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Environmental Bounty Hunters: Reallocating Enforcement Authority Between Citizens and the Government Under the Clean Water Act

BY STEPHEN G. ALLEN*

The term "bounty hunter" conjures up images of the Old West and a dark, unscrupulous rider coming into town wearing muddy boots and a black hat and leading the horse of his unfortunate victim who is strapped across the saddle. He will shortly claim a reward for bringing this outlaw to justice. Few argued that the bounty hunters did not perform a useful function; however, it was difficult to appreciate these loathsome characters.

Today's environmental bounty hunters would be unrecognizable to their traditional counterparts. They wear paisley ties and suspenders. Their weapons are more civilized: twenty-five page complaints and motions for partial summary judgment rather than revolvers. They stalk the trendy restaurants of mid-town Manhattan and frequent watering holes in posh places on Washington's M Street. Despite these differences, they continue to bring violators to justice for a reward.

The bounty hunter may be a loathsome character but he is a cherished image of Americana. Much of the appeal of this

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image is in the symbols that it invokes — unbiased law enforcement for the public good.¹ The use of this image has, however, camouflaged a tremendous increase in regulation under the Clean Water Act² by suggesting that enforcement of regulations is separate from Congressional policy.³ However, the level of enforcement of the CWA is an integral part of the overall policy of the Act. Citizen litigation has thus evolved beyond mere enforcement.

Environmental policy and the path of environmental regulation in this country is not being set by our elected officials. Nor is it being formulated by the Environmental Protection Agency or any of the various state environmental authorities. Environmental policy under the Clean Water Act is today largely determined through enforcement by activist environmental interest groups through aggressive use of citizen suit enforcement procedures. Congress has given the citizen the power to enforce many environmental laws through statutes authorizing private law enforcement⁴ — a concept that has come to be known as the private attorney general.⁵

Under the current version of the CWA, the citizen suit is “the means of seeking a major — perhaps permanent — realignment of roles and powers in important areas of regulation. . . .”⁶

The legislative purpose⁷ of creating an effective remedy for the enforcement of the CWA is obstructed by uncertainty and inconsistency in citizen suit actions adjudicated without reference

¹ Garth, Nagel and Plager, *The Institution of the Private Attorney General: Perspectives From a Empirical Study of Class Action Litigation*, 61 S. CAL. L. REV. 353, 353-54, 395 (1988). The authors note that while the private attorney general concept (see *infra* notes 119-143 and accompanying text) stands out as a successful, progressive legal reform, it has been accompanied by a renewed crises in recent years. *Id.*

² Federal Water Pollution Control Act Amendments [Clean Water Act, CWA or Act], 33 U.S.C. §§ 1251-1376 (1982 & Supp. IV 1986).

³ Garth, Nagel and Plager, *supra* note 1, at 395.

⁴ Congress included citizen suit provisions in the Clean Air Act § 304, 42 U.S.C. § 7604(a)(1) (1982), the Noise Control Act of 1972 § 12, 42 U.S.C. § 4911(a)(1) (1982), the Endangered Species Act of 1973 § 11, 16 U.S.C. § 1540(g)(1) (1982), the Surface Mining Control and Reclamation Act of 1977 § 520, 30 U.S.C. § 1270(a)(1) (1982), and the Toxic Substances Control Act § 20, 15 U.S.C. § 2619(a)(1) (1982) and others.

⁵ See *infra* notes 119-143 and accompanying text.

⁶ Boyer and Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 BUFFALO L. REV. 833, 836-37 (1985).

⁷ See *infra* notes 65-69 and accompanying text.

to national goals and policies of regulatory authorities. Although this author is not advocating that the need for national uniformity is so strong as to warrant displacement of the citizen suit, the basic fairness and consistency of nationwide enforcement is threatened by the current approach to section 505⁸ of the CWA by citizen groups. Agency rulemaking to set minimum standards for citizen suit remedies is suggested as a possible compromise between aggressive private enforcement and the consistency so necessary to fulfill the goals of a nationwide policy of cleaner water.

Ultimately, Congress and the courts have responded to the perceived abuses and virtues of citizen enforcement. This Note will explore the citizen involvement in enforcement and the evolution of this shifting balance of power in light of the growth of the doctrine of the private attorney general, the 1987 Amendments to the CWA, and the landmark citizen suit case of *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*⁹

I. THE CLEAN WATER ACT — STATUTORY HISTORY AND FRAMEWORK

To appreciate how far citizen enforcement has come and the impact of the private attorney general concept, one must have a basic understanding of the Clean Water Act.¹⁰

A. Refuse Act

The federal role in water pollution control began with the Rivers and Harbors Appropriations Act of 1899 (Refuse Act).¹¹ Although primitively obsolete by today's regulatory standards, the Act prohibited the discharge into navigable waters of the United States of "any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing there from in a liquid state. . . ."¹² This early enforce-

⁸ Federal Water Pollution Control Act Amendments § 505, 33 U.S.C. § 1365; see *infra*, notes 58-108 and accompanying text.

⁹ 108 S. Ct. 376 (1987).

¹⁰ 33 U.S.C. §§ 1251-1376 (1982 and Supp. IV, 1986).

¹¹ Rivers and Harbors Appropriations Act of 1899 (Refuse Act), 30 Stat. 1151 (1899), 33 U.S.C. §§ 403, 407, 411 (1982). See generally Rodgers, *Industrial Water Pollution and The Refuse Act: A Second Chance for Water Quality*, 119 U. PA. L. REV. 761 (1971) (discussing the various requirements of the Clean Water Act).

¹² 33 U.S.C. § 407 (1982).

ment tool was held to impose a form of "strict liability" on violators which means no showing of intent or negligence was required for imposition of sanctions.¹³

The Refuse Act authorized "bounties" to informers who alerted the government to violators of the Act's restrictions on dumping refuse into navigable waters.¹⁴ These actions were on the common law *qui tam* actions. A *qui tam* action is defined as a "civil proceeding in which an informer sues for the government, as well as for himself, to recover a penalty under a particular statute."¹⁵ The informer was allowed to keep a portion of the amount recovered by the government.

In the early 1970s, citizens attempted to use the Refuse Act to sue for civil and criminal penalties.¹⁶ By this time, however, bounty hunting generally had fallen into disfavor. Courts ruled that only criminal actions were permitted under the statute and these must only be brought by United States Attorneys.¹⁷ Arguably, all industrial discharges were criminal violations under the Act before 1970 because no regulatory system permitting any level of pollution had been established.¹⁸

B. Federal Water Pollution Control Acts

Without repealing the Rivers and Harbors Act, the Congress passed the Federal Water Pollution Control Act (FWPCA) in 1948.¹⁹ The FWPCA was amended five times prior to 1972,²⁰

¹³ See *United States v. White Fuel Corp.*, 498 F.2d 619, 622-24 (1st Cir. 1974); Olds, Unkovic & Lewin, *Thoughts on the Role of Penalties in the Enforcement of the Clean Air and Clean Water Acts*, 17 DUQ. L. REV. 1 (1978-79).

¹⁴ 33 U.S.C. §§ 401-466n (1982).

¹⁵ *Sierra Club v. Andrus*, 610 F.2d 581, 591 n.17 (9th Cir. 1979); *Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517, 1522 (9th Cir. 1987). See generally Note, *The History and Development of Qui Tam*, 1972 WASH. U.L.Q. 81 (discussing the history of *qui tam* actions in both England and the United States).

¹⁶ *J. MacDonald & J. Conway, Environmental Litigation*, § 7.06, at 121 (1972). See also Note, *The Refuse Act of 1899: New Tasks for an Old Law*, 22 HASTINGS L.J. 782 (1971).

¹⁷ *United States v. Florida-Vanderbilt Dev. Corp.*, 326 F.Supp. 289 (S.D. Fla. 1971); *Guthrie v. Alabama By-Products Co.*, 328 F.Supp. 1140 (N.D. Ala. 1971); *J. MacDonald & J. Conway, supra* note 16, § 7.06, at 121.

¹⁸ Olds, Unkovic and Lewin, *supra* note 13, at 3.

¹⁹ Federal Water Pollution Control Act, 1948 [FWPCA], Pub. L. No. 80-845, ch. 750, 62 Stat. 1155 (1948) (codified as amended at 33 U.S.C. §§ 1251-1376 (1982 and Supp. IV, 1986)).

²⁰ Water Pollution Control Act Amendments of 1956, Pub. L. No. 84-660, ch. 518, 70 Stat. 498; Federal Water Pollution Control Act Amendments of 1961, Pub. L.

but federal involvement under the Act was generally limited to financial support for state programs and, later, a few largely ineffective enforcement efforts.²¹ Although the procedure for federal abatement and enforcement had been available under the FWPCA since 1948, only one judicial proceeding had been completed in 1972.²² Unlike the Refuse Act, Congress did not provide for citizen enforcement under the FWPCA. Rather, the primary responsibility of enforcing the Act was given to the states.²³

Riding a tide of strong environmental populism, Congress passed in 1972 what is now commonly known as the Clean Water Act which are really amendments to the FWPCA.²⁴ These amendments "took a vigorous new approach" to water pollution control.²⁵ Among the objectives of the new law was the restoration and maintenance of "the chemical, physical, and biological integrity of the Nation's waters."²⁶ The Clean Water Act, as amended, is a comprehensive regulatory program.²⁷

C. NPDES System

The heart of the Clean Water Act is its permit program regulating discharges of pollutants from point sources.²⁸ Congress wanted a simplified, straight-forward program for pollu-

No. 87-88, 75 Stat. 204; Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903; Clean Water Restoration Act of 1966, Pub. L. No. 89-753, 80 Stat. 1246; Water Quality Improvement Act of 1970, Pub. L. No. 91-224, 84 Stat. 91.

²¹ Robbins and Montgomery, *What Water Quality Lawyers Should Know About Water Law*, NAT. RESOURCES & ENV'T. 16 (Winter 1986).

²² S. REP. NO. 414, 92d Cong., 2d Sess. 5, reprinted in 1972 U.S. Code Cong. & Admin. News 3668, 3672. See generally Barry, *The Evolution of the Enforcement Provisions of the Federal Water Pollution Control Act: A Study of the Difficulty in Developing Effective Legislation*, 68 MICH. L. REV. 1103 (1970); Olds, Unkovic and Lewin, *supra* note 13, at 2-6.

²³ Olds, Unkovic & Lewin, *supra* note 13, at 2.

²⁴ Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 [FWPCAA], (codified as amended at 33 U.S.C. §§ 1251-1376 (1982 and Supp. IV, 1986)).

²⁵ Robbins and Montgomery, *supra* note 21, at 16.

²⁶ 33 U.S.C. § 1251(a) (1982).

²⁷ W. RODGERS, HANDBOOK ON ENVIRONMENTAL LAW § 4.2 (1977). There are five titles in the Act, articulating eight important policies including citizen participation and discouragement of red tape. *Id.* See 33 U.S.C. §§ 1251(e), (f) (1982).

²⁸ 33 U.S.C. § 1342 (1982). A point source is "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14)(1982). *Cf.* Lykins v. Westinghouse Electric Corp., 27 ENV'T. REP. (BNA) 1591, 1596 (E.D. Ky. 1988) (defendant Westinghouse charged with violating § 1311 of the Clean Water Act by discharging pollutants from a point source without a permit).

tion control, one that would involve little dispute as to whether a violation had been committed. To achieve the Act's goals, EPA was empowered to set national effluent limits that fixed the maximum lawful discharge of certain pollutants.²⁹ These limits are incorporated into the terms and conditions of a National Pollutant Discharge Elimination System (NPDES) permit required by the Act.³⁰ Ultimately, the system would become an absolutely critical weapon to the environmental plaintiff.

The permittee is required to monitor its effluent at regular intervals.³¹ Permittees are required to submit the results of their effluent tests to the EPA or other issuing agency at periodic intervals.³² This information is to be submitted on forms known as Discharge Monitoring Reports (DMRs).³³ DMRs thus indicate whether the permittee violated its permit limits during the reporting period.³⁴ These reports are available

²⁹ 33 U.S.C. § 1314 (b) (1982). An effluent limitation is defined to include "any restriction established by a State or the Administrator [of EPA] on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance." 33 U.S.C. § 1362(11)(1982). These limitations are most often expressed numerically, as for example the concentration of a discharged pollutant in milligrams per liter. For an explanation of effluent limitations, see 1 F. GRAD, *TREATISE ON ENVIRONMENTAL LAW* § 3.03 [4], 3-140 (1986).

³⁰ 40 C.F.R. § 122 (1987).

³¹ 33 U.S.C. § 1342; 40 C.F.R. § 122.41 (1987). The NPDES is the current codification of the old permit program begun by the Corps of Engineers under the Rivers and Harbors Act, ch. 425, § 13, 30 Stat. 1121, 1152 (1899) (current version at 33 U.S.C. §§ 407 and 411 (1982)). See Exec. Order No. 11,574, 3 C.F.R. 556 (1971), reprinted in 33 U.S.C. § 407 app. at 638-39 (1982).

³² 33 U.S.C. § 1342(a)(2) (1982).

³³ Niehaus, *Clean Water Act Permitting; The NPDES Program at Fifteen*, NAT. RESOURCES & ENV'T. 16, 19 (Winter 1987) ("[t]he permit . . . will include standard reporting requirements which compel the permittee to submit monthly discharge monitoring reports (DMR)").

³⁴ Many NPDES permit conditions are standardized boilerplate:

[P]ermit terms established by EPA require the permittee to mitigate violations which would adversely affect human health or the environment; to properly operate and maintain the treatment system; to allow EPA or its authorized representative to enter and inspect the facilities; to conduct monitoring representative of the regulated activity and keep complete records of the monitoring activities for three years; and to comply with the permit.

Id. permit holders are also required to report orally within 24 hours certain specified acts of non-compliance; (1) any exceedance which may endanger health or the environment; (2) any unanticipated bypass exceeding an effluent limitation; (3) any upset or incident in which there is unintentional and temporary noncompliance due to factors beyond the permittee's reasonable control, which exceeds an effluent limitation; and (4)

to the public.³⁵

A permit holder who exceeds an effluent limitation will be strictly liable³⁶ for such a violation, not unlike liability under the old Refuse Act.³⁷ Challenges to the accuracy of the submitted data in the DMRs by the permittee have typically been unsuccessful.³⁸ Good-faith errors in monitoring discharges and preparing DMRs are not totally foreclosed however.³⁹

A discharger who violates an established standard limitation or order in its NPDES permit is subject to enforcement under the CWA by the following:

- (1) the EPA, under section 309⁴⁰ or section 504⁴¹;
- (2) a state, where there exists with an approved pollutant discharge elimination system permit (SPDES), pursuant to sec-

any exceedance of a maximum daily discharge limitation. 40 C.F.R. § 122.41(1)(6) (1987). See also 40 C.F.R. § 122.41 (m)(1) (1987) (defining "bypass"); 40 C.F.R. § 122.41(n)(1) (1987) (defining "upset").

³⁵ 33 U.S.C. § 1318(b)(1982).

³⁶ Although "strictly liable" suggests tort liability, the CWA is similarly unforgiving by allowing the Administrator to begin enforcement action against "any person . . . in violation of any condition or limitation" of a valid NPDES permit without regard to negligence, proximate cause or intent. 33 U.S.C. § 1319(a)(1)(1982); Blomquist, *Rethinking the Citizen as Prosecutor Model of Environmental Enforcement Under the Clean Water Act: Some Overlooked Problems of Outcome-Independent Values*, 22 GA. L. REV. 337, 390 (1988).

³⁷ Connecticut Fund for the Env't v. Upjohn Co., 660 F. Supp. 1397, 1409 (D. Conn. 1987). "Under the FWPCA, compliance is a matter of strict liability and a defendant's intention to comply or good faith attempt to do so does not excuse a violation. . . ." *Id.* But cf. *Sierra Club v. Shell Oil Co.*, 817 F.2d 1169, 1174 (5th Cir. 1987), cert. denied, 108 S. Ct. 501 (1987) (holding that "occasional, minor discharges by the facilities in the face of permit compliance rates exceeding 95%" are "de minimis" and not the appropriate subject of a violation).

³⁸ *Sierra Club v. Union Oil Co.*, 813 F.2d 1480, 1491 (9th Cir. 1987); Connecticut Fund for the Env't. v. Upjohn Co., 660 F. Supp. 1397, 1416-17 (D. Conn. 1987) ("If an entity reports a pollution level in excess of the Permit limits, it is strictly liable, as congress has manifested an intention that the courts not reconsider the effluent discharge levels reported.").

³⁹ Price, *Private Enforcement of the Clean Water Act*, 1 NAT. RES. & ENV. 31, 60 (Winter 1986) (the author, the EPA's Assistant Administrator of Enforcement and Compliance Monitoring, suggests such errors "should be considered by a court when granting relief or imposing a penalty"); see also, Connecticut Fund for the Env't. v. Upjohn, 660 F. Supp. 1397, 1417, n.33 (leaving open the situation in which the DMRs' accuracy is alleged to result from clerical or typographical errors).

⁴⁰ 33 U.S.C. § 1319 (1982) (authorizing administrative orders, civil actions, criminal prosecutions, injunctive relief and civil penalties in civil action).

⁴¹ 33 U.S.C. § 1364 (granting the EPA Administrator or state equivalent the authority to seek emergency relief in cases of imminent and substantial endangerment).

tion 402⁴² and under relevant state laws; or
(3) any citizen, under section 505.⁴³

D. Relief Available Under the Clean Water Act

In the context of multiple enforcement opportunities,⁴⁴ it is important to understand what relief is available to the citizen against one who violates an effluent limitation.

Enforcement of the CWA is through a comprehensive regulatory program.⁴⁵ The primary vehicle to secure compliance under the act is the administrative order, or more often referred to as a "compliance order."⁴⁶ The enforcement authority has the option of bringing a civil action against the discharger if he does not comply with the compliance order or the enforcement authority may bring the civil action in lieu of the compliance order.⁴⁷

Criminal penalties are also available against any person "who negligently violates" the Act's requirements or permit conditions or limitations⁴⁸ or who knowingly makes false statements, representations or certifications in any application. False or misleading Discharge Monitoring Reports (DMR) or other document submitted to the regulatory authority may also result in criminal sanctions.⁴⁹ These are available only to government enforcement authorities.

Any person who violates the terms or conditions of his NPDES permit is subject to civil penalties.⁵⁰ Section 309(d) was

⁴² 33 U.S.C. § 1342(b) (1982) (allowing each state to administer its own permit program upon approval by EPA). See *Environmental Protection Agency v. California ex rel State Water Resources Control Bd.* 426 U.S. 200, 205 (1976) (violation of a discharge permit, whether issued by EPA or a state, is a violation of the Act and exposes the permit holder to liability under § 505 of the Act); 33 U.S.C. § 1342(k) (1982).

⁴³ 33 U.S.C. § 1365 (1982). See *infra* note 63-108 and accompanying text.

⁴⁴ See *supra* note 40.

⁴⁵ *Rodgers, supra* note 27, at § 4.21 (the CWA was strongly influenced by the earlier Clean Air Act). "As with the Clean Air Act, the emphasis is upon administrative remedies" and "suffers from many of its weaknesses." *Id.*

⁴⁶ 33 U.S.C. § 1319(a)(3) (1982).

⁴⁷ *Id.* at § 1319(a)(3), (b).

⁴⁸ 33 U.S.C. § 1319(c)(1) (1982). Criminal violations under the Act are punishable by fines of as much as "\$50,000 per day of violation, or by imprisonment for not more than two years, or by both." *Id.*

⁴⁹ *Id.* at § 1319(c)(2).

⁵⁰ Water Quality Act of 1987, Pub. L. No. 100-4, § 313, 1987 *U.S. Code Cong. & Admin. News* (101 Stat.) 7, 46-47 (codified as amended at 33 U.S.C. § 1319(d) (1982)). The 1987 Amendments to the CWA increased the per day civil penalty from \$10,000 to \$25,000.

amended in 1987 to increase the amount of the per-day civil penalty⁵¹ and allow multiple penalties per day for different permit limits such as different chemical parameters, monthly limits and daily limits.⁵² The amended section also specifies factors affecting the amount of the penalty such as seriousness of the violation, economic benefit received from not complying, history of previous violations, good faith efforts to comply and economic impact of the penalty on the discharger.⁵³ In what appears to be an effort to ameliorate the harshness of citizen suits for multiple violations, the amendments give the court the ability to reduce the amount of the penalty to a single violation in the event of a "single operational upset."⁵⁴

The EPA issued a penalty policy for its agency enforcement personnel in February 1984.⁵⁵ Many of the factors included in the policy were obviously incorporated into the 1987 Amendments.⁵⁶ The policy points out that the "first goal" of civil penalties is to deter people from violating the law.⁵⁷ The conflict between a legitimate deterrence policy intended by Congress and the resulting perception of unnecessarily punishing a violator have spawned many of the debates, commentary and litigation that resulted in the Court's *Gwaltney* decision.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ See *EPA Civil Penalty Policy*, [Federal Laws] 41 *Env't. Rep.* (BNA) 2991 (June 1, 1984); L. JORGENSEN & J. KIMMEL, *Environmental Citizen Suits: Confronting the Corporation* 12-13 (1988).

⁵⁶ The penalty policy included such factors as: (1) "[t]he amounts and types of costs a defendant has delayed paying," (2) "[t]he amounts and types of costs that a defendant was able to completely avoid by failing to comply," (3) "gains made by the violator in terms of the competitive advantage obtained through non-compliance," (4) "the size of the violator" and (5) his "ability . . . to pay a civil penalty." L. JORGENSEN & J. KIMMEL, *supra* note 55, at 12-13.

⁵⁷ *EPA Civil Penalty Policy*, *supra* note 55, at 2991-92.

Specifically, the penalty should persuade the violator to take precautions against falling into noncompliance again (specific deterrence) and dissuade others from violating the law (general deterrence). Successful deterrence is important because it provides the best protection for the environment. In addition, it reduces the resources necessary to administer the laws by addressing noncompliance before it occurs.

Id. Accord *United States v. T & S Brass and Bronze Works, Inc.* 681 F. Supp. 314 (D.S.C. 1988). The court here held the "[a]ssessment of the amount of a civil penalty is committed to the informed discretion of the Court" (citing *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 230 (1975) and *United States v. Phelps Dodge Industries, Inc.*, 589 F. Supp. 1340, 1362 (S.D.N.Y. 1984)). The Court went on to say it "should give effect to the major purpose of a civil penalty: deterrence." *Id.* at 322. *Accord* *United States v. Swingline, Inc.*, 371 F. Supp. 37, 47 (E.D.N.Y. 1974).

E. Citizen Suit Provision

The first citizen suit legislation was drafted by Professor Joseph L. Sax of the University of Michigan Law School for the West Michigan Environmental Action Council.⁵⁸ Impressed by Professor Sax's ideas for wide ranging citizen involvement in his book *Defending the Environment*,⁵⁹ the Council asked Sax to write a legislative reform measure for consideration by the Michigan legislature.⁶⁰ Professor Sax then authored the Model Natural Resources and Environmental Protection Act (MNRA) upon which a number of state statutes have been modeled.⁶¹ The Act significantly changed the status of citizen plaintiffs in environmental suits to overcome some traditional obstacles to private environmental actions: standing, primary jurisdiction and exhaustion of administrative remedies.⁶² It is unclear what effect this legislation had on the development of the citizen suit provisions that were being considered at that time for inclusion in the Clean Air Act, although it can be assumed that they were at least brought to the attention of federal legislatures.

The Clean Water Act explicitly authorizes citizens to bring suit to enforce any "effluent standard or limitation" against "any person . . . alleged to be in violation" or against the regulatory authority to require it to perform a mandatory duty under the Act.⁶³ The citizen suit provision was included in the

⁵⁸ DiMento, *Asking God to Solve Our Problems: Citizen Environmental Suit Legislation in the Western States*, 2 J. ENVTL. L. 169, 171 (1982).

⁵⁹ J. SAX, *DEFENDING THE ENVIRONMENT* (1971).

⁶⁰ DiMento, *supra* note 58, at 171.

⁶¹ *Id.* Versions of the MNRA or Sax Act had been passed in at least 10 states in 1982: California, Connecticut, Florida, Indiana, Massachusetts, Michigan, Minnesota, Nevada, New Jersey and South Dakota. *Id.* at Table A, 174-75.

⁶² *Id.* at 172. The Michigan act became law on October 1, 1970. *Id.* SEE MICH. COMP. LAWS ANN. §§ 691.1201-.1207 (Supp. 1973).

⁶³ 33 U.S.C. § 1365 (1982). Citizen Suits.

(a) Authorization; jurisdiction

Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf —

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the

Act for two principal reasons: (1) to encourage agency enforcement and (2) to help abate future violations CWA regulations and permit limits.⁶⁴

The first federal citizen suit provision was passed in the early 1970s when the Democratic Party held a majority in both houses of Congress and they were very distrustful of the enforcement intentions of the Republican administration.⁶⁵ This political climate "fostered strong Congressional interest in encouraging citizen participation in enforcement of federal environmental laws."⁶⁶ A truly novel section was added to the Clean Air Act, passed in 1970, that viewed the citizen as watchdog on the EPA — the citizen suit provision.⁶⁷ It seems as if the overriding intent

Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator. The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

(b) Notice

No action may be commenced —

(1) under subsection (a)(1) of this section —

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator, except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 1316 and 1317(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

(C) Venue; Intervention by Administrator; United States interests protected (1) Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting such standard or limitation may be brought under this section only in the judicial district in which such source is located. (2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

⁶⁴ Note, *Citizen Suits and Civil Penalties Under the Clean Water Act*, 85 MICH. L. REV. 1656, 1675-76 (June 1987); Village of Kaktovik v. Corps of Engineers, 12 Env't. Rep. Cas. (BNA) 1740 (D. Alaska 1978); Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp., 807 F.2d 1089, 1093 (1st Cir. 1986), cert. denied 108 S. Ct. 484 (1987).

⁶⁵ Blomquist, *supra* note 36, at 366.

⁶⁶ *Id.*

⁶⁷ *Id.* at 367; 42 U.S.C. § 7604(a) (1982).

of the section was to alert the government to a potential violation of the CWA and urge it to take action.⁶⁸ Congress even admitted its intent to "correct the Administration's lack of aggressiveness in implementing congressional requirements."⁶⁹

Congress adopted this policy at a time when the citizen as prosecutor, also known as the private attorney general was described a neutral social advocate, who would help establish even handed enforcement of the laws.⁷⁰ While the citizen suit provision has remained virtually unchanged, the naive and idealistic view of the citizen's motivations has collapsed.⁷¹

Section 505 of the CWA, unlike the Clean Air Act on which it was modeled,⁷² allows citizens to sue both for injunctive relief and civil penalties.⁷³ Although a successful citizen suit may extract civil penalties from a violator, these monies go to the United States Treasury⁷⁴ and *not* to the citizen plaintiff.⁷⁵ Al-

⁶⁸ Note, *supra* note 64, at 1667, n.59 ("[t]he constant emphasis [in the CWA's legislative history] . . . suggests that Congress thought governmental enforcement preferable"). The author goes on to quote the Conference Report on the FWPCA of 1972: "If the Administrator or a State begins a civil or criminal action on its own against an alleged polluter, no court action [can] take place on the citizen's suit." *Id.* (citing S. CONF. REP. NO. 1236, 92d Cong., 2d Sess. 145 (1972)).

⁶⁹ *Id.* (citing H. R. REP. NO. 1146, 91st Cong. 2d Sess., reprinted in 1970 U.S. CODE CONG. & ADMIN. NEWS 5356, 5360).

⁷⁰ See *infra* notes 126-28 and accompanying text.

⁷¹ See *infra* notes 132-34 and accompanying text.

⁷² Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (1970) [hereafter CAA], 42 U.S.C. §§ 7401-7642 (1982).

⁷³ Note, *supra* note 64, at 1656-57; W. ROGERS, *supra* note 27, at § 1.13; 33 U.S.C. § 1365(a) (1982).

⁷⁴ Babich and Hanson, *Opportunities for Environmental Enforcement and Cost Recovery by Local Governments and Citizen Organizations*, 18 ENVTL. L. REP. (ENVTL. L. INST.) 10165, 10171 (May 1988); *Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc.*, 108 S. Ct. 376, 379 (1987).

⁷⁵ The Supreme Court has clearly held that there is no private right of action for damages under the Clean Water Act. *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n.*, 453 U.S. 1, 15-18 (1981); see also *Sierra Club v. SCM Corp.*, 580 F. Supp. 862, 863 n.1 (W.D.N.Y. 1983) (no private right of action for damages; all fines accrue to the federal government), *aff'd*, 747 F.2d 99 (2d Cir. 1984); *City of Philadelphia v. Stepan Chemical Co.*, 544 F. Supp. 1135, 1145-46 (E.D. Pa. 1982) (same); *Lykins v. Westinghouse Electric Corp.*, 27 Env't. Rep. (BNA) 1590, 1596 (E.D. Ky. 1988) ("[C]learly, plaintiffs are prohibited from recovering general damages under FWPCA"); see generally Glicksman, *Federal Preemption and Private Legal Remedies for Pollution*, 134 U. PA. L. REV. 121 (1985) (discussing private rights of action under different environmental statutes). Recently, the Ninth Circuit Court of Appeals refused to imply a right of action under § 309(d) for a state government. *California v. U.S. Dept. of Navy*, 845 F.2d 222, 224-25 (1988) (State of California had attempted to subject a federal facility with a state-issued permit to civil penalty).

though private damages were not available, the goal was for "citizens to enforce the rights of the generally affected community rather than their own economic interests."⁷⁶ The drafters of citizen suit legislation suspected it would "be the rare, rather than the ordinary, person . . . [who] will initiate court action. . . ."⁷⁷

Citizens were to bring suits under section 505 as private attorneys general⁷⁸ rather than in a *qui tam* action.⁷⁹ The former concept has flourished in environmental statutes largely as a result of congressional displeasure with the level of enforcement achieved by EPA.⁸⁰ However, "citizen enforcement through the courts should be secondary to administrative enforcement by EPA."⁸¹ To this end, section 505 requires that a citizen plaintiff notify both the EPA and other regulatory authority (if there is an approved state program) and the alleged polluter at least sixty days before the suit is commenced.⁸² The commentators and the legislative history of the Act indicate the government was to use this time period to respond to the situation brought to its attention.⁸³ Although there has previously been a tremendous amount

⁷⁶ Galloway, *The Citizens' Suit: Its Purposes and Its Use*, 6 EASTERN MIN. L. INST. § 7A.01 (1985) (citing e.g. H.R. REP. NO. 218, 95th Cong., 1st Sess. 90 (1977)).

⁷⁷ *Hamker v. Diamond Shamrock Chem. Co.*, 756 F.2d 392, 396 (5th Cir. 1985) (citing 116 CONG. REC. 33104 (1970), remarks by Senator Hart about the citizen suit provision of the Clean Air Act).

⁷⁸ *Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517, 1522 (9th Cir. 1987); *Chesapeake Bay Foundation v. Bethlehem Steel Corp.*, 608 F. Supp. 440, 449 (D. Md. 1985).

⁷⁹ See *supra* note 15 and accompanying text.

⁸⁰ See *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 106 S. Ct. 3088, 3095-96 (1986); *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981) (noting congressional intent to provide for enforcement by "private attorneys general").

⁸¹ L. JORGENSEN AND J. KIMMEL, *supra* note 55, at 7 (citing *Hallstrom v. Tillamook*, 26 Env't. Rep. Cas. (BNA) 1809, 1810 (9th Cir. 1987); see *Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc.* 108 S. Ct. 376, 382-83 (1987) (citizen suits supplement the enforcement power of the EPA); accord *Sierra Club v. Chevron U.S.A.* at 1522.

⁸² 33 U.S.C. § 1365(b)(1)(A) (1982).

⁸³ Note, *Statute of Limitations for Citizen Suits Under the Clean Water Act*, 72 CORNELL L. REV. 195, 201 at n.42 (1986). The author observes that Senator Muskie explained the purpose of the notice provision was "that [the citizen] might trigger administrative action to get the relief that he might otherwise seek in the courts." *Id.* (citing 116 CONG. REC. 32,927 (1970)); see also *City of Highland Park v. Train*, 519 F.2d 681, 690-91 (7th Cir. 1975) ("Congress intended . . . citizens suits . . . [as a way] most likely to trigger governmental action. . ."). As a practical matter, the time required for EPA and the United States Justice Department bureaucracies to evaluate, prepare

of litigation over the effect of government enforcement actions,⁸⁴ the 1987 amendments and the recent *Gwaltney* decision promise to virtually eliminate this issue.⁸⁵

Although lawmakers generally perceive the citizen suit provision to be accomplishing its original goals,⁸⁶ the Ninety-ninth Congress has recently taken measures to limit the citizen suit impact under section 505, "responding to the perception that citizens might be abusing their authority to obtain penalties."⁸⁷ The EPA enforcement authority, however, was increased under the 1987 Amendments to the CWA.⁸⁸ Significantly, Congress required more government oversight over settlement agreements. Consent decrees between citizens and polluters now must be submitted to the Justice Department and EPA at least forty-five days before court approval.⁸⁹

and file an enforcement case after citizen suit notice is received is said generally to be much longer than 60 days. Babich and Hanson, *supra*, note 74, at 10171 n.74 (citing Miller, *Private Enforcement of Federal Pollution Control Laws, Part II*, 14 ENVTL. L. REP. (Envtl. L. Inst.) 10063, 10064 (1984)).

⁸⁴ 33 U.S.C. § 1365(b)(1)(B). Violation of the 60-day notice provision has spawned extensive litigation, with varying results; see generally *Sierra Club v. SCM Corp.*, 572 F. Supp. 828 (W.D.N.Y. 1983), *aff'd.*, 747 F.2d 99 (2d Cir. 1984); Miller, *Private Enforcement of Federal Pollution Control Laws, Part II*, 14 ENVTL. L. REP. (Envtl. L. Inst.) 10063-67 (Feb. 1984); Schwartz & Hackett, *Citizen Suits Against Private Industry Under the Clean Water Act*, 17 NAT. RESOURCES LAW 327, 345-48 (1984); Note, *supra* note 64, at n.104; Note, *Notice by Citizen Plaintiffs in Environmental Litigation*, 79 MICH. L. REV. 299 (1980).

⁸⁵ The 1987 amendments to the Clean Water Act changed the preemptive nature of government enforcement to allow certain types of administrative enforcement actions to preclude a citizen suit. Water Quality Act of 1987, § 314(a), 33 U.S.C. § 1319 (g)(6)(A) (Supp. V 1987). In fact, the new amendments allow EPA to assess administrative penalties without judicial process. *Gwaltney*, 108 S. Ct. at n.2. Prior to the 1987 amendments, the EPA had preemptively sued in the face of less than one percent of all CWA notices it received. Price, *supra* note 39, at 60.

⁸⁶ L. JORGENSON AND J. KIMMEL, *supra* note 55, at 1 (Congress recently stated that citizen suits "have deterred violators and achieved significant compliance gains") (citing S. REP. NO. 50, 99th Cong., 1st Sess. 28 (1985)). The Administrator of EPA expressed similar feelings in a 1984 memorandum to regional EPA officials: "EPA values the efforts of citizen groups to bring instances of noncompliance to our attention and to support EPA's efforts to reduce that noncompliance." *Id.* at 12.

⁸⁷ *Id.* at 3, *supra* note 55, at 3.

⁸⁸ *Id.* Through the reauthorization of the CWA, Congress increased the government's monitoring of litigation initiated under the citizen suit provision. *Id.* Congress also expanded the power of the EPA Administrator to assess penalties for each violation and for each day it exists. *Id.* Expanded penalty enforcement was intended to streamline the agency's enforcement procedures against violations that are "clearly documented and easily corrected and will likely be uncontested by the violator." S. REP. NO. 50, 99th Cong., 1st Sess. 27 (1985).

⁸⁹ Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 46 (1987), U.S. CODE

Prior to the 1987 Amendments, the only governmental action which could bar a citizen suit was that set out in section 505(b), which provided that no suit be commenced under section 505(a) if the Administrator or a state had "commenced" and was "diligently prosecuting a civil or criminal action in a court . . . to require compliance."⁹⁰ However, the recently amended section 505 allows certain administrative actions to preclude citizen suits.⁹¹

The legislative history of both the notice provision and the government enforcement preclusion provision strongly suggests that Congress included them principally to spur governmental enforcement action⁹² and to ensure that citizens and agencies would not pursue identical enforcement actions simultaneously.⁹³

CONG. & ADMIN. NEWS (101 Stat.) 7, 47-48 (to be codified at 33 U.S.C. § 1365(c)(3)) (Supp. V 1987).

⁹⁰ 33 U.S.C. § 1365(b)(1)(B) (1982). Probably the most litigated issue in the development of citizen's suits had been what effect government actions have under this section including such disputes as the definitions of "diligently prosecuting," "civil action," and "in court." The results of this extensive litigation have been mixed. Many courts read the language of the statute very narrowly and thus precluded few citizens suits. See *Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517, 1524-25 (9th Cir. 1987) (analyzing the conflicting circuits' opinions of whether administrative action is a bar to citizen's suits); *Friends of the Earth v. Consolidated Rail Corp.*, 768 F.2d 57 (2d Cir. 1985); *Student Public Interest Research Group v. Fritzsche, Dodge & Olcott Inc.*, 579 F. Supp. 1528, 1533-35 (D.N.J. 1984) (if agency action is the functional equivalent of "action in court", the citizen suit is barred); Note, *supra* note 64 at 1676-77 nn.104-110.

⁹¹ The 1987 Amendments changed the language of § 505(a) to read: "Except as provided in subsection (b) of this section and section 1319(g)(6). . ." Water Quality Act of 1987, 33 U.S.C. § 1365(a) (Supp. V 1987). § 1319 (g)(6), *as amended*, provides that any violation —

(ii) with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to *this subsection* . . . shall not be the subject of a civil penalty action under subsection (d) of this section or section 1321(b) of this title or section 1365 of this title.

"Any action under . . . this subsection" would refer to subsection 1319(g) which authorizes the imposition of administrative penalties under certain circumstances and conditions.

⁹² See S. REP. NO. 414, 92d Cong., 1st Sess. 79, 80 (1971), *reprinted in* 2 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 1497-98 (1973) (indicating that notice provisions were to "further encourage and provide for agency enforcement. . . . The time between notice and filing of the action should give the administrative enforcement office an opportunity to act on the alleged violation."); Fadil, *Citizen Suits Against Polluters; Picking Up the Pace*, 9 HARV. ENVTL. L. REV. 23, 24 (1985) (citizens suits "may serve to prod public authorities into enforcing environmental laws with increased zeal"). The author indicates that this justification arose repeatedly in the congressional debates over the citizen suit provision of the CWA. *Id.*

⁹³ S. CONF. REP. NO. 1236, 92d Cong., 2d Sess. 145 (1972), *reprinted in* 1 A

Clearly then, Congress has expressed a preference for agency enforcement of the CWA.

Congress continues to adjust this balance of power between the government and citizens to achieve deterrence, one of the principle goals of the CWA.⁹⁴ This is so even though Congress consistently stressed the prospective abatement of ongoing violations as the primary purpose behind citizens suits.⁹⁵ The EPA has certainly seen the potential for pollution abatement⁹⁶ through the threat of “quasi-punitive, economic sanctions.”⁹⁷

While civil penalties have traditionally been remedial, a policy to deter and penalize violations (with penalties paid to the United States Treasury) would seem to carry out the goals normally associated with criminal penalties.⁹⁸ An analogy to the courts’ authority to impose sanctions for civil or criminal contempt points out the degree to which Congress has muddled the two forms of relief.

The purpose behind criminal contempt sanctions is the vindication or imprisonment for an actor’s past conduct.⁹⁹ How-

LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 328 (1973) (“If the Administrator or a State begins a civil or criminal action on its own against an alleged polluter, no court action [can] take place on the citizen’s suit.”); see generally Polebaum and Slater, *Preclusion of Citizen Environmental Enforcement Litigation by Agency Action*, 16 ENVTL. L. REP. (Envtl. L. Inst.) 10013 (Jan. 1986).

⁹⁴ See *supra* note 57; Note, *supra* note 64, at 1671; see generally Olds, Unkovic and Lewin, *supra* note 13 (arguing that the real goal of civil penalties under the CWA is deterrence and penalization).

⁹⁵ Note, *supra* note 64 at 1671 (finding that Congress intended to make § 505 act as a deterrent in limited situations).

⁹⁶ See EPA Assistant Administrator for Enforcement, *EPA Civil Penalty Policy for Major Source Violators of Clean Air Act and Clean Water Act*, 8 ENV’T. REP. (BNA) 2011, 2012 (Apr. 11, 1978) (suggesting that civil penalties deter violations by dischargers by forcing them to consider potential economic losses); Roisman, *The Role of the Citizen in Enforcing Environmental Laws*, 16 ENVTL. L. REP. (Envtl. L. Inst.) 10163 (July 1986) (stressing the deterrent effect of civil penalties); Price, *supra* note 39, at 61 (the author, Assistant Administrator for Enforcement and Compliance Monitoring for EPA in Washington, D.C., expressing her personal view that enforcement must “deter future violations” and “sufficiently penalize past violations”).

⁹⁷ Note, *supra* note 64, at 1671 (questioning the policy of allowing citizen enforced penalization of individual polluters as contradictory to the overriding Congressional emphasis on injunctive relief against future harm).

⁹⁸ Olds, Unkovic and Lewin, *supra* note 13, at 18-19; see also Note, *supra* note 64 at 1678 (questioning the assumption that civil penalties sufficiently redress injuries of plaintiffs to meet constitutional standing requirements); but cf. *Helvering v. Mitchell*, 303 U.S. 391, 404-05 (1938) (distinguishing treatment of civil penalties from criminal penalties).

⁹⁹ *Shillitani v. United States*, 384 U.S. 364, 369-70 (1966); *United States v. United*

ever, civil contempt proceedings serve the purpose of coercing compliance with the orders of the court and to compensate the complainant for losses sustained by defendants' noncompliance.¹⁰⁰ The CWA however, clearly provides for other injunctive and prospective relief; civil penalties are for past violations. Case law in this area supports the argument that the deterrent aspect of the citizen suit provision would be a criminal sanction or at least some hybrid of criminal and civil relief.¹⁰¹ A similar analysis was used recently to find that the seventh amendment guarantees a jury trial to determine liability for enforcement action prior to the imposition of civil penalties under the CWA.¹⁰²

There is legislative history in both the Clean Air Acts to suggest that contrary to its label, the civil penalty provision was intended as a criminal, punitive sanction.¹⁰³ Professor Blomquist has forcefully argued that citizens "possess vast enforcement power and virtually unimpeded authority to impose significant public punishment" under the CWA.¹⁰⁴ No defendant has been

Mine Workers of America, 330 U.S. 258, 302 (1947); *United States v. PATCO*, 678 F.2d 1, 3-4 (1st Cir. 1982); *G. & C. Merriam Col v. Webster Dictionary Co.*, 639 F.2d 29, 40 (1st Cir. 1980); *In re Martorano*, 346 A.2d 22, 27-28 (Pa. 1975).

¹⁰⁰ *Shillitani*, 384 U.S. at 369-70; *United States v. United Mine Workers*, 330 U.S. at 303-04; *United States v. PATCO*, 678 F.2d at 3-4; *G. & C. Merriam Co.*, 639 F.2d at 40-41; *In re Martorano*, 346 A.2d at 27-29.

¹⁰¹ Sanctions for civil contempt must be "wholly remedial." *Nye v. United States*, 313 U.S. 33, 42-43 (1941) (quoting *McCrone v. United States*, 307 U.S. 61, 64 (1939)). Criminal proceedings remain available to *punish . . . for past violations* (emphasis added). *United States v. PATCO*, 678 F.2d at 4. A definite fine which is neither compensatory, nor conditioned on future violations . . . is punitive and can be imposed only in criminal contempt proceedings. *Carbon Fuel Co. v. United Mine Workers of America*, 517 F.2d 1348 (4th Cir. 1975).

¹⁰² *Tull v. United States*, 107 S. Ct. 1831 (1987). For a discussion on the character of the injunctive relief and civil penalty provisions of the CWA, see Note, *United States v. Tull: Jury Trials in Statutory Proceedings*, 4 J. MIN. L. & POL'Y 359 (1988-89) (authored by J. Kolanz).

¹⁰³ See H.R. REP. NO. 294, 95th Cong., 1st Sess. 71, *reprinted in* 1977 U.S. CODE CONG. & ADMIN. NEWS 1077, 1149 (the drafters relied on the rationale of several Supreme Court authorities upholding strict criminal liability when labeling the "civil" penalty provision). For an excellent discussion of the criminal nature of the nominally "civil" penalty provision, see Olds, Unkovic and Lewin, *supra* note 13, at 19; Blomquist, *supra* note 36, at 384 ("Despite their label, 'civil penalties' are the functional monetary equivalent of criminal penalties because of the enormous aggregate potential of fines. . .").

¹⁰⁴ Blomquist, *supra* note 36, at 382 (in his recent attack on the "citizen as prosecutor" model of § 505 enforcement, professor Blomquist advocates Congressional limitations on the private enforcement of the Act's public penal policies).

successful, however, in challenging a civil penalty based on this conflict in purposes.¹⁰⁵

In line with this distinction, a discharger recently made a "well framed constitutional challenge" to citizen suit enforcement based upon a violation of the separation of powers doctrine.¹⁰⁶ The defendants argued that the constitutional scheme was abridged when private citizens were granted powers vested exclusively in the executive branch.¹⁰⁷ The "criminal" nature of the deterrence policy of civil penalties in citizen suits would seem to buttress this argument considerably by claiming usurpation or at least impairment of the state's prosecutorial function.¹⁰⁸

II. CITIZEN ENFORCEMENT

A. Early Citizen Enforcement Efforts

Private enforcement of water pollution laws in Anglo-American law has been traced back to 1388.¹⁰⁹ Richard II and the English Parliament were forced to pass a water pollution control statute to relieve the public health problem caused by the uncontrolled dumping of "filth and garbage" into the Thames River and other streams near London.¹¹⁰

¹⁰⁵ A thorough analysis of the criminal nature of these penalties and their impact is beyond the scope of this Note.

¹⁰⁶ *Chesapeake Bay Foundation, Inc. v. Bethlehem Steel Corp.*, 652 F. Supp. 620 (D. Md. 1987); *Natural Resources Law — 1987: The Year In Review*, Section of Natural Resources Law, ABA, and The National Energy Law & Policy Institute, at 233 (March 15, 1988).

¹⁰⁷ *Chesapeake Bay Foundation*, 652 F. Supp. at 623-26.

¹⁰⁸ It would appear that if an appeal on these grounds were to reach the United States Supreme Court, at least one Justice would be sympathetic to the separation of powers argument. *Cf. Morrison v. Olson*, 108 S. Ct. 2597, 2630 (1988) (Scalia, J., dissenting) (observing that the power and decision to prosecute is inherently in the Executive Branch and any legislation granting others this power would be unconstitutional); *Mistretta v. United States*, 109 S. Ct. 647, 680-83 (1989) (Scalia, J., dissenting) (decrying the Court's recent decisions on the separation of powers). The court in *Chesapeake Bay Foundation* rejected this argument holding that the doctrine is concerned only with preventing one branch of government from exercising powers at the expense of another and citizens suits do not unduly tread in this area. 652 F. Supp. at 624.

¹⁰⁹ Blomquist, *supra* note 36, at 363 (citing Stat. 12 Rich. II, ch. 13 (1388)).

¹¹⁰ *Id.*; Boyer and Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 BUFFALO L. REV. 833, 946-47 (1985) (discussing the early English experience with the concept of shared private and public law enforcement responsibility).

Later private enforcement actions in England were based on the *qui tam* doctrine.¹¹¹ These actions were eventually abolished as they were abused by many who used them.¹¹² Ultimately, the citizen enforcers were seen not as "legitimate spokespersons for the public interest but rather as 'unprincipled pettifoggers' whose office [was] a nuisance and 'an instrument of individual extortion, caprice and tyranny.'" ¹¹³

Parallel problems with *qui tam* proceedings, including "vexatious and collusive" enforcement, developed in the United States.¹¹⁴ Congress continued to enact *qui tam* type legislation however.¹¹⁵ As late as 1943, the United States Supreme Court continued to cite such actions with approval.¹¹⁶

A recent attack on the "citizen as prosecutor" model of citizen enforcement argues that the model undermines several "important outcome-independent values of the American legal system" including "process values, rule of law values and division of legal labor values."¹¹⁷ As citizen enforcement efforts escalate, the regulated community has expressed more and more skepticism about the "motivation and legitimacy" of those who bring citizen suits under section 505.¹¹⁸ These developments are

¹¹¹ Blomquist, *supra* note 36, at 364.

¹¹² *Id.* Three factors led to their abuse and eventual abolition: the violations they were used against were "largely victimless crimes", the statutes themselves were characterized by "overt class bias and paternalism", and the use of "excessive enforcement" led to a "growing disrespect for the laws themselves and widespread contempt for those who enforced them." Boyer and Meidinger, *supra* note 110, at 954.

¹¹³ Boyer and Meidinger, *supra* note 110, at 954 (quoting 2 L. RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750, at 139 (1982)).

¹¹⁴ Blomquist, *supra* note 36, at 365 (some American jurisdictions passed laws restricting these actions).

¹¹⁵ See e.g., The False Claims Act, 31 U.S.C. § 3729 (1982). This Act was passed during the Civil War to curb widespread fraud in government contracting. Terris, PRIVATE WATCHDOGS: INTERNAL AUDITING AND EXTERNAL ENFORCEMENT — THREE PERSPECTIVES, [A. Environmentalists' Citizen Suits] 17 *Envtl. L. Rep. (Envtl. L. Inst.)* 10254, 10255 (July 1987). This Act encouraged private citizens to sue government contractors for fraud and allowed the successful plaintiff to keep one-fourth of any amount recovered. *Id.*

¹¹⁶ United States ex rel. Marcus v. Hess, 317 U.S. 537, 541 (1943) (Black, J.) ("Qui tam suits have been frequently permitted by legislative action, and have not been without defense by the courts.").

¹¹⁷ Blomquist, *supra* note 36 at 340. Rule of law values are described as "certainty, predictability, reliability, and even-handedness." *Id.* at 343. Examples of legal labor values are "democratic control, efficiency of specialization, and distinctive competency." *Id.* The author goes on to describe process values as "fair participation in a legal process." *Id.*

¹¹⁸ Boyer and Meidinger, *supra* note 110, at 959.

not surprising given the checkered history of citizen enforcement.

B. *The Citizen as Private Attorney General*

The term "private attorney general" was first coined in *Associated Industries v. Ickes*.¹¹⁹ This was a consumer action to keep down the price of coal in New York City during World War II.¹²⁰ The court used the term in describing a private citizen who sued "on behalf of consumers" to "vindicate the public interest."¹²¹ A *Yale Law Journal* Comment expanded this theme in 1949,¹²² and the Supreme Court embraced this model in 1963.¹²³

The concept of the private attorney general can be found in three variations of the "liberal legal tradition":

- (1) "social advocacy" approach: this theory translates the political claims of particular groups into enforceable rights in order to persuade courts to promote a political end;
- (2) "neutral solution" approach: advocacy under this theory is seen as a 'solution to the problem of unequal political advocacy by competing interest groups; and
- (3) "inadequate law enforcement" model: this model proposes the correct mix of incentives be developed to encourage individuals to act to enforce specific legislation.¹²⁴

Early use of the private attorney general concept was centered on the "social advocacy" approach.¹²⁵ This theory was replaced however, by a "neutral solution" approach — advocacy that would balance the scales of justice.¹²⁶ The policy underlying this movement assumed that groups that had previously been accorded favor due to their "progressive ideas" (the ACLU, NAACP and Sierra Club for example) could present their views

¹¹⁹ Garth, Nagel and Plager, *supra* note 1, at 357 (citing *Associated Industries v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943)).

¹²⁰ *Id.*

¹²¹ *Id.* at 357-58.

¹²² *Id.* at 358; see Comment, *Private Attorneys-General: Group Action in the Fight for Civil Liberties*, 58 *YALE L.J.* 574 (1949).

¹²³ *Id.*; see e.g., *NAACP v. Button*, 371 U.S. 415 (1963).

¹²⁴ Garth, Nagel and Plager, *supra* note 1, at 357.

¹²⁵ *Id.* at 357-59; See e.g., *Associated Industries v. Ickes*, 134 F.2d 694 (2d Cir. 1943).

¹²⁶ Garth, Nagel and Plager, *supra* note 1, at 359-60. This shift in the image of the private attorney general was considered "the antidote to inequity and the new source of balance." *Id.*

to balance the debate.¹²⁷ This image was promoted by Justice Douglas in his concurring opinion in *Flast v. Cohen*.¹²⁸

During this same period running from the early 1960s to the mid-1970s, the Supreme Court strongly supported the creation of private rights of action under federal statutes to effectuate Congressional purposes.¹²⁹ By 1975 however, the Court had begun to severely restrict implied rights of action.¹³⁰ Ultimately, the Court has adopted a position that "amounts to a strong presumption against recognizing private rights of action."¹³¹

By 1980, the neutral justification for the private attorney general had been discredited.¹³² It was believed that the special interest groups no longer deserved special standing or compensation simply because their views were uniformly seen as "good" or "deserving of more influence" in American life.¹³³ "What was once non-partisan balancing has now become another form of partisan advocacy."¹³⁴

The current view of the private attorney general presumes there is no imbalance of advocacy.¹³⁵ The emphasis has shifted now to the adequacy of economic incentives to allow individuals to vindicate legal rights that might go unenforced otherwise.¹³⁶ Under this model, incentives to litigate a particular case must be established at a proper level to encourage the desired level of

¹²⁷ *Id.*

¹²⁸ 392 U.S. 83, 111 (1968) (Douglas, J., concurring) (the citizen as private attorney general was an answer to the individual's need for a "well organized political group").

¹²⁹ Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. CHI. L.R. 394, 412 (1982) (citing *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964) (creating a private right of action under the securities laws)). See e.g., *Riggle v. California*, 577 F.2d 579, 582-83 (9th Cir. 1978) (holding a private right of action exists to enforce the Rivers and Harbors Act).

¹³⁰ See *Cort v. Ash*, 422 U.S. 66 (1975).

¹³¹ Sunstein, *supra* note 129, at 413 (citing *California v. Sierra Club*, 451 U.S. 287, 297-98 (1981)).

¹³² Garth, Nagel and Plager, *supra* note 1, at 360.

¹³³ *Id.* at 365. See Rabkin, *Public Interest Law: Is It Law in the "Public Interest,"* 8 HARV. J.L. & PUB. POL'Y 341 (1985) (the author suggests that many private attorney general actions do not really represent the public interest but a much narrower interest that for one reason or another was not heard in the political process).

¹³⁴ Garth, Nagel and Plager, *supra* note 1, at 360. The authors suggest that the reason for this shift in perception is the interest groups' "grace period" is over or there is no longer a consensus of what is right or good. *Id.* at 365.

¹³⁵ *Id.* at 360.

¹³⁶ *Id.* " 'Common sense' today seems inconsistent with the idea of using attorney fees to subsidize advocacy of views that a court feels 'ought' to be considered in reaching a decision." *Id.* at 364.

enforcement.¹³⁷ Citizen enforcement under the economic analysis however, has been skewed because this model does not adequately address the effect on overall regulatory enforcement by individuals acting out of ideological motivations.¹³⁸ Professor Blomquist argues that citizen plaintiffs under section 505 of the CWA are very different from the private attorney general concept that developed under the federal antitrust laws.¹³⁹ Confirming this view a Justice Department official, commenting on the tremendous increase in citizen suits, expressed concern that "citizen suits may be used as a mechanism for pursuing goals that are essentially political."¹⁴⁰ Even those identified with the environmental movement admit that citizen suits pose possible dangers: "Private people can act in a venal way."¹⁴¹

Refinement of the private attorney general concept has resulted in the identification of two types of citizen plaintiffs: the "mercenary law enforcer" whose public enforcement effort depends on adequate attorney fee incentives and the "social advocate" whose pursuit of litigation is "a form of pressure group activity."¹⁴²

The tremendous increase in citizen suits by environmental interest groups has deviated from the role Congress intended section 505 to accomplish, which was to provide private incentives for individuals to enforce the Act's requirements¹⁴³ to one

¹³⁷ *Id.* at 362.

¹³⁸ Comment, *Private Attorneys-General Group Action In The Fight For Civil Liberties*, *supra* note 122, at 257; Jaffe, *The Citizen as Litigant in Public Actions: The Non-Holfieldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (finding that an economic model of the private attorney general concept does not account for the ideological plaintiff). For scholarly commentary supporting the constitutionality of the "public action", see Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L.J. 816 (1969). See also *Flast v. Cohen*, 392 U.S. 83, 130 (1968) (Harlan, J. dissenting) (stating his belief that public actions are "within the jurisdiction conferred upon the federal courts by Article III of the Constitution").

¹³⁹ Blomquist, *supra* note 36, at 389. The author argues that only under the CWA and the Resource Conservation and Recovery Act (42 U.S.C. § 6972 (1982 and Supp. IV, 1986)) are citizens allowed "to enforce directly penal monetary sanctions against private polluters on behalf of the public." *Id.* at 368. Other environmental citizen suit provisions are "based on a model of the citizen as a watchdog or a gadfly: spurring the executive branch into action or enjoining clear violators of the law." *Id.*

¹⁴⁰ Hookano, *Private Watchdogs: Internal Auditing and External Enforcement — Three Perspectives*, [C. The Government Perspective] 17 ENVTL. L. REP. (Env'tl. L. Inst.) 10254, 10262 (July 1987). The author, Thomas E. Hookano, is Deputy Assistant Attorney General, Land and Natural Resources Division in the Justice Department.

¹⁴¹ Terris, *supra* note 115, at 10255.

¹⁴² Garth, Nagel and Plager, *supra* note 1, at 356.

¹⁴³ See notes 65-69 and accompanying text.

of social advocacy by politically motivated groups. Since enforcement is such an integral part of the basic policy of the CWA, overenforcement of federal standards is being accomplished without any political accountability.

C. The Policy Effects of Citizen Suits on Government Enforcement

Varying interpretations of the legislative purposes of citizen suits has led to chaotic judicial treatment of citizen suits.¹⁴⁴ "Federal court rulings reflect widely differing views on the respective roles of citizens and the government in environmental enforcement."¹⁴⁵ This leads to direct conflicts between the parallel enforcement efforts of citizens and the government.

Frequent citizen suits have the very real potential to "establish adverse precedent" and "inconsistent legal outcomes" in view of the government's overriding goal of enforcing a *national* clean water policy.¹⁴⁶ The government has corroborated this view and says their objectives of obtaining appropriate remedies and achieving consistency in the case law can "potentially . . . collide with the tactics chosen by citizen groups in litigating under environmental statutes."¹⁴⁷

A government attorney recently stated that citizen suits have a potential detrimental impact on government enforcement efforts in several ways:

[F]irst, by leading to inappropriate remedies in enforcement cases; second, by diverting government enforcement resources away from government priorities and toward the concerns of an array of private interests; and third, by significantly shifting

¹⁴⁴ Comment, *The Rise of Citizen-Suit Enforcement in Environmental Law: Reconciling Private and Public Attorneys General*, 81 Nw. L. Rev. 220, 222 (1987). "Substance and process are intimately related. The procedures one uses determine how much substance is achieved, and by whom." *Id.* (citing Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85).

¹⁴⁵ *Id.* (there is an "inability of the courts to define precisely the relationship between public and private enforcement mechanisms").

¹⁴⁶ *Id.* at 236. See *infra* note 220 (three-circuit split on enforcement of past violations); compare *Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517, 1521-22 (9th Cir. 1987) (holding that a five-year statute of limitations applies) with *Student Pub. Interest Research Group v. Jersey Central Power & Light Co.*, 24 ENV'T. REP. CAS. (BNA) 1627, 1630-31 (D.N.J.) (no statute of limitations on § 505 citizen suits).

¹⁴⁷ Hookano, *supra* note 140, at 10261.

government resources away from enforcement and toward regulatory and administrative processes over the long term.¹⁴⁸

Analogizing extensive citizen suit litigation to the creation of private rights of action under statutory civil rights litigation¹⁴⁹ reveals serious conflicts and shortcomings with private enforcement of government laws and regulations. First, statutory integrity may be compromised by unanticipated levels of private enforcement.¹⁵⁰ Since Congress may have carefully adjusted the creation of a statutory right with specific sanctions for its violation and carefully chosen the enforcement mechanism to further the goals of the statute, an unexpected bulge in one area can subvert the regulatory program. This can result in more enforcement than Congress intended.¹⁵¹

Second, agency specialization is ignored. Agencies are equipped to make determinations through specialized, elaborate techniques while courts are "ill-suited to resolving the sorts of factual issues involved in regulation."¹⁵² EPA and state permit writers will often deal with the intricate detail of technical requirements through the exercise of enforcement discretion.¹⁵³

Third, agency centralization and autonomy are lessened as courts will likely reach different results under the same statutes.¹⁵⁴ Uniformity is more difficult and the like treatment of similarly situated parties is much more difficult.¹⁵⁵ Judicial enforcement, which tends to be decentralized and which depends on the agenda of private litigants, may also impair an agency's ability to devise a consistent and coordinated policy of enforcement.

Last, extensive citizen litigation under judicial supervision may diminish the political accountability of those who administer federal programs.¹⁵⁶ Agencies may become less willing to tackle

¹⁴⁸ *Id.* EPA and the states however, have maintained a low profile despite the increasing tide of citizen suit litigation. Gerret, *Pros and Cons of Citizen Enforcement — Citizen Suits: A Defense Perspective*, 16 ENVTL. L. REP. [Current Developments] (Envtl. L. Inst.) 10162, 10162 (July, 1986).

¹⁴⁹ 42 U.S.C. § 1983 (1982).

¹⁵⁰ Sunstein, *supra* note 129, at 416.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ Garret, *supra* note 148, at 10163.

¹⁵⁴ Sunstein, *supra* note 129, at 417.

¹⁵⁵ *Id.* "The operation of private incentives to litigate may result in ad hoc enforcement, and in areas about which Congress was least concerned." *Id.*

¹⁵⁶ *Id.* at 418.

sensitive enforcement cases if they believe a citizens group will bring the action. By contrast, the courts¹⁵⁷ and the private interest groups are virtually immune from political pressures.

Thomas E. Hookano, Deputy Assistant Attorney General for the Land and Natural Resources Division of the Justice Department recently stated that, "while there are benefits from citizen suits, there may be some problems which Congress may not have foreseen."¹⁵⁸ He believes that government regulatory agencies, and the Department of Justice in particular, are "needed to ensure that the benefits of citizen suits are maximized."¹⁵⁹

Mr. Hookano goes on to describe the interference that citizen suits can generate:

Another concern is that citizen suit may disrupt government enforcement activities. Federal prosecutors set enforcement priorities and select particular cases with the objective of promoting an overall enforcement strategy based on maximizing deterrence. Cases are selected with a view toward establishing favorable precedents of national applicability, developing some areas of law, and avoiding others.

Citizen suits, on the other hand, tend to address specific local or regional problems, with little regard to the needs of the national law enforcement scheme. . . . They force government prosecutors to become involved in cases that they may have preferred to handle at a different time in a different way, or not at all. At times there are fact patterns that do not favor legal theories that the government would like to establish or preserve. In essence, such suits preempt the government's prosecutorial discretion.¹⁶⁰

Although Congress has explicitly granted citizens a private right of action under section 505 to enforce the CWA, extensive citizen litigation has the potential to "frustrate statutory purposes by allowing litigants to bypass the administrative process entirely and permitting the nature and extent of enforcement to be dictated by the judiciary."¹⁶¹ The agency's authority to make law and policy is thus disrupted.

¹⁵⁷ *Id.*

¹⁵⁸ Hookano, *supra* note 140, at 10262.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 414.

D. *The Citizen as Policy-Maker*

A sophisticated model has emerged that defines environmental policy by reference to the interaction of substantive policy as evidenced in statutes and regulations with enforcement procedures.¹⁶² The nature of a substantive policy such as the one developed under the CWA is thus determined by the enforcement process.¹⁶³ Under this model, enforcement efforts are a part of the policy making process and the level of enforcement "defines the environmental result of the statute, and thus, its basic policy."¹⁶⁴

A model that finds enforcement integral to the ultimate nature of one's right leads to the inevitable conclusion that citizens have become policy-makers under section 505:

If citizen suits are merely an additional method of enforcing the environmental laws, as [a] 'naive' model suggests, then there would be little point in allowing citizens to sue once a source had ceased violating the environmental laws. If however, citizen-plaintiffs are part of the substantive policy-making process, as a more sophisticated approach suggests, then they should be permitted to sue for past violations as long as the suit will deter the defendant (and possibly other violators) from violating the relevant environmental standards in the future. By performing this function, citizen plaintiffs, as citizen policymakers, would help determine what constitutes optimal levels of compliance with the environmental laws.¹⁶⁵

The problem with this result is that Congress never intended section 505 to be used by citizens as a "mechanism for policy-making."¹⁶⁶ "The government is the principal policymaker. It can, better than a citizen who is concerned about one particular violator, understand and resolve the conflicting economic and environmental goals of the statutes."¹⁶⁷

¹⁶² Comment, *supra* note 144, at 222.

¹⁶³ Cohen and Rubin, *Private Enforcement of Public Policy*, 3 YALE J. ON REG. 167, 192-93 (1985).

¹⁶⁴ Comment, *supra* note 144, at 235 (citation omitted).

¹⁶⁵ *Id.* at 247 (citations omitted).

¹⁶⁶ *Id.* at 260, n.246 (citing S. REP. NO. 1196, 91st Cong., 2d Sess. 36-39, *reprinted in* 1 ENVIRONMENTAL POLICY DIV., CONGRESSIONAL RESEARCH SERV., LIBRARY OF CONGRESS, A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1970, at 436-39 (1974) (stating that "courts would merely apply factual record developed when standards were originally set, before any permits were issued; thus, there would be no inconsistent policy).

¹⁶⁷ Comment, *supra* note 144, at 255.

Environmental regulations are overinclusive by their very nature.¹⁶⁸ This situation will result in overenforcement of environmental regulations if they are enforced in their entirety. Moreover, this is the case where citizen suit plaintiffs have shown a tendency to press for the maximum enforcement available.

Often, regulatory beneficiaries may prefer different types and amounts of enforcement in collective interests such as clean water.¹⁶⁹ This will lead to overenforcement by those ideological plaintiffs who want more than most.¹⁷⁰ Since citizen plaintiffs are motivated by their own chosen agenda, they no longer "have [the] 'impartial' and 'unprejudiced' motives of a public prosecutor."¹⁷¹

The government's perception of the "public interest" is broader than that of the environmental interest groups.¹⁷² The interest groups' apparent insulation from politics under a private enforcement model leads to the appearance of the role as "a means to promote law enforcement independently without confronting political issues."¹⁷³ Because government goals are often different from narrow private interests, citizen suit litigation "may not provide the same opportunity as a government suit to instigate broader policy changes."¹⁷⁴ Although Congress explicitly provided for citizen enforcement and courts must recognize and enforce rights of action that Congress has created, there is no indication that such enforcement was designed to replace the government as the principle policymaker.

Professor Blomquist has recently stated that aggressive enforcement of the CWA has certain costs associated with it:

¹⁶⁸ *Id.* Environmental rules are "overinclusive because it is too costly to obtain the accurate information needed to create an optimal rule that sets the level of allowable emissions at the point where the cost of meeting that standard is equal to the social cost of pollution at that level." *Id.* at 258.

¹⁶⁹ Sunstein, *supra* note 129, at 436.

¹⁷⁰ *Id.*

¹⁷¹ Comment, *supra* note 162, at 257 (citing Ward, *Private Prosecution — The Entrenched Anomaly*, 50 N.C.L. REV. 1171, 1173 (1972)).

¹⁷² *Id.* (citing DiMento, *Citizen Environmental Litigation and the Administrative Process: Empirical Findings, Remaining Issues and a Directive for Further Research*, 1977 DUKE L.J. 409, 439).

¹⁷³ Garth, Nagel and Plager, *supra* note 1, at 395 (discussing the role of the private attorney general).

¹⁷⁴ Comment, *supra* note 144, at 254 (citing *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917) ("government's interest in protecting 'lands which it holds in trust for all the people' is distinct from private party's interest in title to land")).

[I]n the course of the working of the citizen suit provisions of the Clean Water Act, the goals of vigorous enforcement and recovery of maximum monetary penalties against polluters have been pursued by unusually muscular means: authorizing private citizens to assume the powers and prerogatives of government prosecutors. But realization of the Congressional goals of increased enforcement and imposition of stiff monetary penalties is being purchased at great cost: the sacrifice of other goals, the sacrifice of means that could be used to serve these other goals, and increased economic costs to the private and public sectors.¹⁷⁵

In order to achieve desired social goals, it is important to maintain the proper balance between government enforcement and the private sector. It is also important to avoid the adverse consequences of having this balance shift too far toward private enforcement.

E. Citizen Involvement

Since 1984 there has been a dramatic increase in the number of citizen suits filed under the CWA.¹⁷⁶ This increase is attributed to a number of causes, with a decrease in federal enforcement during the Reagan Administration the most prominently mentioned.¹⁷⁷ Most of these suits have been for violations of the discharger's NPDES permit.¹⁷⁸

In 1983 and early 1984, 195 suits and notices of intent to sue under section 505 were filed by citizens, almost five times the number filed during the previous five years.¹⁷⁹ Between 1984 and 1987, 800 notices of intent to sue had been filed.¹⁸⁰ The explosion of citizen enforcement action has been viewed with

¹⁷⁵ Blomquist, *supra* note 36, at 406-07.

¹⁷⁶ See e.g., Fadil, *supra* note 92, at 23; Meier, "Citizen Suits" Become a Popular Weapon in the Fight Against Industrial Polluters, *Wall St. J.*, Apr. 17, 1987 at 11, col. 4.

¹⁷⁷ Comment, *supra* note 144, at 233. See also *infra* note 198 and accompanying text.

¹⁷⁸ Price, *supra* note 39, at 31.

¹⁷⁹ Note, *supra* note 83, at 195 (citing ENVIRONMENTAL LAW INSTITUTE, CITIZEN SUITS: AN ANALYSIS OF CITIZEN ENFORCEMENT ACTIONS UNDER EPA-ADMINISTERED STATUTES III-10 (fig. D.) (1984)). Citizens had begun only 41 actions between 1978 and 1983.

¹⁸⁰ Garrett, *U.S. Supreme Court's Ruling in Gwaltney Case Marks Watershed in Citizen Enforcement of Environmental Laws*, *ENV'T. REP. (BNA)* [Current Developments] 2027 (Jan. 15, 1988).

alarm by industry¹⁸¹ and was recently acknowledged by Congress.¹⁸² Citizen suits are now being filed at a rate that almost exceeds government enforcement actions.¹⁸³ In fact, citizens suits have generated most of the reported cases under the CWA, and the majority of those have been in favor of the citizens.¹⁸⁴

While the citizen suit provision states that citizens will bring suit on their own behalf, in reality, national environmental groups have initiated the great majority of litigation under section 505 of the CWA.¹⁸⁵ Often, individual citizens are nominal co-plaintiffs in order to satisfy constitutional standing requirements.¹⁸⁶

In the last five years, several well-known environmental groups including the Sierra Club, Natural Resources Defense Council and Friends of the Earth as well as several regional groups,¹⁸⁷ have led a nationwide campaign of citizen enforcement of the CWA.¹⁸⁸ The effort began in New York and New Jersey, two states with strong environmental programs,¹⁸⁹ and has "spread throughout the country."¹⁹⁰

¹⁸¹ *Id.* (permit holders viewed these suits with feelings of alarm and skepticism).

¹⁸² During consideration of the Clean Water Act Amendments of 1985, the Senate Committee on Environmental and Public Works concluded: "In the past two years, the number of citizen suits to enforce NPDES permits has surged so that such suits now constitute a substantial portion of all enforcement actions filed in Federal court under this Act." Clean Water Act Amendments of 1985, S. REP. No. 50, 99th Cong., 1st Sess. 28 (1985).

¹⁸³ Note, *supra* note 83, at 195. See generally Miller, *supra* note 3; Moore, *Private Suits Flood Companies Under Clean Water Provision*, Legal Times, May 7, 1984, at 1, col. 2.

¹⁸⁴ Powers, *A Citizen's View of Gwaltney*, 18 ENVTL. L. REP. (Envtl. Law Institute) 10119, 10122 (April, 1988).

¹⁸⁵ Note, *supra* note 64, at 1659 n.17. "Such groups are primarily responsible for the explosion of citizen suits under the Clean Water Act." *Id.* (quoting Fadil, *supra* note 92, at 31). It has been speculated that lax enforcement by EPA of the CWA under the Reagan Administration has prompted this reliance on citizen suits. See Miller, *Private Enforcement of Federal Pollution Control Laws, Part III*, 14 ENVTL. L. REP. (Envtl. L. Inst.) 10407, 10424 (Nov. 1984).

¹⁸⁶ *Sierra Club v. Morton*, 405 U.S. 727 (1972) (requiring that every plaintiff, whether an individual citizen or an environmental group, must show an "injury in fact" to meet Art. III standing requirements).

¹⁸⁷ Most prominently the Student Public Interest Research Groups of New York and New Jersey and The Chesapeake Bay Foundation.

¹⁸⁸ T. L. Garrett, *supra* note 180, at 2027.

¹⁸⁹ New York and New Jersey "were ranked among the top states in efforts to establish and enforce environmental programs, according to a report released by the Fund for Renewable Energy and the Environment." HAZARDOUS WASTE AND TOXIC TORTS LAW & STRATEGY, Vol. 3, No. 10, March 1988, at 2.

¹⁹⁰ T. L. Garrett, *supra* note 180, at 2027.

One of the most attractive aspects of the citizen suit provision is that it allows an environmental group to set its own enforcement priorities. Often citizens pursue enforcement against a polluter whom the regulatory authority has chosen not to prosecute.¹⁹¹ Although this is warmly embraced by some EPA administrators,¹⁹² it would appear to put the citizen firmly in the role of choosing the level of deterrence applied under the Act, which is clearly a policy decision. These enforcement actions mark a distinct change in the environmental groups' agendas from one of seeking new laws to a policy that includes enforcement of existing laws.¹⁹³ This change has led to a shift in the deterrence policy of the citizen suit that was at least downplayed by Congress when enacting the CWA.¹⁹⁴

F. *Reasons for Increased Level of Citizen Enforcement*

Senator Hart, in remarks made about another citizen suit provision,¹⁹⁵ said:

[The citizen suit provision] therefore provides no incentives to suit other than to protect the health and welfare of those suing and others similarly situated. It will be the rare, rather than the ordinary, person, I suspect, who, with no hope of financial gain and the very real prospect of financial loss, will initiate court action under this bill.¹⁹⁶

¹⁹¹ Price, *supra* note 39, at 32. The reality of an agency's finite resources often prevents it from taking enforcement action against every violation of which it is aware. *Id.*

¹⁹² *Id.* at 61 (quoting EPA Administrator William D. Ruckelshaus in a July 30, 1984, policy memo: "EPA values the efforts of citizen groups. . ."). Mr. Ruckelshaus also directed EPA Regional Offices to continue to cooperate with citizen requests for information (primarily DMRs) on dischargers' violations of the CWA. *Id.* *But cf.* notes 140 and 147-48 and accompanying text.

¹⁹³ See Babich and Hanson, *supra* note 74, at 10165; see also Fadil, *supra* note 92, at 23-24; Meier, *supra* note 176, at 17, col. 4; Comment, *supra* note 144, at 221-22 ("[a]lthough environmentalists may believe the present statutes are inadequate, they recognize that passage of stricter requirements would be meaningless unless the present laws are enforced").

¹⁹⁴ See *supra* notes 63-77 and accompanying text.

¹⁹⁵ Senator Hart was discussing the citizen suit provision of the Clean Air Act; *cf. supra* note 4, upon which § 505 of the CWA is modeled. See Note, *supra* note 64, at 1656.

¹⁹⁶ Hamker v. Diamond Shamrock Chemical Co., 756 F.2d 392, 396 (5th Cir. 1985) (citing 116 CONG. REC. 33104 (1970)).

Recent environmental plaintiff activity would suggest that citizen suits are utilized neither rarely nor secondarily.¹⁹⁷ A high level EPA official has suggested three reasons for the high level of citizen initiated litigation:

- (1) persistent noncompliance by some members of the regulated community;
- (2) the compilation and public availability of facilities' self-monitoring reports as evidence of violations; and
- (3) availability of civil penalties through Clean Water Act citizen suits.¹⁹⁸

A fourth reason could be added to the list — the ability of a successful or partially successful plaintiff to recover attorney's fees.¹⁹⁹ And contrary to Senator Hart's belief, citizen enforcers are not likely to lose money by suing to punish polluters.

In fact, in 1983 alone, environmental attorneys recovered as attorney's fees more than 400 percent of civil penalty amounts paid to the United States Treasury in those same citizen enforcement suits.²⁰⁰ Thus, the modern environmental bounty hunter's reward seems out of proportion to the amount he benefits society if civil penalties are in any way related to the damage done to the environment.

Another major reason why section 505 has attracted so much public interest litigation is because the enforcement cases are so easy to win.²⁰¹ The single most important factor in identifying and proving noncompliance is the discharger's own self-monitoring data — the Discharge Monitoring Report (DMR).²⁰² DMRs

¹⁹⁷ The legislative history of the citizen suit provision and the CWA has indicated Congress expected the citizen's role to be secondary to the government's. See *supra* notes 81-85 and 92-93 and accompanying text.

¹⁹⁸ Price, *supra* note 39, at 32.

¹⁹⁹ 33 U.S.C. § 1365(d) (1982). This concept is known as fee shifting and requires the losing party to pay the prevailing party's attorney fees. This statute allows citizen suit plaintiffs to recover reasonable attorney and expert witness fees where appropriate. Comment, *supra* note 144, at 231. See Note, *Attorney Fee Shifting: A Roadmap for the Unwary — The SMCRA Example*, 4 J. MIN. L. & POL'Y 159, 160 (1988) (authored by W. Gorton).

²⁰⁰ Lewis, *Environmentalists' Authority To Sue Industry For Civil Penalties Is Unconstitutional Under the Separation of Powers Doctrine*, 16 ENVTL. L. REP. (Envtl. L. Inst.) 10101, 10102.

²⁰¹ Note, *supra* note 64, at 1657 n.119. Observing that citizen enforcers face only a very slight risk of losing CWA suits and recovering attorney's fees in cases where the discharger's DMRs show obvious violations.

²⁰² See *supra* notes 31-35 and accompanying text. See also Schwartz and Hackett, *supra* note 84, at 327.

represent a detailed self-policing scheme on a discharger's performance and compliance with the Act.²⁰³ Most courts have found dischargers strictly liable on the basis of these DMRs²⁰⁴ while a few have allowed limited defenses.²⁰⁵ Citizen victories are not difficult, despite the courts' first adjustment to the Act which required strict compliance with requirements of the statute in *Middlesex County Sewerage Authority v. National Sea Clammers Association*.²⁰⁶ This holding was consistent with the Supreme Court's previous environmental decisions requiring a narrow reading and rigid adherence to the plain meaning of the statute.²⁰⁷

²⁰³ Price, *supra* note 39, at 33. In completing these reports for regular submission to the regulatory authority under the terms of its NPDES permit, the permit holder lists both the effluent requirement he must meet and the actual laboratory results of the sampling performed. This system results in easy comparisons and one may determine immediately whether the discharger has violated an effluent limit or permit condition. *Id.*

²⁰⁴ See e.g., *Student Pub. Interest Res. Group of N.J., Inc. v. Monsanto Co.*, 600 F. Supp. 1479 (D.N.J. 1985). "Reports or records which are required to be kept by law . . . may be used as admissions to establish a defendant's civil liability" (emphasis added). *Id.* at 1485. See also *Sierra Club v. Union Oil Co.*, 813 F.2d 1480 (9th Cir. 1987), *vacated on other grounds* 56 U.S.L.W. 3607 (1988); *Student Pub. Interest Res. Group of N.J., Inc. v. Fritzsche, Dodge & Olcott*, 579 F. Supp. 1538 (D.N.J. 1984) (rejecting defendant's argument that their DMRs were inaccurate or unreliable).

²⁰⁵ See e.g. *Friends of the Earth v. Facet Enterprises, Inc.*, 618 F. Supp. 532, 536 (W.D.N.Y. 1984) (typographical errors might be challenged); *Connecticut Fund for the Environment v. Upjohn Co.*, 660 F. Supp. 1397, 1417 n.33 (D. Conn. 1987) (clerical or typographical errors might be challenged successfully).

No reported CWA case has involved the challenge of the admissibility of DMRs in a criminal conviction under the Act. However, it is almost certain that the "required records" exception would defeat the protection guaranteed by the fifth amendment against self-incrimination. In *Shapiro v. United States*, 335 U.S. 1 (1948), the Court held the government has a right to require a person to maintain records under regulatory schemes and the government may compel production of these records and use them in a criminal prosecution. The high Court went on to define the limits of this exception in *Grosso v. United States*, 390 U.S. 62, 67-68 (1968) (requiring that purpose of record retention be essentially regulatory; information sought to be obtained must be of a kind the regulated party customarily keeps; and the records must have assumed "public aspects").

²⁰⁶ 453 U.S. 1 (1981) (requiring that citizens suing under § 505 must comply with specified procedures). See also *Walls v. Waste Resource Corp.*, 761 F.2d 311 (6th Cir. 1985) (holding that compliance with 60-day notice provision is a jurisdictional prerequisite to citizen suits under the CWA); *Lykins v. Westinghouse Electric Corp.*, 27 Env't. Rep. (BNA) 1590 (E.D. Ky. 1988) (notice to one defendant does not impute notice to other defendants).

²⁰⁷ See e.g. *Sierra Club v. Morton*, 405 U.S. 727 (1972) (see *supra* note 96); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 558 (1978) ("[t]he fundamental policy questions appropriately resolved in Congress and in the state legislatures are not subject to reexamination in the federal courts under the

Most citizen suits have been settled before a trial on the merits.²⁰⁸ Suits are settled by consent decrees between the alleged violator and the environmental group.²⁰⁹ If the trial court has jurisdiction, it must approve the decree once a complaint is filed.²¹⁰ As a practical matter, if a citizen suit is threatened or likely, a discharger that has violated the Act should negotiate a consent decree, through a court, as part of the settlement of any administrative action. A company would be well advised to initiate contact with a regulatory agency to arrange a consent decree that would cover any previous five-year period to foreclose a citizen suit for past violations if the discharge point is likely to remain in non-compliance for any period in the future. Under the 1987 Amendments, this will foreclose a citizen suit under section 505.

Previously, environmental groups would often secure donations to their favorite causes as part of a settlement with a discharger and one defendant was even required to run a full page advertisement in the Los Angeles Times stating it had violated the law and "got caught."²¹¹ In 1983, 90 percent of all civil penalty amounts paid in settlements or litigation by citizens were made to environmental groups rather than the federal

guise of judicial review" (emphasis in original)); *TVA v. Hill*, 437 U.S. 153 (1978) ("the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with 'common sense and the public weal'").

²⁰⁸ L. JORGENSEN AND J. KIMMEL, *supra* note 55, at 17; Galloway, *supra* note 76, at 7A.12.

²⁰⁹ *Id.* Often, consent decrees include: a statement by the discharger declining to admit liability for any violations; an agreement to provide future monitoring reports to the environmental group; limitations on citizen suits for future violations; stipulated penalty terms for failure to comply with the decree and future violations and procedural terms such as jurisdiction and venue for any future litigation covering anything in the original complaint or consent decree. *Id.*

²¹⁰ In approving the decree, the court must find that it is consistent with the statute being enforced, that its terms are fair and equitable, and that it has been agreed upon and entered into in good faith. Galloway, *supra* note 76, at 7A.12-7A.13; *see* *Citizens for a Better Environment v. Gorsuch*, 13 ENV'T. REP. (BNA) 20975 (D.C. Cir. 1983).

²¹¹ *Hazardous Waste and Toxic Torts Law & Strategy*, Vol. 3, No. 2, June 1987, at 2; *See* *Friends of the Earth v. Eastman Kodak Co.*, 656 F. Supp. 513 (W.D.N.Y. 1987), *aff'd* 834 F.2d 295 (2d Cir. 1987) (defendant would make a \$49,000 contribution to the Conservation Foundation to be used in projects reasonably related to the protection of water quality); *Student Pub. Interest Res. Group of N.J., Inc. v. Tenneco Polymers, Inc.*, 602 F. Supp. 1394 (F.N.J. 1985) (defendant to make a \$255,000 contribution to the American Littoral Society Inc. for projects in the Delaware River Basin). *See generally* *Environmental Penalties and Environmental Trusts*, 17 ENVTL. L. REP. (Envtl. Law Institute) 10356 (Sept. 1987) (observing that settlements in CWA cases often result in contributions to environmentally beneficial projects in lieu of penalties).

government.²¹² The Justice Department has taken the position that such contributions, which are not paid to the U.S. Treasury, cannot be considered the payment of a civil penalty and do not bar future enforcement actions and claims for penalties.²¹³

The 1987 Amendments to the CWA included a provision for the government to evaluate any proposed consent decree between the discharger and the citizen so that it may "protect the interests of the United States."²¹⁴ This is further evidence of Congressional displeasure with some citizen suit efforts and a contraction of citizens' enforcement freedoms.

III. *GWALTNEY OF SMITHFIELD, LTD. v. CHESAPEAKE BAY FOUNDATION*²¹⁵

It was said at the time of the decision that "[b]y any reckoning, *Gwaltney* must be the citizen enforcement case of the decade, if not the century."²¹⁶ Both the regulated community and environmentalists claimed a victory²¹⁷ in the Supreme Court's

²¹² Lewis, *supra* note 200, at 10102.

²¹³ Price, *supra* note 39 at 59.

²¹⁴ 33 U.S.C.A. § 1365(c)(3) (West Supp. 1988). This recently enacted section provides that no consent decree shall be entered in a citizen enforcement case without 45 days prior notice to the United States Attorney General and the Administrator of EPA.

²¹⁵ *Gwaltney of Smithfield v. Chesapeake Bay Foundation*, 108 S. Ct. 376 (1987). For the purposes of discussing and clearly distinguishing the five reported *Gwaltney* decisions from the trial court through the Supreme Court and back down on remand, the following system will be used: *Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd.*, 611 F. Supp. 1542 (E.D. Va. 1985) [hereinafter *Gwaltney I*] (the trial court's decision); *Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd.*, 791 F.2d 304 (4th Cir. 1986) [hereinafter *Gwaltney II*] (affirming the trial court); *Gwaltney*, 108 S. Ct. 376 (1987) [hereinafter *Gwaltney III*] (the Supreme court opinion and the most often cited); *Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield, Ltd.*, 844 F.2d 170 (1988) [hereinafter *Gwaltney IV*] (the 4th Circuit's opinion on remand); *Chesapeake Bay Foundation Inc. v. Gwaltney of Smithfield, Ltd.*, 688 F. Supp. 1078 (E.D. Va. 4th Cir. 1988) [hereinafter *Gwaltney V*] (the trial court's opinion on remand).

²¹⁶ Miller, *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.: Invitation to the Dance of Litigation*, 18 ENVTL. L. REP. (Envtl. Law Institute) 10098, 10098 (March 1988).

²¹⁷ See Taylor, *Citizens' Suits in Pollution Cases are Limited*, New York Times, Dec. 2, 1987, at A24; Duboff and Clearwater, *Arguing for the Defense after Gwaltney*, 18 ENVTL. L. REP. (Envtl. Law Institute) 10123, 10123 (April 1988). However, some attorneys for environmental groups and some representing industry have expressed their disappointment at the decision. See Powers, *supra* note 184, at 10122 (expressing the view that the decision reverses the recent trend of "relatively streamlined" litigation under citizen suit provisions); Schatzow, *High Court Decision on Water Pollution: Taking Middle Road?* Legal Times, Dec. 21, 1987, 15, at 16 (industry attorneys disappointed).

opinion in the recent citizen suit case in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*²¹⁸ These claims are symptomatic of the confusion which plagues the law of citizen suit litigation even after the landmark *Gwaltney* decision. Both groups, however, agree on one issue — the decision will increase the amount of motion practice and delay involved in environmental citizen suit litigation.²¹⁹

The decision in *Gwaltney* resolved a three-way split among the federal circuit courts of appeal,²²⁰ by holding that section 505 of the Clean Water Act²²¹ does not confer subject matter jurisdiction over citizen suits based on “wholly past” violations of the Act.²²² While there have been other citizens suit cases to reach the Supreme Court, *Gwaltney* was the first to reach the Court on the purely jurisdictional scope of the citizen suit provision.²²³

²¹⁸ 108 S. Ct. 376 (1987).

²¹⁹ Powers, *supra* note 184, at 10119; Miller, *supra* note 217, at 10104 (“[T]he court, in its more modest way, has been kind to litigating attorneys”).

²²⁰ The Fifth Circuit in 1985 became the first court of appeals to interpret § 505 expressly. *Hamker v. Diamond Shamrock Chem. Co.*, 756 F.2d 392 (5th Cir. 1985). The *Hamker* court affirmed a dismissal for lack of subject matter jurisdiction holding that citizen suits are authorized only where plaintiffs allege a current, ongoing violation of an effluent standard limitation or order and that the section authorized only civil penalties and injunctive relief for these “current” violations. 756 F.2d at 396. The Fourth Circuit expressly rejected *Hamker* and concluded that § 505 authorized actions for wholly past violations, even if such violations were not continuing at the time the complaint was filed. *Chesapeake Bay Foundation v. Gwaltney of Smithfield Ltd.*, 791 F.2d 304 (4th Cir. 1986). The First Circuit took a position midway between the other two circuits, holding that jurisdiction lies under § 505 when “the citizen-plaintiff fairly alleges a continuing likelihood that the defendant, if not enjoined, will again proceed to violate the Act.” *Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp.*, 807 F.2d 1089, 1094 (1st Cir. 1986).

²²¹ Federal Water Pollution Control Act Amendments § 505, 33 U.S.C. 1365 (1982). Congress amended § 505 in 1987. See *supra* notes 50-54 and accompanying text. However, the major litigation discussed in this Note rests on the earlier version. References in this Note to the CWA will be to the earlier version unless specifically noted.

²²² 108 S. Ct. at 384-385.

²²³ See generally *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981) (holding that there is no implied cause of action under the Clean Water Act); *International Paper Company v. Ouellette*, 479 U.S. 481 (1987) (holding the Clean Water Act preempted Vermont nuisance law to the extent that the law sought to impose liability on a New York point source); *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983) (citizens’ group that failed to achieve some degree of success on the merits of its citizen suit under the Clean Air Act was held not entitled to attorneys fees); *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60 (1975) (held that an EPA implementation plan that allowed individual variances from state ambient air quality standards was permissible).

The decision in *Gwaltney* has spawned a litany of views, predictions and interpretations of its holding and the future of citizen suits in general.²²⁴ Although *Gwaltney* resolved a hotly litigated issue, it represents only the latest in a series of mid-course corrections that affect the balance of power between private citizens and the government in the enforcement of the Clean Water Act.

A. *Gwaltney I*

Gwaltney of Smithfield, Ltd., a meat processor and packer of the famous Smithfield hams, discharged effluent under a valid NPDES permit into the Pagan River near Smithfield, Virginia.²²⁵ For three years prior to the citizen suit, *Gwaltney* had exceeded its effluent limitations on several occasions.²²⁶ These violations were listed in their DMRs filed with the Virginia regulatory authority.²²⁷

The Chesapeake Bay Foundation and The Natural Resources Defense Council sent the requisite sixty-day notice to *Gwaltney* in February 1984, based on its reported violations in the filed DMRs. *Gwaltney* installed new equipment that completely corrected its violations by May 15, 1984. The environmental groups filed their citizen suit June 15, 1984.²²⁸

The court denied *Gwaltney's* motion to dismiss for lack of subject matter jurisdiction on the grounds that it was in complete compliance with its NPDES permit when the suit was filed.²²⁹ The district court held that section 505 authorized civil penalty actions for wholly past violations, and alternatively held that plaintiffs had sufficiently alleged that *Gwaltney* continued to violate effluent limitations at the time the complaint was filed.²³⁰

²²⁴ See e.g., *supra* notes 217 and 219 and accompanying text.

²²⁵ *Gwaltney I*, 611 F. Supp. at 1544. *Gwaltney* discharged wastewater from its production facility under NPDES Permit No. VA0002844. *Id.*, at n.1.

²²⁶ Pollutant limits exceeded were (1) fecal coliform; (2) chlorine (CL₂); (3) total suspended solids (TSS); (4) total Kjeldahl nitrogen (TKN) (the most frequent violations); and (5) oil and grease. 611 F. Supp. at 1544 n.2. For a complete breakdown of all its violations, see *Gwaltney I*, 611 F. Supp. at 1566 (appendix A).

²²⁷ *Id.* at 1545.

²²⁸ Appendix E of Petition for Certiorari (Complaint and Stipulations) [hereinafter Brief] at 79a), *Gwaltney III*, 108 S. Ct. 376 (1987).

²²⁹ *Gwaltney I*, 611 F. Supp. at 1548-50.

²³⁰ *Id.* The speed at which liability was established in this case merits notice. As mentioned, the complaint was filed June 15, 1984. Six weeks later, on July 25, plaintiffs

The district court noted specifically that it was not bound by the EPA Penalty Policy or by the penalties that EPA would seek were it prosecuting the case. Even though the court did later use the Policy as a "guideline," such independence on the part of the federal courts is directly contrary to nationwide consistency of remedies and actually gives citizens the ability to extract larger penalties than the Justice Department could in the same case. The court then assessed a civil penalty in the amount of \$1,285,322 plus interest from the date of judgment.²³¹

B. *Gwaltney II*

The Fourth Circuit affirmed the trial court's holding that section 505 of the CWA conferred subject matter jurisdiction on wholly past violations.²³² The court emphasized that a significant deterrent would be lost under any other interpretation of the Act.²³³ The court rejected the reasoning of the Fifth Circuit in *Hamker v. Diamond Shamrock Chemical Co.*²³⁴ and never reached the district court's alternative reasoning on the good faith allegation of the violation.

C. *Gwaltney III*

The Supreme Court reversed both lower courts in an opinion by Justice Marshall and held that the citizen suit provision in section 505 does not confer subject matter jurisdiction over wholly past violations of the CWA.²³⁵ The Court based its conclusion on the use of the present tense language in section 505 requiring a defendant be "alleged to be in violation" of the

filed a Motion for Judgment on the Pleadings. Brief, *supra* note 228, at DOCKET ENTRIES, p. 2. One month later, on August 28, 1984, the court heard plaintiff's Motion for Partial Summary Judgment. *Id.* The motion was granted in favor of the plaintiffs on the issue of liability during a hearing that lasted only 21 minutes. *Id.* The trial on the amount of penalty was held December 19, 1984, and lasted only five hours and 36 minutes. *Id.* Thus defendant's liability for civil penalties in excess of \$1.2 million was established in slightly more than six months.

²³¹ *Gwaltney I*, 611 F. Supp. at 1565.

²³² *Gwaltney II*, 791 F.2d 304, 316-17 (4th Cir. 1986).

²³³ *Id.* at 309-10 ("a significant deterrent would be lost if citizen suits seeking civil penalties for past violations were not permitted").

²³⁴ *Id.* at 309 (discussing *Hamker*, 756 F.2d 392 (5th Cir. 1985), for a discussion of this case, see *supra* note 220).

²³⁵ *Gwaltney III*, 108 S. Ct. 376, 383-85 (1987) (J. Brennan, J. White, J. Marshall, joined by C.J. Rehnquist, and J. Blackmun).

Act.²³⁶ On this point, the Court rejected an interpretation that environmental groups claimed to be critical to citizen enforcement efforts.²³⁷ However, the Court struck a balance between those who argued it would be impossible to determine whether a polluter was "in violation" on the day suit is filed, and those urging an even narrower reading of the statute to foreclose any action by a citizen against a violation occurring prior to the filing of a suit. The Court held that to establish subject matter jurisdiction, a citizen must "make a good faith allegation of continuous or intermittent violations."²³⁸ The Court did indicate that "longstanding principles of mootness" and Rule 11 sanctions were available to protect the defendant's interests against non-meritorious litigation.²³⁹

Justice Scalia wrote a concurring, de facto dissenting, opinion.²⁴⁰ He argued that the majority's test for standing was "utterly unique" and that a defendant should be able to challenge the sufficiency of the allegations as well as the accuracy of the jurisdictional facts alleged.²⁴¹ He disagreed sharply with the majority on the issue to be resolved by the Court of Appeals on remand. The majority directed the lower court to determine whether the plaintiff had made the "good faith allegation" required.²⁴² Justice Scalia argued that the issue was whether the defendant was in fact "in violation" on the date suit was brought.²⁴³

²³⁶ *Id.* at 384 (observing that the statutory requirement of "in violation" cannot be fairly read to include "wholly past" violations).

²³⁷ The Sierra Club has argued in its petition for certiorari to the United States Supreme Court in *Sierra Club v. Shell Oil Co.*, 817 F.2d 1169 (5th Cir. 1987), *cert. denied* 484 U.S. 985 (1987), that the Fifth Circuit's approach in *Hamker* "effectively nullified" citizens' enforcement rights. 18 ENV'T. REP. (BNA) 1931 [Current Developments] (Dec. 18, 1987). The lower court in *Shell Oil*, 817 F.2d 1169, ruled a citizen suit based on multiple, sporadic, and past violations of effluent limitations contained in NPDES permits cannot be maintained under FWPCA § 505.

²³⁸ *Gwaltney III*, 108 S. Ct. at 385-86.

²³⁹ *Id.* at 385-86.

²⁴⁰ *Gwaltney III*, 108 S. Ct. at 386-88 (J. Scalia, concurring in part and concurring in the judgment, joined by J. Stevens and J. O'Connor).

²⁴¹ *Id.* at 387. Justice Scalia said "I can think of no other context in which, in order to carry a lawsuit to judgment, allegations are necessary but proof of those allegations (if they are contested) is not." *Id.*

²⁴² *Id.* at 386. "[A] suit will not be dismissed for lack of standing if there are sufficient 'allegations of fact' — not proof — in the complaint or supporting affidavits." *Id.* ((citing *Warth v. Seldin*, 422 U.S. 490, 501 (1975) ("Art. III's requirement remains: the plaintiff still must *allege* a distinct and palpable injury to himself. . . .")) (emphasis added)). *Id.* at n.5.

²⁴³ *Id.* at 387. Justice Scalia suggested that the question on remand should be

Notwithstanding the disagreement over the role of the lower courts on remand, the Court was unanimous in holding that the use of the present tense in section 505 is pervasive, indicating "the harm sought to be addressed by the citizen suit lies in the present or the future, not in the past."²⁴⁴ The Court relied in part on the legislative history of the Act to support this conclusion. It stated that the citizen suit provisions were described as abatement or injunctive provisions, clearly indicating prospective relief and noted that it was modeled after section 304 of the Clean Air Act which provided for wholly injunctive relief.²⁴⁵

The Court went on to comment that the sixty-day notice provision to both the violator and the government would be meaningless if citizens were allowed to sue for past violations.²⁴⁶ The purpose of the notice was to provide an opportunity for the discharger to comply and make a lawsuit unnecessary.²⁴⁷

The majority in *Gwaltney III* characterized the citizen's role as supplementing rather than supplanting government actions.²⁴⁸ The Court felt that if citizens were permitted to sue for wholly past violations, there was a danger that such suits would interfere with the government's enforcement and prosecutorial functions.²⁴⁹ The Court concluded that they could not agree with the environmental groups' view of the nature of the citizens' role, one that would change that role from "interstitial to potentially intrusive."²⁵⁰

Thus the Supreme Court swung the pendulum of power back toward the government agencies and away from the citizen. Their opinion expresses a real fear that citizens had expanded the role of section 505 to oust the government of its regulatory role. This is a significant realignment of the parties and one that clearly

whether the defendant had taken sufficient remedial steps that had clearly achieved the effect of curing all past violations by the time suit was brought. *Id.*

²⁴⁴ *Gwaltney III*, 108 S. Ct. at 382.

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 384. *But cf.* Miller, *supra* note 216, at 10100-01 (observing that many violators cannot achieve compliance within this time period and that the notice provision serves other purposes as well).

²⁴⁷ *Gwaltney III*, 108 S. Ct. at 382-83.

²⁴⁸ *Id.* at 383. The Court said this intent was evidenced by the bar on citizen suits where the government has taken action. *Id.*

²⁴⁹ *Id.* The Court pointed out that the government's discretion to enforce the Act in the public interest would be curtailed since the government may choose to forego or compromise penalties as part of its enforcement strategy.

²⁵⁰ *Id.*

indicates it is the government's role to punish and deter and the citizen's role to correct.

D. *Gwaltney IV*

On remand to the Fourth Circuit, the Appeals Court addressed two issues. In a terse paragraph, the Court held that the "district court did find a good faith allegation of ongoing violation sufficient to avoid threshold jurisdictional challenges."²⁵¹ The Court also remanded to the district court the question as to whether the plaintiffs had proved "the existence of an ongoing violation (continuous or intermittent) in order to prevail."²⁵²

The Appeals Court suggested that the plaintiffs may accomplish this by either of two methods. First, the plaintiffs may prevail by proving that the alleged violations did continue on or after the date the complaint was filed.²⁵³ Alternatively, the plaintiffs could adduce "evidence from which a reasonable trier of fact could find a continuing likelihood of a recurrence of intermittent or sporadic violations."²⁵⁴

The second portion of the court's test is troubling. It appears to contradict Justice Marshall's statement that "after the plaintiff offers evidence to support the allegation, the case proceeds to trial on the merits, where the plaintiff must prove the allegations in order to prevail."²⁵⁵

The standard allows a factfinder much more latitude and changes his inquiry from the objective issue of whether a violation occurred to a choice between competing experts as to the potential for the violation to occur in the future. This would seem to be an appropriate question in the context of injunctive relief. However, as a threshold for millions of dollars of civil penalties to be imposed, a serious potential for abuse is present. Only in equitable proceedings for injunctions does the future

²⁵¹ *Gwaltney IV*, 844 F.2d 170, 171 (4th Cir. 1988). The court also held the District Court's finding was "not clearly erroneous." *Id.*

²⁵² *Id.* (rebutting Justice Scalia's suggestion that the majority would never require a plaintiff be called on to prove the jurisdictional allegation).

²⁵³ *Id.*

²⁵⁴ *Id.* at 171-72. The court noted that "[i]ntermittent or sporadic violations do not cease to be ongoing until the date when there is not real likelihood of repetition." *Id.*

²⁵⁵ *Gwaltney III*, 108 S. Ct. 376, 386 (1987). Justice Marshall was distinguishing the challenges to the allegation required to sustain standing from those challenges to the merits of the case. *Id.*

potential conduct of an actor play a part in his liability for past conduct.

E. *Gwaltney V*

On remand, the district court was forced to consider the second part of the Appeals Court's test, as Gwaltney had not violated its NPDES permit since the citizen suit was filed.²⁵⁶ As expected, the district court's opinion was mainly concerned with expert testimony offered at trial concerning the likelihood of continued compliance. The court held that sufficient evidence had been presented at the trial to demonstrate that "at the time plaintiffs filed suit, there existed a very real danger and likelihood of further violation."²⁵⁷

Thus the court ruled that the original judgment of the trial court for a total civil penalty of \$1,285,322 be reinstated,²⁵⁸ despite the fact that the penalty was for violations that occurred before the filing of the citizen suit and the fact that Gwaltney had not violated any effluent standard or order since the suit was filed.

F. *Gwaltney VI*

Gwaltney once again appealed the finding that it was "in violation" at the time suit was brought under the Supreme Court's decision in *Gwaltney III*. Gwaltney proved that there was insufficient evidence presented at trial to support the district court's finding of ongoing violations of TKN limits and especially chlorine limits.²⁵⁹ In what has become known as a *param-*

²⁵⁶ *Gwaltney V*, 688 F. Supp. 1078, 1079 (E.D. Va. 1988). In conjunction with the second element of the test in the Fourth Circuit's remand opinion, the district court also relied heavily on the appeals court's observation that violations "do not cease to be ongoing until the date when there is no real likelihood of repetition." *Id.* at 1079 (citing *Gwaltney IV*, 844 F.2d 170, 172 (4th Cir. 1988)).

²⁵⁷ *Id.* at 1079. This proof consisted of statements by one of the plaintiff's witnesses, Dr. Bell, who "had clear doubts . . . about continued compliance" and the defendant's witness, Mr. Sheed, who, when asked on cross examination whether there was some doubt, innocuously replied: "I think there is some doubt every year that you would expect the plant to go out of compliance at some time." *Id.* at n.3.

²⁵⁸ *Id.* at 1080.

²⁵⁹ *Chesapeake Bay Foundation, Inc., v. Gwaltney of Smithfield, Ltd., (Gwaltney VI)*, 890 F.2d 690 (4th Cir. 1989).

eter by parameter approach,²⁶⁰ the Court held "that the district court had no jurisdiction to impose penalties for Gwaltney's wholly past chlorine violations."²⁶¹ Thus, the Fourth Circuit vacated the original judgment and remanded the case once again, this time with instructions to the trial court to enter judgment against Gwaltney for \$289,822, the penalty amount attributable to the TKN violations only.²⁶² The Court also held that the imposition of penalties for past violations which were linked to the same parameter with an ongoing violation deterred future pollution and thus presented a live case or controversy under Article III standing requirements.²⁶³

IV. POST-GWALTNEY CITIZEN SUIT LITIGATION

Gwaltney has raised more questions than answers, certainly more than can be adequately addressed here, and its actual impact may not be known for years. However, it has already become one of the most cited CWA cases in little more than a year. It has been applied to citizen suits under the Clean Air Act,²⁶⁴ and used as authority that Rule 11 should be used to protect defendants from actions premised on baseless allegations.²⁶⁵ It has also been used to reject challenges to standing based on certain allegations.²⁶⁶

The major battle on "wholly past violations" is over. However, despite the Supreme Court's unanimous holding on that

²⁶⁰ This approach views violations of different parameters under a discharge permit as separate violations for jurisdictional purposes. Thus it is necessary for an environmental plaintiff to plead and prove an ongoing violation of each discharge parameter in order to impose penalties for violations of that parameter. The Court in *Gwaltney VI* rejected a *permit* approach that would have allowed the imposition of penalties for *any* current or past violations of *any* parameter as long as the plaintiff proved at least one violation of a limit established in the discharge permit. *Gwaltney VI* 890 F.2d at 698 (This "theory . . . runs against the reasoning of the Supreme Court in finding that there must be an ongoing violation to create subject matter jurisdiction.").

²⁶¹ *Gwaltney VI*, 890 F.2d at 698.

²⁶² *Id.*

²⁶³ *Id.* at 695.

²⁶⁴ See *Moran v. Vaccaro*, 684 F. Supp. 1201 (S.D.N.Y. 1988) (holding that the Clean Air Act contains the same language as the CWA, that a defendant be "alleged to be in violation" before a citizen suit can go forward and will bar citizen plaintiffs in CAA cases unless this requirement is met).

²⁶⁵ See *International Shipping Co. v. Hydra Offshore, Inc.*, 675 F. Supp. 146, 150 n.3 (S.D.N.Y. 1987).

²⁶⁶ See *Books on Tape, Inc. v. Booktape Corp.*, 836 F.2d 519, 520 (Fed. Cir. 1987) (reversing a decision of the Trademark Trial and Appeal Board that had confused a petitioner's standing with merits of the case).

issue, the focus has turned to just what a wholly past violation is. In what appears to be a clear misreading of *Gwaltney III*, the Fourth Circuit at least has said that ending violations before the citizen suit is filed does not necessarily make a past violation.²⁶⁷ It is clear, however, that some types of actions brought in the past would not be allowed under the *Gwaltney* holdings.²⁶⁸

One case currently winding its way through the Supreme Court's docket, *Sierra Club v. Simkins Industries, Inc.*,²⁶⁹ raises a number of challenges, both to the correct application of *Gwaltney III* and the constitutional dimension of standing in citizen suits.²⁷⁰ The case squarely raises the issue of whether civil penalties under section 505 meets the Article III standing requirement of "redressability" by authorizing the penalties to be paid to the United States Treasury.²⁷¹ Also raised is the issue of whether the failure to file DMRs, without evidence that any effluent limitation was violated, is within the scope of the jurisdictional requirement of the citizen suit provision.

As manifested in *Simkins Industries*, *Gwaltney III* is likely to spawn a number of challenges to section 505 on the standing issue, especially in light of the Scalia concurrence. Justice Scalia seems to draw an important distinction between a motion to dismiss under Rule 12(b)(6)²⁷² and a motion to dismiss under Rule 12(b)(1).²⁷³ Justice Scalia argues that the "good faith alle-

²⁶⁷ See *supra* notes 254-57 and accompanying text.

²⁶⁸ See *e.g.*, *Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp.*, 807 F.2d 1089, 1091 (1st Cir. 1986), *cert. denied*, 108 S. Ct. 484 (1987) (the facility's discharge system was connected to a municipal treatment facility before the citizen suit was commenced); *Friends of the Earth v. Archer Daniels Midland Co.*, 24 ENV'T. REP. CAS. (BNA) 1993 (N.D.N.Y. 1986) (facility's previous owner held liable for violations occurring after he shut down and sold the plant); *Student Public Interest Research Group of New Jersey v. AT&T Bell Laboratories*, 617 F. Supp. 1190, 1192 (D.N.J. 1985) (prior to citizen suit, the defendant had connected his discharge to a nonpolluting municipal treatment facility); *Menzel v. County Util. Corp.*, 712 F.2d 91 (4th Cir. 1983) (no violations after the utility received a new NPDES permit that allowed an increase to the previous levels of discharge). *But cf.* *Sierra Club v. Hanna Furnace Corp.*, 636 F. Supp. 527, 528-29 (W.D.N.Y. 1985) (refusing to dismiss a case as moot even after the discharger sold its plant equipment and permanently shut down).

²⁶⁹ *Sierra Club v. Simkins Industries, Inc.*, 847 F.2d 1109 (4th Cir. 1988), *cert. denied*, 109 S. Ct. 3185 (1989).

²⁷⁰ See *infra* notes 272-75.

²⁷¹ *Petition for cert.*, 57 U.S.L.W. 3382 (U.S. Nov. 29, 1988) (No. 88-660).

²⁷² *Fed. R. Civ. P.* 12(b)(6) (a motion to dismiss for failure to state a claim — most often converted to a summary judgment motion under Rule 56 in the citizen suit context).

²⁷³ *Fed. R. Civ. P.* 12(b)(1) (a motion to dismiss on the grounds of a lack of subject matter jurisdiction).

gation" is sufficient to invoke the subject matter jurisdiction of the court, albeit under a different standard of the quality of "cure" the discharger has achieved at the time suit is brought.²⁷⁴ However, he stated that independently of subject matter jurisdiction, a defendant may challenge a plaintiff's standing with the result that only the violation's actual existence, not its good faith allegation, would support a plaintiff's standing.²⁷⁵ Arguably this interpretation of standing could accelerate a trial on the merits to a hearing on a motion to dismiss under Rule 12(b)(1).

Another troubling decision under *Gwaltney III* that shifts the balance of enforcement authority back toward citizens is *Public Interest Research Group of New Jersey, Inc. v. Carter-Wallace, Inc.*²⁷⁶ The court in *Carter-Wallace* stated that once a citizen suit is properly commenced — the citizen meets the jurisdictional threshold — the court has the authority to impose any penalty amount (up to statutory maximum) on past violations that is appropriate.²⁷⁷ This holding again suggests that an actual violation of the CWA need not be found, only that sufficient facts be alleged to support the "continuing" standard of the good faith allegation.

In *Hudson River Fishermen's Association v. Westchester*,²⁷⁸ a landfill operator was sued by an environmental group under section 505. The defendant had allowed leachate and storm water runoff to be discharged through a pipe in a small impoundment.²⁷⁹ The defendants attempted to cap the pipe and invoke *Gwaltney*.²⁸⁰ However, the court rejected the argument to dismiss for lack of a continuing violation.²⁸¹ The evidence submitted showed that the cap on the pipe leaked and could be manually removed.²⁸² Thus the court here could easily sustain both the subject matter jurisdiction of the court and plaintiff's standing

²⁷⁴ *Gwaltney III*, 108 S. Ct. 376, 387 (1988) (J. Scalia, concurring in part and concurring in the judgment) (claiming that the Court's "good faith allegation" would differ little from his view in practical application).

²⁷⁵ *Id.* at 388 (if "the defendant were in a state of compliance when this suit was filed, the plaintiff would have been suffering no remediable injury in fact that could support suit").

²⁷⁶ 684 F. Supp. 115 (D.N.J. 1988).

²⁷⁷ *Id.* at 118.

²⁷⁸ 686 F. Supp. 1044, (S.D.N.Y. 1988).

²⁷⁹ *Id.* at 1047.

²⁸⁰ *Id.* at 1051.

²⁸¹ *Id.*

²⁸² *Id.*

since violations did exist at the time suit was brought. It would appear that this is the type of situation that the Supreme Court had in mind when it decided *Gwaltney*.

V. A PROPOSAL FOR REGULATORY ACTION

Congress has shown no inclination to eliminate the increasingly controversial citizen suit. The legislative branch has shown it keeps a watchful eye on executive branch enforcement and citizen enforcement actions and has adjusted the balance of power between them to fit its current view of the policies behind the provision. Government enforcement officials at the same time have had to struggle with the question of whether to treat the citizen enforcer as a compatriot or competitor.²⁸³

The recent increase in private attorney general actions by ideological plaintiffs with their own conception of the responsibilities of citizenship has led to an increase in total enforcement but at the cost of national consistency. If citizen suits are to continue to supplement and enhance the role of the regulatory authority, the remedies in these suits must be more consistent with the national goals of the Act.

The courts have treated citizen suits in an ad-hoc fashion, "creating random and discrete judicial limitations on the role of citizen suits in the enforcement of environmental laws."²⁸⁴ Differing judicial philosophies have led to two serious concerns; citizen suits invite judicial lawmaking where the government is not a party to the suit, and citizen suits impair the mix of cooperation and deterrence that is necessary under the environmental laws.²⁸⁵ A section 505 remedy must not result in enforcement of a different nature from that desired by Congress, nor may such a remedy disrupt a statutory compromise or cause overenforcement of the law.

One solution to the conflict between the right established by Congress that allows citizens to sue violators and the consistency of national enforcement would be to establish rules under the citizen suit provision reflecting a compromise position. These rules would be aimed at making citizen suit remedies more consistent nationwide. The rules could not restrict the citizen's

²⁸³ Price, *supra* note 39, at 31.

²⁸⁴ Comment, *supra* note 122, at 236.

²⁸⁵ *Id.* at 223.

right to *bring suit* since it is statutorily established. However, in the interest of national consistency and fairness to similarly situated defendants, the EPA and state regulatory agencies could establish detailed rules and guidelines²⁸⁶ to establish appropriate remedies to further the national goals of the Act and not hinder future agency enforcement of other cases. This is particularly important in the policy-oriented remedies such as monetary penalties for past violations and other deterrence related actions.

Rules could be similar the the EPA's civil penalty policy or drawn from many of the reported citizen suit cases. Once these rules are promulgated through the public notice and comment process, then open and meaningful debate on these policy issues could result in workable solutions that would allow continued citizen enforcement that is consistent with the important national goals Congress had in mind when it passed the Clean Water Act.

CONCLUSION

Traditional environmental law in the clean water area before 1972 had pitted the government against corporations. During the 1970s, it often thrust environmental groups against the govern-

²⁸⁶ The Administrator of the Environmental Protection Agency is authorized to promulgate rules under the CWA in broad grant of authority in 33 U.S.C. § 1361(a):

The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter.

Arguably, the Administrator's power would reach the establishment of standards for citizen remedies that are "necessary to carry out his functions" under the Act. Consistent application of the law is a fundamental responsibility of the Administrator under any regulatory system.

In contrast, the citizen suit provision allows as a remedy any "appropriate civil penalties." 33 U.S.C. § 1365(a) (emphasis added). There is no definition in the Act for appropriate, but the dictionary definition includes "fitting," "proper" and "[s]uitable for a particular person, condition, [or] occasion." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 64 (1975). Appropriate civil penalties would be only those that further the purposes of the Act, including consistent application of the law and the pursuit of nationwide enforcement.

Congress even contemplated that the administrator would develop regulations under the citizen suit provisions:

Public participation in the . . . enforcement of any regulation, standard, [or] effluent limitation . . . established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator . . . shall develop and publish regulations specifying minimum guidelines for public participation in such processes.

33 U.S.C. § 1251(e) (emphasis added).

ment. Now, under citizen suit provisions of most environmental regulation passed since 1970, environmental groups and citizens are battling corporations under the color of state and federal statutes.

The evolution of citizen suits under the Clean Water Act has become a virtual three-way tug of war between environmental groups, the regulated industry and the government. Each party has its own view of the scope and philosophy of section 505. Through various legislative acts and judicial decisions in response to the large increase in citizen suits, the parties are changing the contours of the basic policy of the Clean Water Act. The 1987 Amendments to the CWA altered the relevant enforcement authority under the statute to allow the government more control of citizen suit litigation. The *Gwaltney* decision significantly reduced the punishment aspect of such suits.

There is no legislative history that indicates Congress was willing to sacrifice consistency and coordination because of the value of citizen suits. Since enforcement is such an integral part of the total policy of the Act, liberal allowance of remedies in citizen suits is unwise. The increasing number of citizen suits that extract large penalties may result in "overdeterrence" where serious violators may alter DMRs to show no violations and thus undermine a principle part of the CWA — the record system's ability to pinpoint violators.

Environmental groups, anxious though they may be to vindicate and protect congressionally established rights to a cleaner environment, must always endeavor to do so in ways that will not unduly interfere with the legitimate overall government enforcement policy. Rulemaking to establish minimal standards for remedies under section 505 would continue to represent a system in which there is sensitivity to the legitimate interests of local citizen groups while restoring the necessary fairness and continuity of national governmental policy reflected in the Clean Water Act. The alternative to establishing minimal consistency could very well be the historical solution to aggressive bounty hunting, which would be in the present context, the erosion of public confidence in the motives of the citizen groups and possible extinction of the right.

