; 31 cases were referred from March to June 1982.

II. PROCEDURAL STRUCTURE OF CITIZEN SUITS

The CAA established the statutory model for citizen suit provisions in subsequent anti-pollution and substantive environmental protection statutes.¹⁷ These clauses provide liberal access to the courts and administrative agency resources. Generally, any person may bring a suit based on a violation of a federal pollution law, regulation, or permit issued under that law.¹⁸ By not requiring plaintiffs to allege an injury in fact to obtain standing, Congress hoped to recruit citizens to serve as private attorneys general to facilitate enforcement of statutes in the face of official inaction.¹⁹ An exception to this general standing rule was created in the CWA, which defines a citizen as a "person or persons *having an interest* which is or may be adversely affected."²⁰ Thus, standing to sue under the CWA is available to those persons who qualify as plaintiffs under the standing criteria established in *Sierra Club v. Morton*.²¹ Given the broad interpretation of *Sierra Club* applied in recent citizen suits decisions,²² this stricter standard for standing probably is not a significant impediment to private suits.

Jurisdiction over citizen suits is vested exclusively in the federal courts.²³ Parties are thereby spared the need to establish diversity of parties or a minimum claim for damages as required under 28 U.S.C. § 1292 or other jurisdictional statutes.²⁴ Of course, jurisdiction over citizen actions may be acquired through other laws such as the Administrative Procedure Act,²⁵ but, in general, violations of anti-pollution laws fall under the jurisdiction of the federal courts without resort to other statutes.

Notice requirements form the only limitation on the jurisdiction of the courts to entertain citizen suits. Under each statute allowing private enforcement actions, private plaintiffs must notify interested parties, the government of the state where the alleged violation occurred, and the EPA administrator of the contemplated action sixty days in advance of the suit's

17. 42 U.S.C. § 7604 (1976 & Supp. V 1981). *See also* 15 U.S.C. § 2619 (1976 & Supp. V 1981) (Toxic Substances Control Act); 16 U.S.C. § 1540(g)(1) (1976 & Supp. V 1981) (Endangered Species Act); 33 U.S.C. § 1515 (1976) (Deep Water Port Act); 42 U.S.C. § 4911 (1976) (Noise Control Act); 42 U.S.C. § 6305 (1976 & Supp. V 1981) (Energy Conservation Act).

18. *See, e.g.*, Metropolitan Washington Coalition for Clean Air v. District of Columbia, 511 F.2d 809, 814 (D.C. Cir. 1975) (general standing requirements relaxed for citizen suits).

19. *Id.*

20. 33 U.S.C. § 1365(g) (1976 & Supp. V 1981) (emphasis added).

21. 405 U.S. 727 (1972) (plaintiff required to allege facts showing he is adversely affected). *See* Natural Resources Defense Council, Inc. v. Train, 510 F.2d 692, 701 nn.47-8 (D.C. Cir. 1975); Loveladies Property Owners Ass'n v. Raab, 430 F. Supp. 276, 280 (D. N.J. 1975) (application of the *Sierra Club v. Morton* standing rule).

22. *See* O'Leary v. Moyer's Landfill, Inc., 523 F. Supp. 642 (E.D. Pa. 1981); Pymatuning Water Shed Citizens for a Hygienic Environment v. Eaton, 506 F. Supp. 902 (W.D. Pa. 1980) (suit to halt sewage discharges from municipal treatment plant).

23. *See, e.g.*, 42 U.S.C. § 7604(a) (1976 & Supp. V 1981) (CAA's liberal grant of federal jurisdiction). *See also* 33 U.S.C. § 1365(a) (1976 & Supp. V 1981). The CWA states that "district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard of limitation." *Id.*

24. 33 U.S.C. § 1356(a) (1976 & Supp. V 1981); 42 U.S.C. § 7604(a) (1976 & Supp. V 1981).

25. 5 U.S.C. §§ 701-706 (1976 & Supp. V 1981). *See* NRDC v. Callaway, 524 F.2d 79, 83 (2d Cir. 1975).

commencement in federal district court.²⁶ Notice provides the agency with an opportunity to seek abatement of the violation through administrative means.²⁷ In *NRDC v. Train*,²⁸ Judge Leventhal agreed that the notice section of the CWA's citizen suit provision was designed to give the EPA an opportunity to act on the alleged violation, and the court should therefore "stay its hand" when the administrator might be able to act informally and obviate the need for litigation.²⁹

The EPA has authority to influence the polluter in various ways. For example, under the CAA, the EPA administrator is empowered on the basis of information available to him, to give a violator thirty days to comply with the applicable standard.³⁰ If compliance is not achieved, the EPA may institute a civil suit or issue an administrative order to bring the pollution source into compliance.³¹ The threat of such administrative action or the administrative order itself may alleviate the pollution problem without further action.

Several exceptions to the sixty-day notice requirement are found in pollution legislation and case law. Where targets of enforcement are dischargers of hazardous substances, citizens may commence suit immediately; no deferral period is imposed where there is threat of public injury.³² Another exception to the notice requirement has been noted by at least two courts.

26. *See, e.g.*, 33 U.S.C. § 1365(b) (1976 & Supp. V 1981) (CWA's notice requirements for citizen suits). *Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor*, 619 F.2d 231, 243-44 (3d Cir. 1980) (60 day notice provisions were constructively satisfied).

27. *See, e.g.*, 42 U.S.C. § 7604(c) (1976 & Supp. V 1981). *See also* S. REP. NO. 1196, 91st Cong., 2d Sess. 35-6 (1970). The purpose of notifying the EPA of a potential suit against polluting parties was described by the Senate Committee which drafted the citizen suit clauses: "Government initiative in seeking enforcement under the Clean Air Act has been restrained. Authorizing citizens to bring suits for violations of standards should motivate governmental agencies charged with the responsibility to bring enforcement and abatement proceedings." *Id.*

28. 510 F.2d 692 (D.C. Cir. 1975) (a suit by private parties to compel the EPA to publish effluent regulations as required under the law). Subsequent cases involving private actions against polluters have upheld the notice requirement. Plaintiffs in *Pymatuning Water Shed Citizens v. Eaton*, 506 F. Supp. 902 (W.D. Pa. 1980), were allowed to maintain an action against the local municipal water treatment facilities which had failed to comply with their permit, only after a showing that plaintiffs had given 60 days notice of the action to the EPA and the Pennsylvania State Department of Environmental Resources. *Id.* at 907-08. Similarly, in *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981) the Supreme Court affirmed the denial of jurisdiction to fishing groups seeking damages and other remedies from local municipalities for alleged dumping of waste materials in violation of CWA. *Id.* at 22. The plaintiffs had failed to notify government agencies of the prospective suit, ignoring the 60 day prior notice requirement. *Id.* at 14. The Court emphasized that plaintiffs invoking the citizen suit provisions "first must comply with specified procedures." *Id.*

See also *Massachusetts v. United States Veterans Admin.*, 541 F.2d 119, 121-22 (1st Cir. 1976) (complaint for alleged CWA violations dismissed for failure to provide actual or constructive notice); *City of Highland Park v. Train*, 519 F.2d 681, 690 (7th Cir. 1975) (action brought pursuant to CAA failed to satisfy 60 day notice requirement).

After plaintiffs in *Metropolitan Washington Coalition for Clean Air v. District of Columbia*, 511 F.2d 809 (D.C. Cir. 1975) failed to provide 60 days notice of the suit, they filed an identical claim 60 days after the first unnoticed complaint in order to meet the requirements of the CAA. *Id.* at 814.

29. *Metropolitan Washington Coalition for Clean Air*, 511 F.2d at 814.

30. 42 U.S.C. § 7413(a)(1) (Supp. V 1981).

31. *Id.*

32. *See, e.g.*, Clean Water Act, 33 U.S.C. § 1365(b) (1976 & Supp. V 1980) (allowing immediate actions for violations involving toxic materials).

Where administrative action would be inadequate to provide relief from the violation alleged³³ or where the agency refuses to take any action against the polluter,³⁴ constructive notice of the suit will satisfy the statute. In effect, constructive notice allows plaintiffs to commence their suit prior to the passage of the sixty-day notice period.³⁵

In addition to encouraging the EPA to take administrative action where it would be beneficial to the public interest, notice of a citizen enforcement suit allows the agency to intervene in the proceeding.³⁶ The EPA has the statutory authority to intervene in any citizen action as a matter of right.³⁷ Agency intervention may have useful consequences for the plaintiffs' case. Parties violating emissions standards or discharging beyond their permitted levels are more inclined to cooperate with the EPA than with private plaintiffs during discovery proceedings or settlement negotiations. Another advantage of agency intervention is citizen access to EPA's extensive system of information on all permittees and discharging entities in the region.³⁸

The EPA is under no obligation, however, to intervene in suits against polluters initiated by citizens.³⁹ In fact, since it is the EPA's failure to obtain compliance with the relevant pollution standard which initially creates the need for citizen action, the agency may be reluctant to participate. Thus, despite notification of the suit, EPA may decide to entrust the private attorney general with responsibility for the enforcement action.

As stated in the amendments to the CAA, any person may commence a civil action on his own behalf against any person "alleged to be in violation of (A) an emission standard or limitation under this chapter or, (B) an order issued by the Administrator or State with respect to such a standard or limitation" ⁴⁰ Similar language is contained in other anti-pollution and environmental protection laws.⁴¹ The courts consistently require that plaintiffs show a violation of a clear cut standard issued under the pertinent anti-pollution law. For example, the defendants in *O'Leary v. Moyer's Landfill, Inc.*,⁴² were accused of recirculating hazardous leachate materials into their

33. See *Massachusetts v. United States Veterans Admin.*, 541 F.2d 119, 121 (1st Cir. 1976) (citing CWA's legislative history).

34. *National Resources Defense Council, Inc. v. Callaway*, 524 F.2d 79, 83 (2d Cir. 1975) (citing *Conservation Soc'y of S. Vt., Inc. v. Secretary of Transp.*, 508 F.2d 927 (2d Cir. 1974)).

35. See generally *supra* notes 33-34.

36. See, e.g., 42 U.S.C. § 7604(c) (1976 & Supp. V 1981).

37. See, e.g., 33 U.S.C. § 1365(c) (1976 & Supp. V 1981); 42 U.S.C. § 7604(c) (1976 & Supp. V 1981).

38. Interview with Thomas Voltaggio, Division Chief, EPA Region III Compliance Division, in Philadelphia (Mar. 19, 1982) [hereinafter cited as Voltaggio Interview]. See *Friends of the Earth v. Carey*, 535 F.2d 165 (2d Cir. 1976). In this case the Second Circuit declared that "the EPA's participation in a citizen enforcement suit is welcomed by the court, since the EPA, as the agency vested by Congress with important overall responsibilities related to the matter under consideration, possesses expertise which should enable it to make a major contribution." *Id.* at 173.

39. *Friends of the Earth v. Casey*, 535 F.2d 165, 173 (2d Cir. 1976); *Metropolitan Washington Coalition for Clean Air v. District of Columbia*, 511 F.2d 809, 814-15 (D.C. Cir. 1975).

40. 42 U.S.C. § 7604(a) (1976 & Supp. V 1981).

41. See, e.g., 42 U.S.C. § 4911(a) (1976 & Supp. V 1981) (Noise Control Act); 42 U.S.C. § 6972(a) (1976 & Supp. V 1981) (RCRA).

42. 523 F. Supp. 642 (E.D. Pa. 1981).

privately operated landfill, allowing some 100,000 to 200,000 gallons of the waste liquid to seep from the landfill into a nearby river every month. The landfill's state operating permit, issued pursuant to the CWA, proscribed the treatment of leachate near the fill, requiring instead that landfill operators transport the material to the municipal sewage treatment facility.⁴³ The finding of a clear violation of the defendant's permit sustained an order for the repair and cleanup of the landfill site.⁴⁴

A comparable suit against the North and South Shenango, Pennsylvania, municipal water treatment plant resulted in a court order to the defendants to rectify their plumbing problems. The treatment system had emitted sewage into the local river on numerous occasions.⁴⁵ The court found a clear violation of the plant's permit. Defendants' assertion that the underground sewage transport system was poorly constructed and negligently installed provided no defense to the permit violation.⁴⁶ Because the CWA required the treatment plant to utilize the "Best Practical Technology" (BPT) to meet its permit discharge requirements, the court's order mandated that a plan, to install the technology or repair the system, be submitted to the court within ninety days of the order.⁴⁷

The Seventh Circuit Court of Appeals further clarified the types of violations that are actionable under citizen suit provisions in *City of Evansville v. Kentucky Liquid Recycling, Inc.*⁴⁸ Plaintiffs brought suit claiming that defendants had discharged toxic chemicals into the sewage treatment system, thereby contaminating the Ohio River and the local water supply.⁴⁹ In addition to problems of insufficient notice and standing, which were addressed by the court, the Seventh Circuit found that plaintiffs had failed to raise a proper claim under the Act. Because plaintiffs had sought compensatory damages for past acts violating CWA guidelines,⁵⁰ the court held that the statute authorizing civil action against a party "alleged to be in violation" of effluent standards was not applicable.⁵¹ To the extent that plaintiffs alleged only past violations, the court lacked jurisdiction to hear the claim.

The *Evansville* plaintiffs failed to seek remedies satisfying the statute. Had they sought an injunction on the grounds that the defendants' past acts indicated a pattern of behavior that was likely to lead to future violations, the court may have granted relief. The parties in *O'Leary v. Moyer's Landfill, Inc.*,⁵² on the other hand, succeeded under similar facts, by showing that defendants' discharges in excess of the permitted levels had occurred on a regular basis in the past, and that defendants had taken no more than stop-gap measures to remedy the violations.⁵³ By showing that the violations

43. *Id.* at 651-53.

44. *Id.* at 659.

45. *Pymatuning Water Shed*, 506 F. Supp. 902 (W.D. Pa. 1980).

46. *Id.* at 909.

47. *Id.*

48. 604 F.2d 1008 (7th Cir. 1979) (citizens suit brought under the CWA).

49. *Id.* at 1010.

50. *Id.* at 1014.

51. *Id.*

52. 523 F. Supp. 642 (E.D. Pa. 1981).

53. *Id.* at 652-53.

were likely to continue, plaintiffs provided the court with an adequate basis to grant injunctive relief.⁵⁴

III. REMEDIES AVAILABLE IN CITIZEN SUITS

Private enforcement actions provide a number of remedial options for pollution law violations. Injunctive relief is a common remedy awarded to successful plaintiffs in citizen enforcement actions. Private suits may enforce anti-pollution laws by obtaining court-ordered compliance with the applicable standard or limitation. This compliance order may take the form of prohibitory or mandatory injunctive relief.⁵⁵ Secondly, where appropriate remedies are not readily identifiable, the court may rely on its equitable authority to require a polluter to submit a plan describing the steps he will take to attain compliance with the standard violated.⁵⁶ This was the course taken by the court in *Pymatuning Water Shed*.⁵⁷ The technological problems involved in repairing defendant's water treatment facility plumbing were not sufficiently understood by the court that immediate compliance could be demanded; but the court did require, in cooperation with the state and the EPA, preparation of a plan for compliance within a reasonable time.⁵⁸

A third remedial category is civil penalty. Requests for civil penalties are not often granted, though they are appropriately requested under the CWA.⁵⁹ In many cases, courts consider that the penalty money would be more wisely invested in the effort to attain compliance rather than in punitive sanctions.⁶⁰ The judiciary may be reluctant to allow private citizens to bring cases seeking quasi-criminal sanctions in the form of civil fines for pollution violations. Although Congress sought to create private attorneys general under anti-pollution laws, the spirit of citizen enforcement actions casts plaintiffs in the role of protectors of their immediate environment, rather than in the role of society's corporate watchdogs.⁶¹ Pursuit of penalties against violators is more appropriate as an agency function.⁶²

Another reason for judicial unwillingness to award civil penalties is the statutory reservation to plaintiffs of private common law causes of action.⁶³

54. *Id.* at 659.

55. *See, e.g.*, 33 U.S.C. § 1365(a) (1976 & Supp. V 1981). *See also* National Resources Defense Council, Inc. v. Train, 510 F.2d 692 (D.C. Cir. 1975) (establishing timetable for defendants to comply with CAA).

56. *Pymatuning Water Shed*, 506 F. Supp. 902 (W.D. Pa. 1980); *see supra* text accompanying notes 45-47.

57. 506 F. Supp. 902 (W.D. Pa. 1980).

58. *Id.* at 909.

59. 33 U.S.C. § 1365(a) (1976 & Supp. V 1981).

60. *See O'Leary*, 523 F. Supp. at 659.

61. Voltaggio Interview, *supra* note 38.

62. *Id.*

63. Citizen suit provisions in CWA and CAA create no implied private cause of action as has been held to exist in other federal statutes. *See generally* Cort v. Ash, 422 U.S. 66 (1975). Implied actions were discussed by the Court in *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1982). The structure of the CWR and its "legislative history both lead us to conclude that Congress intended that private remedies in addition to those expressly provided should not be implied. Where, as here, Congress has made clear that implied private actions are not contemplated, the courts are not authorized to ignore this legislative judgment." *Id.* at 18. Citizen suit clauses, however, do specifically reserve for plaintiffs any

Thus, citizens may pursue damages emanating from the violation in a separate action. The availability to plaintiffs of these civil remedies may affect the inclination of courts to impose penalties on polluters.

IV. ATTORNEYS FEES

Although plaintiffs rarely recover damages under citizen suit enabling clauses, private attorneys general are eligible for attorneys fees. All citizen suit clauses in anti-pollution laws provide for the award of attorneys fees to "any party, whenever the court determines that such an award is appropriate."⁶⁴ Recent judicial discussion of attorneys fees clauses has affirmed the viability of fee awards before the courts.

In *Sierra Club v. Gorsuch*,⁶⁵ the Court of Appeals for the District of Columbia awarded attorneys fees to the Sierra Club and co-plaintiff Environmental Defense Fund (EDF), despite the fact that plaintiffs did not substantially prevail in their suit challenging regulations controlling sulfur dioxide and particulate emissions, promulgated by the EPA under the CAA.⁶⁶ In its two-pronged analysis the court first considered whether the questions raised by plaintiffs in the course of the suit were significant. Second, the court evaluated whether the plaintiffs substantially assisted the court in its consideration of the important questions raised.⁶⁷ The controversy before the court also presented the first major judicial review of the rulemaking procedures adopted in the 1977 amendments to the CAA.⁶⁸

At trial, plaintiffs had alerted the court to several crucial issues regarding EPA's rulemaking procedure for the challenged rule.⁶⁹ In addition, counsel for the EDF and the Sierra Club compiled extensive legislative history and factual background for the specific amendments under review, not only enriching the court's understanding of the issues but also saving the court time in its deliberations.⁷⁰ The award of fees was justified by the court on the grounds that the plaintiffs did substantially contribute to the goals of the Act:

the issues they addressed were important, complex and novel; their assistance in the resolution of the issues was substantial and not duplicative of the efforts of other parties; and the caliber of their written and oral presentations was exemplary. While the occasions upon which non-prevailing parties will meet such criteria may be exceptional [cite omitted], *Sierra Club* is such an occasion.⁷¹

Contrary to the general rule that parties bear their own litigation ex-

other common law actions they might have. *See, e.g.*, 33 U.S.C. § 1365(e) (1976 & Supp. V 1981).

64. *See, e.g.*, 33 U.S.C. § 1365(d) (1976 & Supp. V 1981); 42 U.S.C. § 7604(d) (1976 & Supp. V 1981).

65. 672 F.2d 33 (D.C. Cir. 1982), *cert. granted*, 103 S. Ct. 254 (1982).

66. 672 F.2d at 34.

67. *Id.* at 39-42.

68. *Id.* at 40.

69. *Id.* at 40-41.

70. *Id.* at 41.

71. *Id.* at 39.

penses regardless of the suit's outcome,⁷² the decision in *Sierra Club v. Gorsuch* is the latest in a line of cases that have established the principles of fee awards to parties who seek to enforce federal anti-pollution laws through private suits.⁷³ Because courts have recognized that awards of attorneys fees provide a major incentive for parties to undertake public interest litigation, it is not surprising that Congress voted to codify this socially utilitarian practice into environmental statutes.

The rationale for attorneys fees awards in citizen suits is not the reimbursement of the party "wronged" in the litigation.⁷⁴ Theoretically, whether a party prevails in a suit brought to enforce anti-pollution laws is inconsequential in determining the award of fees:

[T]he purposes of the authority to award fees are not only to discourage frivolous litigation, but also to encourage litigation which will assure *proper implementation and administration of the act* or otherwise serve the public interest. The committee did not intend that the court's discretion to award fees under this provision should be restricted to cases in which the party seeking fees was the "prevailing party." In fact, such amendment was expressly rejected by the committee, largely on the grounds set forth in *NRDC v. EPA*.⁷⁵

The phrase "proper implementation and administration of the act"⁷⁶ has been interpreted narrowly by the courts.⁷⁷ Only cases brought under the jurisdiction of the citizen suit clause itself may qualify for fee awards; suits brought to remedy actions illegal under the act, but nonetheless not included in those violations of effluent or emission standards or limitations, are subject to the historical prohibition against fee awards.⁷⁸ Thus, where suits are properly commenced to enforce emission standards or similar anti-pollution limitations under the laws which provide for citizen action, prevailing plaintiffs are entitled to receive fee awards from defendant polluters. Courts award fees or request parties to negotiate a proper fee settlement consistent with the terms of the act and subject to the approval of the court.⁷⁹

In *Alabama Power Co. v. Gorsuch*,⁸⁰ a companion case to *Sierra Club*, the court addressed, among other issues, whether environmental groups, which had intervened on behalf of the EPA, were entitled to an award of attorneys fees under the CAA.⁸¹ EPA opposed the award of attorneys fees, asserting

72. See generally *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975).

73. See, e.g., *Natural Resources Defense Council, Inc. v. EPA*, 484 F.2d 1331 (1st Cir. 1973); *Palila v. Hawaii Dep't of Natural Resources*, 512 F. Supp. 1006 (D. Haw. 1981); *Save Our Sound Fisheries Ass'n v. Callaway*, 429 F. Supp. 1136 (D. R.I. 1977); *Citizens Ass'n v. Washington*, 383 F. Supp. 136 (D. D.C. 1974), *rev'd on other grounds*, 535 F.2d 1318 (D.C. Cir. 1976).

74. See S. REP. NO. 414, 92d Cong., 2d Sess. 79, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 3668, 3747.

75. H. REP. NO. 294, 95th Cong. 1st Sess. 337, *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 1077, 1416 (emphasis added).

76. *Id.*

77. *Save Our Sound Fisheries Ass'n v. Callaway*, 429 F. Supp. 1136 (D. R.I. 1977).

78. *Id.* at 1141.

79. See, e.g., *Bymatuning Water Shed*, 506 F. Supp. at 909; *Sierra Club*, 672 F.2d at 42.

80. 672 F.2d 1 (D.C. Cir. 1982).

81. *Id.* at 4.

that the intervenors had duplicated the EPA's efforts. The court held that the Sierra Club and the Environmental Defense Fund in their role as intervenors had "not demonstrated with any sort of particularity that their intervention added in any essential way to EPA's stance on the issues involved,"⁸² and therefore, the court denied that portion of the award for attorneys fees associated with the environmental groups' intervention.

The calculation of attorneys fees has been standardized under most federal attorney fee shifting schemes.⁸³ To encourage competent attorneys to undertake public interest representation, the court must compensate attorneys sufficiently for the work they perform.⁸⁴ The measurement for computation of fees is a "reasonable hourly rate" multiplied by the number of hours expended on the law suit.⁸⁵ On its face this formula appears simple, but complications have surfaced in its application by the courts. Many courts have been unwilling to accept the actual number of hours spent on a case as the basis for calculating reasonable fees. The court in *Copeland v. Marshall*,⁸⁶ asserted that "no compensation is due for nonproductive time."⁸⁷ Thus, where multiple attorneys are assigned to duties that the court finds could have been handled by a single attorney, under *Copeland* the court would deny fees for those hours billed by the extra lawyers. Only the hours necessary for the task, in the court's estimation, would be compensable.

The hourly rate should be the prevailing rate in the community for similar work performed.⁸⁸ That rate is a product of the level of skill required by the suit, the importance or risk posed by the litigation, and the attorney's reputation and ability.⁸⁹ Although the hourly rate emerging from this calculus has consistently approached fair market value for the services of the attorneys in the case,⁹⁰ some courts tend to discount fee rates to public interest attorneys.⁹¹ These courts opine that attorneys who litigate public interest claims should not expect remuneration, but rather serve *pro bono* under their

82. *Id.* The court did, however, grant these environmental groups' attorneys fees in their role as petitioners and in the situation where the court specifically requested one of the intervenors to address an issue. *Id.*

83. See generally *Environmental Defense Fund v. EPA*, 672 F.2d 42 (D.C. Cir. 1982); *Lindy Bros. Builders, Inc. v. American Radiation and Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973). These cases measure attorneys' fees by market value. Cf. *Keith v. Volpe*, 501 F. Supp. 403 (C.D. Cal. 1980). The court calculated fees to prevailing plaintiffs based on market value, but added a 3.5 multiplier to compensate counsel for their meritorious services in a complex environmental case. *Id.* at 574-77.

84. *Copeland v. Marshall*, 641 F.2d 880, 889 (D.C. Cir. 1980) (award of attorneys' fees in a Title VII action). In *Environmental Defense Fund v. EPA*, 672 F.2d 42 (D.C. Cir. 1982), the Court of Appeals adopted the *Copeland* fee calculus in the environmental context.

85. *Copeland*, 641 F.2d at 891.

86. 641 F.2d 880.

87. *Id.* at 891.

88. See *Environmental Defense Fund v. EPA*, 672 F.2d at 50-61 (extensive discussion of fee awards calculation).

89. *Id.* at 52 (citing *Lindy Bros. Builders, Inc. v. American Radiation and Standard Sanitary Corp.*, 487 F.2d 161, 168 (3d Cir. 1973)).

90. See *Environmental Defense Fund v. EPA*, 672 F.2d at 58 n.11; *Keith v. Volpe*, 501 F. Supp. at 412-13.

91. See Berger, *Court Awarded Attorneys Fees: What is Reasonable?*, 126 U. PA. L. REV. 281, 310-11 (1977).

professional obligation to perform community service.⁹² Nevertheless, many courts utilize the formula set out in *Copeland*, instructing parties to develop a fee settlement based on those criteria.⁹³

Fee awards are also available to the alleged violators in environmental citizen suits where frivolous or bad faith claims are shown. Although actual awards of such fees have not been reported in any case, potential plaintiffs should be aware that fee awards are available to defendants under the standard "American Rule," which allows a court to make an award of fees to parties victimized by bad faith or frivolous claims.⁹⁴

It is noteworthy that while the prevailing standards for attorney fee awards are fairly liberal toward plaintiffs, the Supreme Court recently granted certiorari in *Sierra Club v. Gorsuch*.⁹⁵ The Court's pending scrutiny of *Sierra Club*'s "award where appropriate" analysis has raised speculation that attorneys fees may not be as broadly accepted by the Court on review.⁹⁶

The development of the law governing citizen suits to enforce anti-pollution laws has resulted in a favorable climate for litigation. Jurisdiction and standing limitations present no major restrictions on citizen suits,⁹⁷ providing plaintiffs meet rudimentary notice requirements. The major procedural impediment has been plaintiffs' strategic error in seeking personal damages instead of remedies to abate defendants' prohibited activity.⁹⁸ It is clear that causes of action created by environmental laws are for the public benefit; therefore, the selection of remedies should be tailored to that end in order to state a proper cause of action.

Recent court decisions regarding awards of attorneys fees encourage plaintiffs in citizen enforcement suits. The District of Columbia Circuit's adoption of the "substantial contribution" theory of awarding fees to public interest litigants,⁹⁹ would seem to indicate that prevailing plaintiffs, in particular, have a strong claim to fees because their suits generally will advance the purposes of the statute at issue. In addition, the language of *Sierra Club v. Gorsuch* suggests that in cases focusing on national policy issues, non-prevailing plaintiffs stand a better chance of obtaining some fees from successful defendants than do those plaintiffs in smaller, locally oriented cases.¹⁰⁰

92. *Id.* at 311. See, e.g., *Gilpin v. Kansas State High School Activities Ass'n*, 377 F. Supp. 1233, 1253 (D. Kan. 1974).

93. See, e.g., *Environmental Defense Fund v. EPA*, 672 F.2d at 50-61.

94. For an overview of the development of attorney fee awards in American law and the introduction of statutorily authorized awards, see *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975).

95. 672 F.2d at 33.

96. The Department of Justice argued in its petition for certiorari in *Sierra Club v. Gorsuch* that awards of attorneys fees to losing plaintiffs in suits against the government impose a major burden on government efforts, by encouraging "unproductive, expensive and time consuming litigation." Note, *Awards of Attorneys' Fees to Unsuccessful Environmental Litigants*, 96 HARV. L. REV. 677, 687 n.56 (1983) (quoting Petition for Certiorari at 8, *Sierra Club v. Gorsuch*, 672 F.2d 33 (D.C. Cir.), cert. granted, 103 S. Ct. 254 (1982).

97. The CWA contains a stricter standing requirement. See *supra* text accompanying notes 20-25.

98. See *supra* notes 48-54 and accompanying text.

99. See *supra* text accompanying notes 64-80.

100. *Sierra Club v. Gorsuch*, 672 F.2d at 39-40.

Because the basic legal landscape appears amenable to private enforcement of federal anti-pollution laws, the paucity of such actions must result from non-procedural factors.

V. THE SCARCITY OF CITIZEN SUITS

Examination of available case law suggests a number of reasons why citizen suits to enforce anti-pollution laws have been relatively scarce. Many violations are not readily apparent to the inhabitant of an area affected by illegal air and water pollution; violations do not often announce themselves in easily perceived forms. While some cases arise where citizens observe a visible change in the color or odor of a river, see a shift in the color or quality of industrial smokestack exhaust, or experience personal injury from contaminated drinking water or failing crops, most violations are not so evident. Nevertheless, inconspicuous deviations from emissions and discharge standards may have significant impacts on water and air quality.

A second reason for the rare use of private enforcement is the highly complex, scientific nature of many environmental regulations.¹⁰¹ Average citizens may not have the ability or willingness to engage in the educational process required to understand and effectively enforce environmental quality standards.

Even where lack of knowledge is no barrier to a citizen suit, economic disincentives may stifle the prospective plaintiffs' initiative. Actual costs of a suit vary with the facts of the case; however, in the simplest case, filing of charges and motions with the court, discovery efforts, and the assembly of expert witnesses requires some financial resources "up front." The expectation that plaintiffs may be reimbursed by the court through an award of fees does not remove the immediate burden of such expenses.¹⁰²

Other financial disincentives discourage citizen suits. Several citizens' suits to date have been brought in pursuit of compensation for personal injuries received allegedly from the illegal pollution caused by the defendant;¹⁰³ but, since private enforcement precludes recovery of damages, plaintiffs are deprived of a powerful, personal motive to sue. In addition, citizens must consider the economic risk of liability for defendants' attorneys fees. Though these awards are rare, the fear of having to pay one's adversary's legal costs may dissuade citizens from bringing suit.

Situations conducive to private enforcement action usually involve obvious regulatory violations resulting in public harm, such as a river foaming due to toxic discharges of a tanning company or the silting of a local creek by a coal mining operation. But such patent violations are also likely to be the subject of EPA or state enforcement actions. It is, therefore, arguable that a portion of citizen enforcement activity in the last decade has been preempted by some form of agency action.

101. See 40 C.F.R. §§ 129-36 (1982) (examples of the complex nature of chemical regulations).

102. Heenahan Interview, *supra* note 13.

103. See generally *City of Evansville v. Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008 (7th Cir. 1979); *Yates v. Coal Creek Co.*, 485 F. Supp. 995 (D. W.Va. 1980).

Agency action taken in the sixty-day notice period may also limit the number of citizen suits that actually reach the litigation stage. Because an agency letter or conference with the polluter often achieves corrective action,¹⁰⁴ citizen suits perform their intended role: to awaken government enforcement machinery.¹⁰⁵ Nevertheless, at the point where a citizen gives notice to the EPA of his intended suit, he may have expended considerable energy and resources. EPA action during the deferral stage renders those efforts non-compensable because fees are available only to litigants. Thus, citizens may be discouraged from bringing suits if they anticipate being preempted by agency action.

No one of these problems facing citizen plaintiffs may be cited as the primary cause for the scarcity of private enforcement actions. In combination, however, they present major barriers to the participation of private parties in the implementation of water and air quality statutes.

The remaining section of this paper proposes a model for citizen enforcement suits, focusing on the CWA as a potential arena for increased citizen suit participation.

VI. A MODEL FOR PRIVATE ATTORNEYS GENERAL ACTIONS

One of the major impediments to citizen participation in the enforcement of anti-pollution standards has been the difficulty, both perceived and real, of collecting sufficient factual evidence on which to base citizen enforcement suits.¹⁰⁶ Several factors contribute to this problem including the complexity of pollution standards, the specialized technology often required to discover violations of regulations, and the cost of acquiring data. During the initial years of anti-pollution legislation, citizens were on their own to collect necessary information; but as state and federal administration of those laws developed, a number of agencies have created substantial resource systems from which private citizens can draw information to support their enforcement efforts.¹⁰⁷

The machinery created for the administration of anti-pollution laws is illustrative of the government resources presently available to citizens. The EPA is divided into geographic regions, each administered by an office containing an enforcement division and a compliance division.¹⁰⁸ These regional offices are responsible for: 1) the collection of compliance data from all parties governed by federal pollution laws and regulations; 2) the coordination of the enforcement efforts of the state environmental programs with the region; and 3) the screening and development of desirable enforcement actions, which are forwarded to the EPA headquarters in Washington, D.C. for approval and reference to the Department of Justice.¹⁰⁹

104. Voltaggio Interview, *supra* note 38.

105. *Id.*

106. *Id.*

107. *Id.*

108. Interview with Anne Pyzick, Report Manager, EPA Region III NPDES Compliance Division, in Philadelphia (Mar. 19, 1982) [hereinafter cited as Pyzick Interview].

109. Voltaggio Interview, *supra* note 38.

Each region has developed its own reporting and compliance evaluation system,¹¹⁰ tailored to the needs of the federal jurisdiction in the area and the memoranda of agreement signed with the delegated states in the region. Delegated states have elected to accept primary responsibility for enforcement of water quality standards subject to EPA review.¹¹¹ These states issue permits to parties who are subject to emission and discharge regulations, collect monthly discharge reports from permittees, and seek compliance with limitations or standards through administrative or civil actions.¹¹² Delegated states must report to the EPA regional administration any compliance information as specified in the memorandum of agreement for that state. By contrast, in non-delegated states the EPA compiles all compliance information and carries out enforcement actions.¹¹³

EPA Region III offers a good example of a reporting system under the CWA. The principal reporting document is the National Pollutant Discharge Elimination System (NPDES) permit, which describes the specific limitations under which the permittee must operate.¹¹⁴ In order to ascertain whether those limitations are being complied with, the NPDES permit typically requires the permittee to file a monthly discharge monitoring report (DMR).¹¹⁵ The DMR requires three categories of information.

1) Permitted Discharge Levels. Each permittee is permitted to discharge amounts of various effluent matter, measured both by total volume of discharge and by the concentration of effluent in the water receiving the discharge. The limitations circumscribe safe levels of discharge of chemical compounds, total suspended solid materials, and other water quality measures such as water acid content, biochemical oxygen, and water color. The DMR also locates the permittee and the specific body of water receiving discharges.

2) Method of Discharge Analysis. As specified in the NPDES permit, effluent discharges are measured by the permittee utilizing various testing methods. Sampling is done one of two ways: "composite sample," a combination of individual samples taken at regular intervals proportional to the discharge flow rate, or in volumes proportional to the total flow; or a "grab sample," an individual sample taken to spot check the water quality and content. By multiplying the proportional content of the sample by the total flow, which is also a regulated quantity, a permittee computes total output levels of the effluents. Most effluent discharges are regulated by average as well as by minimum/maximum output level.

3) Actual Discharge Levels. These are the actual figures which describe the permittee's discharge activity for the reported month, the results of the permittee's mandatory sampling under the NPDES permit.¹¹⁶

110. Pyzick Interview, *supra* note 108.

111. *See, e.g.*, 33 U.S.C. §§ 1316-19 (1976 & Supp. V 1981).

112. Pyzick Interview, *supra* note 108.

113. *Id.*; *see supra* text accompanying notes 109-10.

114. 40 C.F.R. § 122.18 (1982) established reporting requirements under the CWA.

115. 40 C.F.R. § 122.7(j) (1982).

116. All information regarding DMRs was gathered through Freedom of Information Act requests. *See also* Pyzick Interview, *supra* note 108; interview with John Hundertmark, Engineer,

Immediately available to the public once filed with the regional office, DMRs are not difficult to interpret. Substantial violations by the permittee may be identified by comparing the discharge level reported with the permitted level of effluent output. The gravity of a violation, however, may be burdensome to estimate because a number of considerations qualify the importance of effluent discharges. For example, in some parts of the country it is more difficult for permittees to meet permit standards during the winter months than from June to October, owing to decreased water levels in most inland tributaries; effluent concentrations necessarily increase during such times, although the actual amounts discharged remain static.¹¹⁷ Many NPDES permits take these seasonal changes into account, dictating relaxed effluent limits during periods of low water flow.¹¹⁸

The Code of Federal Regulations requires that each regional office produce a quarterly noncompliance report (QNCR) which catalogues all instances of NPDES violations by major effluent sources in the region.¹¹⁹ Among the violations recorded in the QNCR are failures to submit DMRs, submission of inadequate DMRs, failures of municipal entities to meet secondary treatment construction schedules, and deviations beyond effluent discharge limitations.¹²⁰ The regulations, however, do not require the publication of all discharge violations, only those violations that the permittee has not remedied within forty five days from the DMR reporting date.¹²¹ Under most NPDES permits, the reporting date is twenty eight days after the end of each month.¹²² Permittees, therefore, have approximately ten weeks to correct discharge violations before risking publication. Some permittees try to avoid publication of violations in the QNCR by a series of excess discharges followed by corrective action within the forty-five day period. To prevent these cyclical violations, the regulations also require the publication of those violations which establish a pattern of noncompliance over the most recent four-month reporting period.¹²³

The availability of NPDES reports to private citizens is key to the effi-

Region III NPDES Permit Division in Philadelphia (Mar. 19, 1982) [hereinafter cited as Hundertmark Interview].

117. Heenahan Interview, *supra* note 13. For an example of seasonal effects on effluent concentrations in tributaries receiving discharges, see Discharge Monitoring Reports of the Hershey Chocolate Co., NPDES Permit No. Pa. 0008087 (Mar. 1982) (on file at the Denver Law Journal) (low seasonal flow creating temperature differentials of 10 degrees in excess of permitted levels).

118. *See, e.g.*, NPDES Permit of the City of St. Albans, NPDES Permit No. WV. 0023175, EPA, Region III, Philadelphia, Pa. (variance of organic nitrogen and ammonia nitrogen levels from June to October and November to May).

119. 40 C.F.R. § 122.18 (1982). EPA compiles a similar report on violations by non-major permittees which is published annually. 40 C.F.R. § 122.18(c) (1982).

120. *See, e.g.*, EPA Region III Quarterly Non-Compliance Report for Period Ending September 1981, EPA Region III, Philadelphia, Pa. (Dec. 1981) (on file at the Denver Law Journal).

121. 40 C.F.R. § 122.18(a)(2)(A) (1982). In addition to using DMRs and QNCRs to determine NPDES permit violators, citizens can retrieve discharge information from the EPA by filing a Freedom of Information Act request.

122. Pyzick Interview, *supra* note 108. *See also* NPDES Permit of Met Fin Co., NPDES Permit No. WV 0004596, EPA, Region III, Philadelphia, Pa. (on file at the Denver Law Journal).

123. 40 C.F.R. § 122.18(a)(2)(B) (1982).

cient use of citizen suits to enforce water pollution laws. First, the reports readily identify the sources of pollution, their locations, and the public waters affected by the effluent discharges.¹²⁴ Second, the DMRs filed by permittees clearly describe specific discharge activities.¹²⁵ If a permittee is exceeding his effluent limitations, one need only look to the results of the permittee's monitoring tests to verify the violations. The DMRs provide the EPA and private attorneys general with a *prima facie* case of illegal water pollution activity against the NPDES violator.¹²⁶ In addition, the quarterly and annual noncompliance reports indicate which violations have been targeted for compliance by informal or judicial administrative efforts.

Although the average QNCR in Region III contains more than 1500 discharge and reporting violations,¹²⁷ not all of the listed CWA violations are appropriate for citizen enforcement suits. Where agency enforcement action has commenced, private efforts would be duplicative. Moreover, many violations identified in the QNCR may not warrant the investment of litigation resources; citizen suits for small, inconsistent violations lack cost effectiveness. Thus, the dilemmas facing potential plaintiffs are numerous. If citizens are to accept increased responsibility for the enforcement of the CWA and other anti-pollution statutes in response to flagging EPA activities, a coherent litigation strategy must be developed.

Because relatively few citizen enforcement suits have been brought directly against polluters, successful litigation strategies have not been developed. One alternative is to examine the EPA's exercise of prosecutorial discretion in its case selection process. At a minimum, regional staff attorneys consider four factors to decide whether a violator should be prosecuted: degree of excursion from stipulated discharge limits, time over which the violations occurred, corrective action taken to bring the effluent source into compliance with the permit, and future corrective measures planned.¹²⁸

When evaluating degree of excursion from stipulated discharges, it is difficult to determine when effluent discharges constitute a significant enough excursion to support enforcement. Obviously, the limitations of the permit delineate acceptable emission levels within the regulation. Small deviations from the limitations may or may not have a major impact on the affected tributary. In addition, testing methods may provide ambivalent data on discharges, such as a permittee who reports being within his permitted maximum daily discharge, but far exceeds the allowable monthly discharge standard. In such cases the agency often has been unwilling to institute an administrative action;¹²⁹ however, the violation could support a private enforcement proceeding notwithstanding EPA's exercise of prosecutorial discretion.

The duration of a violative practice may raise the significance of an excursion to an actionable level. For example, a poultry processing plant

124. *See supra* text accompanying note 116.

125. *Id.*

126. Heenahan Interview, *supra* note 13; Voltaggio Interview, *supra* note 38.

127. Hundertmark Interview, *supra* note 116.

128. Heenahan Interview, *supra* note 13.

129. *Id.*

exceeding its Biological Oxygen Demand (BOD)¹³⁰ daily maximum limitation for eighteen consecutive months indicates disregard for the statutory requirements imposed by the CWA. The permittee may claim that his excursions are relatively small; but, if he fails to comply over a period of months, the permittee is a good candidate for enforcement proceedings. In contrast, many instances of noncompliance found in the QNCR are short term excursions¹³¹ caused by temporary equipment failures or seasonal variations, after which the permittee returns to compliant discharge levels.¹³² Because the statute does not provide citizens with a cause of action for past violations, one-time or infrequent violators technically would not be valid subjects for citizen actions.¹³³ Where it appears, however, that structural or technical infirmities of a permittee's pollution control system create the expectation of future violations, equitable remedies allow suit for injunctive relief. Expectations of continued excessive discharges must be measured by a consistent pattern of past violations, over a minimum period of three or four months.¹³⁴ Examination of violators' DMRs would supply data to determine the duration of violations.¹³⁵

Citizens should avoid bringing suits against polluters who are in the process of correcting problems in their discharge treatment equipment. This suggestion does not indicate that violators are able to avoid enforcement by promising corrective action when threatened with a suit, but rather that those permittees making good faith efforts to comply with their permits are not cost-effective subjects for citizen actions.

Since 1977, permittees under the CWA have been required to use the Best Practical Technology (BPT) in their efforts to reduce effluent discharges to acceptable levels.¹³⁶ Insuring that such technology is continually effective presents a problem in a number of industries; constant repair and modification is necessary to meet permitted discharge levels. During these repair periods, permittees report violations over which they exercise little control.¹³⁷

Some violations exceed permit limitations but, nevertheless, are difficult to enforce for policy or economic considerations. For example, a small company, which has conscientiously attempted to meet its NPDES discharge standards, spends perhaps \$2-3 million installing the Best Practical Technology but discovers that the technology fails to perform as needed. The company remains in violation of its permit. Because of its substantial expenditure on treatment equipment, the company rejects plans for corrective action in the immediate future. This situation, considered in light of

130. The BOD level is a quantification of the amount of oxygen necessary to maintain the ecological balance of the subject tributary. *See O'Leary v. Moyer's Landfill, Inc.*, 523 F. Supp. at 653 n.22.

131. *See supra* text accompanying notes 119-22.

132. Dates on which a permittee returns to compliance prior to publication also appear in the QNCR. 40 C.F.R. § 122.18(a)(1)(iv) (1982).

133. *See supra* text accompanying notes 48-54.

134. Heenahan Interview, *supra* note 13.

135. *See supra* text accompanying notes 115-17.

136. *See, e.g., Pymatuning Water Shed*, 506 F. Supp. at 909.

137. *See* NPDES Permit for the City of St. Albans and Pursuant Correspondence, *supra* note 118.

EPA's case selection criteria,¹³⁸ presents a potential cause of action. The likelihood that a court would grant any significant relief to claimants, however, is negligible. The company has, in fact, met its statutory burden of fitting BPT equipment. Although the system failed to achieve acceptable performance levels, the courts may deem equipment failure more a misfortune of the marketplace than a situation of the company's inattention to NPDES standards.¹³⁹ Consequently, private enforcement resources would not be wisely spent bringing suit against the company unless the alleged discharges had an environmental impact that overshadowed the benefits of continued plant operation. In enacting the CWA, Congress theoretically balanced these factors and decided that environmental protection was the predominant consideration; however, practical aspects of the laws' application will probably lead courts to deny any major form of relief where no immediate threat to public health exists.

Generally, municipal treatment facilities are good subjects for citizen enforcement actions. The crunch in local public funds of the mid-1970's caused many jurisdictions to become lax in the operation and maintenance of their treatment facilities. Many localities have been unable to construct water treatment facilities without the assistance of federal grant monies available through the CWA.¹⁴⁰ Because of these difficulties the EPA has been reluctant to initiate enforcement proceedings against jurisdictions that have not acquired federal grants. Although fiscal incapacity to attain compliance with NPDES standards is not a defense to a charge of failing to install BPT treatment facilities, the factor effectively reduces the court's options to construct an appropriate remedy. For this reason, EPA suits have focused on municipal violators that have the fiscal capacity to properly comply with effluent guidelines, or have rejected available funds.¹⁴¹

A private enforcement group created with the intent to implement a plan of action could be organized efficiently on a regional basis. First, regional enforcement groups could confront environmental problems where they frequently occur: at the interstate level. Local enforcement efforts aimed at large local pollution sources may be sufficient to halt various immediate point sources from further violations of the law, but fail to cleanup the entire stream where discharges were attributable to out-of-state points of emission. A regional structure also would effectively coordinate with EPA regional reporting and administrative systems. Where federal or state authorities in a region are active in cleaning up a particular water body, private resources could be channeled to complement enforcement efforts.

VII. CONCLUSIONS

To predict the success of large-scale efforts to enforce anti-pollution laws through a scheme of citizen suits would be highly speculative. The history of citizen suits brought directly against polluters provides little indication of

138. *See supra* text accompanying note 129.

139. Heenahan Interview, *supra* note 13.

140. 33 U.S.C. § 1256 (1976 & Supp. V 1981).

141. Hundertmark Interview, *supra* note 116.

how a continuous, organized program of litigation would fare as a public interest enterprise. The stage is set for a systematic attempt to privately enforce environmental statutes. The evolution of federal administrative machinery in support of those laws has created a store of discovery materials on which citizens may draw to identify and assemble cases. This is the cornerstone of any future private enforcement venture. The EPA reporting machinery facilitates selection of violations and significantly reduces the costs of discovery. The judiciary seems favorably disposed to the award of attorneys fees to plaintiffs bringing effective or useful citizen suits. Though it is impossible to state with any certainty that courts will allow all plaintiffs the full value of the fees and costs incurred in litigation, it is clear that courts are currently more willing to make such awards than at any time in the past. As a result, the financial deterrents are less threatening than in previous years.

These favorable mechanical factors create the opportunity for an effectively organized and conducted private enforcement group to operate. As federal enforcement efforts are directed away from the CAA and CWA, and the degradation of the environment becomes an expanding threat, the use of citizen suits to enforce anti-pollution laws becomes correspondingly more attractive and feasible.

