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The Supreme Court's Water Pollution Jurisprudence: Is the Court All Wet?

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THE SUPREME COURT'S WATER POLLUTION
JURISPRUDENCE: IS THE COURT ALL WET?

Jeffrey G. Miller*

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I. INTRODUCTION

Some of my environmental law colleagues have long lamented that the Supreme Court is anti-environmental.¹ This assertion always struck me as unlikely. Why would nine intelligent, thinking

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¹ J. William Futrell, *The Ungreening of the Supreme Court*, ENVTL. F., Jan.-Feb. 1992 at 12; Richard E. Levy & Robert L. Glicksman, *Judicial Activism and Restraint in the Supreme Court's Environmental Law Decisions*, 42 VAND. L. REV. 343 (1989); A. Dan

persons be against the environment that nurtures us all? But then Professor Richard Lazarus began counting and demonstrated that a decided majority of the Court's environmental law decisions have anti-environmental results.² Statistics alone, however, do not indicate that the Court has an anti-environmental bias. As Lazarus suggests, the statistics could reflect the resolution of conflicts between environmental values and other social or legal values embodied in the Constitution, statutes, or cross-cutting legal doctrines.³ Such conflicts would inevitably lead to some decisions counter to environmental values. A more qualitative analysis of the Court's opinions might suggest whether resolution of diverging values or an anti-environmental bias explains the majority of the Court's decisions.

At the same time, some of the Court's environmental law decisions misconstrue the environmental statutes. Perhaps the environmental statutes are too long and complex for the Court to grasp. Years ago my tax law professors complained that "the Supreme Court just does not understand the Internal Revenue Code!"⁴ When many full-time tax practitioners cannot comprehend the Code in its entirety, it may be too much to expect that the part-time tax practitioners on the Court could do so. Perhaps the sheer volume and complexity of environmental law, which rivals tax law,⁵ makes it equally difficult for the Court to comprehend. As a result, I have similarly complained to my students that "the Court just does not understand the Clean Water Act" (CWA).⁶ Perhaps the concern of my colleagues with the apparent anti-envi-

Tarlock, *Is There a There in Environmental Law?*, 19 FLA. ST. U. J. LAND USE & ENVTL. L. 213, 224 (2004).

² Richard J. Lazarus, *Environmental Law and the Supreme Court: Three Years Later*, 19 PACE ENVTL. L. REV. 653 (2002) [hereinafter Lazarus, *Three Years Later*]; Richard J. Lazarus, *Thirty Years of Environmental Protections Law in the Supreme Court*, 17 PACE ENVTL. L. REV. 1 (1999) [hereinafter Lazarus, *Thirty Years*]. See also Richard J. Lazarus, *Restoring What's Environmental About Environmental Law in the Supreme Court*, 47 UCLA L. REV. 703 (2000).

³ See Lazarus, *Three Years Later*, *supra* note 2, at 654.

⁴ David Hurwitz, Professor, Harvard Law School, Lecture at the Harvard Law School (1966); Frank Sanders, Professor, Harvard Law School, Lecture at the Harvard Law School (1967). My tax colleagues, Professors Ron Jensen and Bridgett Crawford, tell me the complaint is as valid today as it was when I was a law student.

⁵ The 2004 version of the Code of Federal Regulations contains: twenty volumes in Part 26, regulations of the Internal Revenue Service under the Internal Revenue Code, and thirty volumes in Part 40, regulations of the Environmental Protection Agency under the environmental statutes it administers. Moreover, many of the EPA volumes are larger than the IRS volumes and the EPA volumes occupy about sixty percent more shelf space than the IRS volumes. See 26 C.F.R. §§ 1.1–801.6 (2004); 40 C.F.R. §§ 1.1–1700.13 (2004).

⁶ Clean Water Act, 33 U.S.C. §§ 1251–1387 (2000).

ronmental tilt of the Court's decisions and my own concern with the Court's apparent misunderstanding of environmental statutes are related. The Court may not understand environmental law and thus be prone to analytical error, which in turn could lead to anti-environmental decisions. On the other hand, the Court could mistakenly or purposefully misconstrue an environmental statute to reach results-oriented, anti-environmental decisions. Again, a more qualitative analysis of the Court's opinions may suggest why the Court's environmental decisions sometimes contain analytical errors and the relationship, if any, between the errors and anti-environmental results.

A qualitative analysis of the over 240 cases Lazarus counted⁷ is beyond the scope of a single law review article. A qualitative examination of the Court's decisions under the CWA, however, is perfectly suited for this task. The Court has rendered twenty-three decisions under the CWA, more than any other statute implemented by the Environmental Protection Agency (EPA),⁸ enough to form a critical mass susceptible to analysis within a single article.

Most of the Court's early CWA opinions decided before 1980 involved relatively simple issues of statutory interpretation. Additionally, these decisions were relatively unaffected by legal values and doctrines beyond the CWA and were unanimously decided or decided by a strong majority. The results of these early decisions were overwhelmingly pro-environmental.⁹ In contrast, many of the opinions decided after 1980 involved more complex issues of statutory interpretation and were often affected by legal values and doctrines extrinsic to the CWA. These decisions were rarely unanimous. The results of these later decisions were overwhelmingly anti-environmental. It is tempting to speculate that the change from predominantly pro-environmental decisions to predominantly anti-environmental decisions occurred because of a change in the makeup of the Court, e.g., reflecting a difference between the Burger Court and the Rehnquist Court. However, the change from decisions with pro-environmental results to anti-environmental results occurred in 1980,¹⁰ a year when there were no changes in Justices.

⁷ See Lazarus, *Thirty Years*, *supra* note 2, at Appendix.

⁸ See *infra* Table A.

⁹ The same could be said for the Court's decisions under earlier water pollution legislation. See *infra* notes 21–22.

¹⁰ See *infra* Table B.

Qualitative analysis of the decisions reveals a surprising level of mistakes in the Court's interpretation of the CWA. In fact, two-thirds of the decisions contain analytical errors,¹¹ mischaracterizing or acting in apparent ignorance of some statutory provisions pertinent to the issues before the Court. While these mistakes were not always critical to the Court's decisions, the rate of error is greater in the post-1980 decisions than in the pre-1980 decisions and the severity of the errors is far greater in the post-1980 decisions. The rate of mistake is also greater in decisions with anti-environmental results than it is in decisions with pro-environmental results. Furthermore, the severity of the errors is much greater in the decisions with anti-environmental results.

The apparent explanation for the change from decisions with pro-environmental results to anti-environmental results and the increase in the rate and severity of analytical errors in the Court's decisions before and after 1980 is a change in the nature of the CWA cases coming before the Court. Before 1980, all of the cases sought judicial review of EPA actions or appealed federal enforcement of the CWA. After 1980, ten of the fifteen decisions were either citizen suits, private common law nuisance actions against polluters, or appeals of state action. Because EPA action was not at issue in these decisions, the United States was not a party in most of the actions, although it often filed an amicus brief. When the United States was a party, its position did not necessarily represent the EPA's interpretation of the CWA, especially when the federal defendant was sued for violating the CWA.¹²

This suggests that the anti-environmental tilt and the analytical mistakes resulted from a combination of the Court's ambivalence toward citizen enforcement¹³ and the absence of the EPA's participation in framing the government's position explaining the CWA, especially in cases in which the Department of Justice represented the government as a polluter rather than as a guardian of the envi-

¹¹ *Id.* These errors are identified and discussed in Part III.

¹² In *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982), for instance, the Governor of Puerto Rico sued the Secretary of the Department of Defense to enjoin practice bombing in the ocean near Vieques Island without a CWA permit. Because the Solicitor General represented the Department as a defendant, the brief filed by the United States represented the position of the CWA-violating Department rather than of the CWA-enforcing EPA. See discussion of *Romero-Barcelo* *infra* pp. 156-163 and accompanying notes 168-204.

¹³ The dissent in *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n* (*Sea Clammers*), 453 U.S. 1, 25 (1981) (Stevens, J., dissenting), commented that in its recent decisions the Court had "been more and more reluctant to open the courthouse door to the injured citizen."

ronment and of the CWA. An examination of the briefs filed by the United States in these cases confirms this notion. A similar examination of the Court's opinions under other environmental statutes would indicate whether this is generally the case and might determine which aspect of the combination is dominant.

Part I of this article sets the stage with a brief survey of federal water pollution control, focusing on the CWA. Part II examines statistical conclusions and inferences from a cursory review of the Court's CWA opinions. Part III examines some of the opinions in a more qualitative manner to determine whether the statistical conclusions withstand analysis and whether the Court understands the CWA. The latter determination requires examining the nature and severity of the Court's misinterpretations of the statute. Part IV examines the Court's decisions with anti-environmental results to determine whether they reflect an anti-environmental bias or the other factors suggested. Table A lists the Court's opinions under the statutes administered by the EPA, documenting that the Court's CWA decisions outnumber those under any other EPA administered statute. Table B contains basic information about the Court's CWA opinions, from which the conclusions in Part II are drawn.

II. OVERVIEW OF FEDERAL WATER POLLUTION CONTROL

A. Pre-CWA

Prior to 1972, federal water pollution legislation provided: 1) some funding to states for building local sewage treatment plants; 2) research into the causes of, effects of, and cures for water pollution; 3) technical expertise and guidance to states on developing water quality standards; and 4) cumbersome enforcement of poorly established pollution control requirements.¹⁴ Frustrated with this ineffective construct, federal regulators discovered the Refuse Act of 1899, a neglected statute that was designed to protect channels of navigation from siltation but read broadly enough to serve as an

¹⁴ See Clean Water Restoration Act of 1966, Pub. L. No. 89-753, 80 Stat. 1246; Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903. See also *EPA v. Cal. ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 200-209 (1976) (examining the pre-1972 program and contrasting it with the 1972 legislation). For a detailed account of pre-1972 efforts to control water pollution, see William L. Andreen, *The Evolution of Water Pollution Control in the United States—State, Local and Federal Efforts, 1789-1972: Part I*, 22 STAN. ENVTL. L.J. 145 (2003).

effective vehicle for pollution control.¹⁵ The Refuse Act required a permit from the U.S. Army Corps of Engineers (“Corps of Engineers”) to introduce refuse into navigable waters. The EPA and the Corps of Engineers developed a permit program under which the Corps of Engineers issued permits requiring compliance with pollution reduction requirements specified by the EPA.¹⁶ A suit by environmentalists effectively ended this effort by requiring environmental impact statements under the National Environmental Policy Act (NEPA)¹⁷ to be issued with each permit.¹⁸ This set the stage for the wholesale revamping of federal water pollution legislation in 1972.¹⁹

Although the pre-CWA water pollution control regime was largely ineffective, a number of water pollution cases reached the Supreme Court before enactment of that statute, including: several federal common law disputes between states,²⁰ three appeals under the Refuse Act,²¹ and one case under oil pollution legislation later incorporated into the CWA.²²

The Constitution vests the Supreme Court with original jurisdiction over disputes between states.²³ As a result, states have

¹⁵ 33 U.S.C. § 407 (2000). See William H. Rodgers, Jr., *Industrial Water Pollution and the Refuse Act: A Second Chance for Water Quality*, 119 U. PA. L. REV. 761, 762 (1971).

¹⁶ Ray M. Druley, *The Refuse Act of 1899*, BNA ENVTL. REP., Monograph No. 11, Jan. 28, 1972, at 10–16.

¹⁷ 42 U.S.C. §§ 4321–4370f (2000).

¹⁸ *Kalur v. Resor*, 335 F. Supp. 1, 15 (D.D.C. 1971). See also *EPA v. Cal.*, 426 U.S. at 203.

¹⁹ Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816.

²⁰ See *infra* notes 24–26 and accompanying discussion.

²¹ *United States v. Pa. Indus. Chem. Corp.*, 411 U.S. 655, 674 (1973) (noting that the government may prosecute a defendant discharging refuse into a navigable water without a permit issued by the Corps of Engineers, even in the absence of a formal program to issue such permits, but that it was an error not to admit evidence that defendant reasonably relied on statements by the Corps of Engineers that no permit was necessary); *United States v. Standard Oil Co.*, 384 U.S. 224, 230 (1966) (upholding a prosecution for an oil spill from vessel against an argument that commercially valuable oil was not refuse); *United States v. Republic Steel Corp.*, 362 U.S. 482, 490 (1960) (noting that the government may seek an injunction against discharge of industrial waste causing siltation of a channel and noting that industrial waste was not covered by the “streets and sewers” exception).

²² *Askew v. Am. Waterways Operators*, 411 U.S. 325, 328 (1973) (holding that federal oil spill legislation did not pre-empt state oil spill legislation absent a clear conflict). The oil spill legislation was enacted as the Water Quality Improvement Act of 1970, Pub. L. No. 91-224, 84 Stat. 91 (codified prior to 1972 at 33 U.S.C. § 1161, later incorporated into the CWA as § 311, 33 U.S.C. § 1321 (2000)). However, the Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484 (codified as amended at 33 U.S.C. §§ 2701-2761 (2000)), largely supplanted § 311.

²³ U.S. CONST. art. III, § 2, cl. 2.

brought to the Court many of their disputes over rights to or revolving around interstate waters. The cases have included border disputes caused by shifting boundary waters,²⁴ disputes over rights to use and consume common water,²⁵ and disputes over pollution of a downstream state's water by sources of pollution located in other states upstream.²⁶ Opinions in these interstate disputes culminated in *Illinois v. Milwaukee*,²⁷ in which the Court recognized a federal common law of nuisance caused by interstate water pollution. The Court rendered this opinion on April 24, 1972, noting that water pollution legislation was pending and "new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance."²⁸

B. *The CWA*

The 1972 legislation,²⁹ now commonly called the Clean Water Act or CWA,³⁰ divided all water pollution sources into two groups:

²⁴ *Georgia v. South Carolina*, 497 U.S. 376, 379 (1990); *Louisiana v. Mississippi*, 466 U.S. 96, 99 (1984); *Ohio v. Kentucky*, 444 U.S. 335, 336 (1980); *Texas v. Louisiana*, 410 U.S. 702, 707 (1973); *Minnesota v. Wisconsin*, 252 U.S. 273, 276 (1920); *Iowa v. Illinois*, 147 U.S. 1, 2 (1893).

²⁵ *Colorado v. New Mexico*, 467 U.S. 310, 312 (1984); *Colorado v. New Mexico*, 459 U.S. 176, 177 (1982); *Arizona v. California*, 373 U.S. 546, 551 (1963); *Washington v. Oregon*, 297 U.S. 517, 518 (1936); *Nebraska v. Wyoming*, 295 U.S. 40, 41 (1935); *New Jersey v. New York*, 283 U.S. 336, 341 (1931); *Connecticut v. Massachusetts*, 282 U.S. 660, 662 (1931); *Wyoming v. Colorado*, 259 U.S. 419, 455 (1922); *Kansas v. Colorado*, 206 U.S. 46, 47 (1907).

²⁶ *Illinois v. Milwaukee*, 406 U.S. 91, 93 (1972); *New Jersey v. New York*, 347 U.S. 995, 995 (1954); *New Jersey v. New York*, 283 U.S. 473, 476 (1931); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 236 (1907); *Missouri v. Illinois*, 200 U.S. 496, 517 (1906).

²⁷ 406 U.S. 91, 107 (1972).

²⁸ *Id.*

²⁹ William L. Andreen, *Water Quality Today—Has the CWA Been a Success?*, 55 ALA. L. REV. 527 (2004), is a timely description and analysis of the operation and effectiveness of the CWA which also cites much of the pertinent literature. Also see the leading environmental law treatises: 2 FRANK P. GRAD, *TREATISE ON ENVIRONMENTAL LAW* § 3.01–3.05 (2004), and 1 WILLIAM H. RODGERS, JR. *ENVIRONMENTAL LAW: AIR & WATER* §§ 1.1–3.41 (1986).

³⁰ The original water pollution control legislation, which passed on June 30, 1948, was known as the Federal Water Pollution Control Act (FWPCA), Pub. L. No. 80-845, 62 Stat. 1155 (1948) (codified prior to 1972 at 33 U.S.C. §§ 1151–1165). Congress completely amended this Act in 1972, creating the same basic form and content which exists today, despite numerous subsequent amendments. It continued to be known as the FWPCA until the Clean Water Act Amendments of 1977, Pub. L. No. 95-217, 91 Stat. 1577. Although the 1977 amendments adopted "Clean Water Act" or "CWA" as the name of the amending statute rather than the name of the underlying statute (see the Historical and Statutory Notes following 33 U.S.C.A. § 1251 (2000)), environmental practitioners quickly adopted the far more appealing CWA nomenclature. The Supreme Court first adopted it in *Chemical Manufacturers Ass'n v. Natural Res. Def. Counsel (NRDC)*, 470 U.S. 116, 118 (1985).

point sources and non-point sources. Pipes and other conveyances carry point source pollution to surface water. Storm water runoff carries non-point source pollution to surface water.³¹ The CWA erects a sophisticated and effective regulatory system to control and reduce pollution from point sources. The CWA³² establishes only the suggestion, not the requirement, of creating what amounts to an ineffective state-run program for dealing with pollution from non-point sources.³³ Predictably, the Court's decisions have dealt only with the point source program.

The prohibition against the addition of any pollutant to a navigable water from a point source that is without a permit or in violation of a permit is the basis of the CWA's regulatory program.³⁴ The CWA establishes a permit program administered by the EPA to control point-source discharges of pollutants³⁵ and a separate permit program administered by the Corps of Engineers to control filling of wetlands.³⁶ The EPA and the Corps of Engineers were the original and remain the default permit issuing authorities for their respective programs. However, a state may develop an equivalent permit program and submit it to the EPA or the Corps of Engineers for approval. Either entity must approve a state program if it meets federal standards, and thereafter the state, not the federal agency, is the permit issuing authority.³⁷ Most states oper-

³¹ While the point source/non-point source distinction is clear in most cases, it is blurred in others. For instance, courts have held that man-made piles of material placed so that rain water runoff naturally forms channels into navigable waters are point sources in *Sierra Club v. Abston Construction Co.*, 620 F.2d 41, 47 (5th Cir. 1980), and they are not point sources in *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1373 (4th Cir. 1976). Perhaps as a result, courts have ruled that the EPA has considerable discretion to define point sources by rule as indicated by *NRDC v. Costle*, 568 F.2d 1369, 1380 (D.C. Cir. 1977).

³² CWA § 208, 33 U.S.C. § 1288 (2000).

³³ See Richard A. March et al., *Nonpoint Source Water Pollution Section 208 Planning: Legal and Institutional Issues*, 1981-1982 AGRIC. L. REV. 324, 349; Lawrence P. Wilkins, *The Implementation of Water Pollution Control Measures - Section 208 of the Water Pollution Control Act Amendments*, 15 LAND & WATER L. REV. 479, 496 (1980).

³⁴ CWA § 301(a), 33 U.S.C. § 1311(a) (2000) (elaborated by CWA § 502(12), 33 U.S.C. § 1362(12) (2000)). To expedite issuance of permits, CWA § 511(c), 33 U.S.C. § 1361(c) (2000), exempted the issuance of pollution control permits to existing sources from the requirements of NEPA, thus solving the problem that caused the Refuse Act permit program to abort. See *Kalur v. Resor*, 335 F. Supp. 1, 10 (D.D.C. 1971).

³⁵ CWA § 402, 33 U.S.C. § 1342 (2000).

³⁶ CWA § 404, 33 U.S.C. § 1344 (2000).

³⁷ The Corps of Engineers, however, may only approve state programs for waters that are not within the traditional federal jurisdiction for improvement and maintenance of navigation. CWA § 404(g), 33 U.S.C. § 1344(g) (2000).

ate approved pollution control programs today, but few operate approved wetlands protection programs.³⁸

Pollution control permits, whether issued by the EPA or a state with an approved program, must require the permit holder to treat its wastewater to levels reflecting the more stringent of either: 1) the level established by a nationally applicable technology-based standard for the particular industry promulgated by the EPA, or 2) the level necessary to achieve water quality standards designated for the receiving water, developed by states and the EPA.³⁹ The statute requires industrial point sources to meet two progressively more stringent levels of technology-based standards over time, but requires municipalities to meet only one level.⁴⁰ If the EPA is the permit issuing authority, a state in which the pollution discharge occurs has the opportunity to certify conditions in the permit necessary to meet the requirements of the CWA and appropriate state law.⁴¹ Those conditions must be included in the federal permit. Permits also require the permit holder to self-monitor its effluent for compliance with the permit's effluent limitations and to report the results to the EPA.⁴² Those reports are public information and effluent data is not entitled to confidential treatment.⁴³

The CWA provides the EPA with information gathering and inspection authority,⁴⁴ as well as a full array of enforcement sanctions for discharges of pollutants without permits or in violation of CWA § 402 permits, whether the EPA or a state is the permit issuing authority.⁴⁵ It provides citizens with authority to sue violators if the United States or an individual State has not done so.⁴⁶ The citizen suit provision also authorizes citizens to sue the EPA for

³⁸ Only five states lack approved § 402 permit programs, although thirteen states just have partially approved programs. See Environmental Protection Agency State NPDES Program Authority Website, http://www.epa.gov/npdes/images/State_NPDES_Prog_Auth.pdf (last visited Oct. 6, 2005). By contrast, only two states have approved § 404 programs, primarily because of the lack of funding and the exclusion from the coverage of state programs of traditionally defined navigable waters. See Environmental Protection Agency Wetlands Website, <http://www.epa.gov/owow/wetlands/facts/fact23.html> (last visited Oct. 6, 2005).

³⁹ CWA § 301(b), 33 U.S.C. § 1311(b) (2000).

⁴⁰ *Id.*

⁴¹ CWA § 401, 33 U.S.C. § 1341 (2000).

⁴² 40 C.F.R. §§ 122.44–.45 (2004).

⁴³ CWA § 308(b), 33 U.S.C. § 1318(b) (2000).

⁴⁴ CWA § 308(a), 33 U.S.C. § 1318(a) (2000).

⁴⁵ CWA § 309, 33 U.S.C. § 1319 (2000). CWA § 404(s), 33 U.S.C. § 1344(s) (2000) (providing the Corps of Engineers with enforcement authority against violations of § 404 permits).

⁴⁶ CWA § 505, 33 U.S.C. § 1365 (2000).

failure to perform a mandatory duty under the statute. The 1972 legislation created a major program of federal construction grants for local sewage treatment plants,⁴⁷ later morphing into a revolving fund administered by states.⁴⁸ Finally, the CWA incorporates free-standing programs for oil spill prevention and remediation and for control of sewage from vessels.⁴⁹

The Court's opinions deal with issues arising in all but two of these major aspects of the CWA.⁵⁰ Its decisions occur in judicial review of final administrative actions by the EPA and the Corps of Engineers (for example, the promulgation of rules, the issuance or denial of permits, and the assessment of administrative penalties) as well as for non-administrative actions such as civil and criminal actions, citizen suits against the EPA for not performing mandatory duties, citizen suits against violating members of the regulated public, and state certification of conditions to be placed in permits.

III. QUANTITATIVE CONCLUSIONS

A. *The Scoreboard*

The results of the Court's decisions may be labeled pro- or anti-environmental,⁵¹ depending on whether they restrict or expand the CWA's jurisdictional or substantive provisions controlling water pollution⁵² or its procedural provisions for implementing and enforcing the pollution control program.⁵³ It might be assumed

⁴⁷ CWA §§ 201–221, 33 U.S.C. §§ 1281–1301 (2000).

⁴⁸ CWA §§ 601–607, 33 U.S.C. §§ 1381–1387 (2000).

⁴⁹ CWA § 311, 33 U.S.C. § 1321 (largely replaced by the Oil Pollution Act, 33 U.S.C. §§ 2701–2753 (2000)).

⁵⁰ The exceptions are CWA § 308, 33 U.S.C. § 1318 (2000) (giving EPA authority to gather information, require the submission of information, and conduct inspections), and CWA § 312, 33 U.S.C. § 1321 (2000) (regulating the discharge of sewage from vessels).

⁵¹ Lazarus was able to categorize most of the Court's over 240 environmental law decisions, including all of the decisions he considered under the CWA. See Lazarus, *Thirty Years*, *supra* note 2, at 27–32.

⁵² In *Environmental Protection Agency v. National Crushed Stone Ass'n*, 449 U.S. 64, 66 n.2 (1980), the Court's decision, upholding an EPA regulation allowing variances in pre-treatment standards for toxic pollutants, restricts the prohibition in § 402(l), 33 U.S.C. § 1342(l), against variances from technology-based standards for toxic pollutants. The decision could thus be considered anti-environmental.

⁵³ In *Tull v. United States*, 481 U.S. 412, 414–15, 427 (1987), the Court's decision that a jury trial is required to determine liability for a civil penalty under CWA § 309, 33 U.S.C. § 1319, could make it more difficult to enforce the statute and may thus be considered anti-environmental. Some predicted *Tull* would discourage the government from seeking civil penalties in such cases. See Mark Dyner, *Tull v. United States: Jury Trial Required in Statutory Civil Penalty Actions*, 1988 UTAH L. REV. 435, 449–50 (1988); Barbara L. Lah, *Right to Trial by Jury in an Action for Civil Penalties and Injunctive Relief under the Clean Water*

that sound decisions under a statute intended to restore and maintain water quality would be pro-environmental decisions, but the CWA is not a one-dimensional statute blindly pursuing clean water regardless of other values. For instance, in establishing technology-based standards for water pollution control, the statute considers the costs of pollution control technology.⁵⁴ It also considers the implementation of the pollution control program by a complex partnership of federal and state governments to be a value in itself, even if another arrangement might abate water pollution more efficiently or effectively.⁵⁵ Moreover, even if the CWA was a single-minded edict, it does not exist in isolation, but is embedded in the totality of the American legal system, inevitably intersecting with constitutional, statutory, and judicial measures promoting or protecting other social and legal values. In reconciling conflicts within the CWA or between the CWA and other components of the legal system, even a pro-environmental Court could not be expected to render decisions with pro-environmental results in all cases.

In terms of raw numbers, the Court's decisions reach anti-environmental results in thirteen of twenty-three cases, or in 56% of the cases.⁵⁶ That is not much of an imbalance. On the other hand, its pre-1980 decisions reached anti-environmental results in one of eight cases, or in 12.5% of the cases, while its post-1980 decisions reached anti-environmental results in eleven of fifteen cases or in 73% of the cases.⁵⁷ On the face of it, that seems seriously out of balance. The post-1980 decisions were also considerably more contentious than the earlier ones. While only two of the eight earlier decisions had dissents, with never more than two dissenters, all but three of the last fifteen decisions had dissents, six of them with three or more dissenters.⁵⁸

Act, 28 NAT. RESOURCES J. 607, 621 (1988); Charles Openchowski, *Changing the Nature of Federal Enforcement of Environmental Laws*, 17 ENVTL. L. REP. 10304, 10306-307 (1987).

⁵⁴ See CWA § 302(b), 33 U.S.C. § 1312(b) (2000); CWA §§ 304(b)(1)(B), (2)(B), (3), & (4)(B)-(C), 33 U.S.C. §§ 1314(b)(1)(B), (2)(B), (3), & (4)(B)-(C) (2000). The Court discussed the role of cost in developing the effluent guidelines in *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 129-31 n.21 (1977).

⁵⁵ The partnership and some of the strains in the partnership are described in *EPA v. California ex rel. State Water Resources Control Board*, 426 U.S. 200, 202 (1976); *International Paper Co. v. Ouellette*, 479 U.S. 481, 487-92 (1987); *Arkansas v. Oklahoma*, 503 U.S. 1 (1992); *United States Department of Energy v. Ohio*, 503 U.S. 607, 611 (1992).

⁵⁶ See *infra* Table B.

⁵⁷ See *infra* Table B. The contrast is emphasized by the Court's generally pro-environmental decisions under earlier water pollution control legislation. See *supra* notes 21-22.

⁵⁸ See *infra* Table B. While the greater dissention in the latter cases does not explain their anti-environmental tilt, the fact that the pro-environmental dissents came overwhelmingly from two Justices—Justices Stevens (eight pro-environmental dissents) and Black-

Before concluding that the Court's post-1980 decisions are hopelessly anti-environmental, it should be noted that three of its four latest decisions have pro-environmental results. Moreover, the anti-environmental effects of some of the other, later decisions are of minor significance.⁵⁹ Finally, many of the decisions with anti-environmental results do not reflect the Court consciously picking the least pro-environmental among the possible interpretations of the statute. Instead, they result from the Court reconciling the CWA with the Constitution, other statutes, and cross-cutting judicial doctrines that have lives far beyond the CWA.⁶⁰ Where such cross-cutting issues were at play, the environmental position prevailed in three cases and lost in ten, prevailing in 23% of the cases. Where cross-cutting issues were not at play, the environmental position prevailed in six cases and lost in four, prevailing in 60% of the cases.⁶¹

A more disturbing observation about the eleven post-1980 decisions with anti-environmental results is that seven of them were citizen enforcement or private federal common law public nuisance actions.⁶² The repeated anti-environmental rulings of the Court against citizen suits and private actions raise the question of whether the Court is unsympathetic with that aspect of open gov-

mun (five pro-environmental dissents)—may not bode well for pro-environmental decisions under the CWA in the future.

⁵⁹ For instance, while *Chemical Manufactures Ass'n v. NRDC*, 470 U.S. 116, 134 (1985), upholds the EPA's authority to grant variances from technology-based standards for toxic pollutants, the EPA's record of granting only four variance requests in the first twelve years of its administration of the CWA—noted by the Court in footnote twelve—suggests that the availability of the variance will not result in a flood of variances for toxics.

⁶⁰ Preemption of federal common law by federal statutes is addressed in *Illinois v. Milwaukee*, 451 U.S. 304 (1987); private rights of action were implied from federal statutes in *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 11, 14 (1981); equitable discretion in granting injunctions is discussed in *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 318 (1982); preemption of state common law by federal statutes appears in *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987); right to trial by jury in civil penalty cases is outlined in *Tull v. United States*, 481 U.S. 412, 427 (1987); sovereign immunity is addressed in *United States Department of Energy v. Ohio*, 503 U.S. 607 (1992); the American rule that all litigants pay their own attorney fees is expressed in *City of Burlington v. Dague*, 505 U.S. 557, 565-66 (1992); the reach of Commerce Clause jurisdiction is discussed in *Solid Waste Authority of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 173 (2001).

⁶¹ See *infra* Table B.

⁶² See *infra* Table B. Two of the decisions were judicial reviews of EPA actions and deference to the implementing agency explains these two decisions. If the decisions have anti-environmental results and the Court defers to agency action in an even-handed manner, their anti-environmental tilt originates with the EPA, not with the Court. Additionally, one decision was a government enforcement action and one was a CWA § 404 permit denial by the Corps of Engineers.

ernment. The question becomes more serious when the outcome of these private suits is combined with the outcome of suits with cross-cutting issues. Before 1980, in cases with a cross-cutting issue, the anti-environmental position prevailed in two of four cases, or in 50% of the cases. In the one case in which private plaintiffs brought an action with a cross-cutting issue, the anti-environmental position prevailed. After 1980, when there was a cross-cutting issue, the anti-environmental position prevailed in eight cases and lost in one, prevailing in 88% of the cases. When a private party brought such a case, the anti-environmental position prevailed in seven out of eight cases, prevailing in 85% of the cases. This suggests that the private nature of these suits influences their outcome as much as the presence or absence of a cross-cutting issue, and that both are important factors. Those decisions are worth examining with that question in mind,⁶³ although it probably cannot be answered conclusively by examining only decisions arising under the CWA.

B. *The Headcount*

Richard Lazarus surveyed over 240 decisions rendered by the Supreme Court under the environmental statutes, and he concluded that neither the Court nor the individual Justices appreciate “environmental law as a distinct area of law.”⁶⁴ The fact that Justice White wrote more opinions in those cases than any of the other Justices reinforces Lazarus’ conclusion, because Justice White’s opinions do not “suggest any distinct vision of the role of law in environmental protection.”⁶⁵ While Justice Kennedy voted with the majority in virtually one hundred percent of the environmental decisions, he never wrote an opinion. The anomaly between Kennedy’s critical vote in environmental decisions and his apparent lack of interest in the issues they raise further reinforced Lazarus’ conclusion.⁶⁶ Finally, Lazarus found that while Justice Douglas voted for the environmental position one hundred percent of the time, only three other Justices voted for such positions more than half the time.⁶⁷ Because Douglas left the Court in 1974, his perfect voting record did not have much of an impact on the course of modern environmental law. The lack of a more long-lived voice

⁶³ This examination is made in Part III.

⁶⁴ Lazarus, *Thirty Years*, *supra* note 2, at 3.

⁶⁵ *Id.* at 5.

⁶⁶ *Id.* at 6–7.

⁶⁷ Brennan, 58.5%; Marshall, 61.3%; and Stevens, 50.6%. *Id.* at 11.

for the environment on the Court could go a long way in accounting for Lazarus' conclusions.

Conducting the headcount with CWA decisions confirms the bulk of Lazarus' observations, although it raises interesting differences. Again, Justice White wrote more decisions in CWA cases than any other Justice, but those decisions lack an overarching environmental view.⁶⁸ Yet his dissent in *U.S. Department of Energy v. Ohio (DOE)*⁶⁹ speaks eloquently of the massive failure of federal facilities to shoulder their environmental responsibilities and of the Court depriving citizens and states of a "powerful weapon in combating federal agencies that persist in despoiling the environment" by taking an unduly narrow reading of the congressional waiver of sovereign immunity in CWA § 313.⁷⁰ Again, Justice Kennedy is always in the majority on CWA decisions and has never written an opinion.⁷¹ But Justice Douglas is no longer the only Justice with a perfect pro-environment record; he is joined by Justices Breyer and Ginsberg.⁷² And while Lazarus could identify only three Justices voting for pro-environmental decisions fifty percent of the time or more, in CWA decisions, eight Justices have done so.⁷³

Lazarus ended his survey with cautious optimism, noting that the Court had just granted a writ of certiorari filed by environmental plaintiffs in what would become *Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc. (Laidlaw)*.⁷⁴ He noted that the

⁶⁸ Justice White wrote six, Justice Rehnquist three, and Stevens, Marshall, and Powell each wrote two. See *infra* Table B.

⁶⁹ 503 U.S. 607, 629 (1992).

⁷⁰ 33 U.S.C. § 1323 (2000).

⁷¹ Justice Kennedy did author a one paragraph concurrence in *Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 197 (2000), raising the disturbing issue of whether the authorization of citizens to seek civil penalties for violations of the CWA under § 505, 33 U.S.C. § 1365, usurps the constitutional prerogative of the executive branch, thus violating separation of powers principles. This appears to be a non-issue, because separation of powers conflicts arise where one branch of government invades the constitutional prerogative of another branch, e.g., Congress invading the President's prerogative in legislation asserting the right to veto otherwise valid presidential action. *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919, 945-46 (1983). Citizen suits do not represent congressional usurpation of executive power, for they retain no power in Congress and the executive branch may prevent a citizen suit by taking an enforcement action.

⁷² See *infra* Table B.

⁷³ See *infra* Table B (showing the following pro-environmental records for Supreme Court justices: Brennan, 50%; Burger, 56%; Blackmun, 68%; Kennedy, 59%; Marshall, 63%; Souter, 59%; Stevens, 81; and White, 58%).

⁷⁴ Lazarus, *Thirty Years*, *supra* note 2, at 21. The Court granted certiorari in *Laidlaw* at 525 U.S. 1176 (1999), and decided the case at 528 U.S. 167 (2000).

Court had not granted a writ of certiorari at the exclusive request of an environmental plaintiff since 1972 and that there was no reason for it to do so unless it desired to overturn the Fourth Circuit's decision against the environmental plaintiffs. The Court's decision in the case was better than he could have hoped, as he subsequently explained.⁷⁵

The good news does not stop with *Laidlaw*. Three of the Court's last four CWA decisions have favored the pro-environmental positions. Justice O'Connor authored two of these decisions.⁷⁶ She has also voted for the pro-environmental position in six of the thirteen decisions (46%) in which she participated. Two of her six pro-environmental votes were in dissent, and in two of the remaining four she wrote the majority opinion. Moreover, her voting position migrated over the years. Before *City of Burlington v. Dague (Dague)*,⁷⁷ her votes were for pro-environmental positions in only two out of eight decisions or 25% of the time; since *Dague*, her votes have been for pro-environmental positions in four out of five decisions or 80% of the time. While some of these later votes may be explained by other preferences,⁷⁸ in the aggregate they will make environmentalists regret her departure from the Court. Nevertheless, the history of Justice O'Connor's evolution in CWA decisions suggests that some Justices can and do become progressively more pro-environmental during their terms on the Court.

IV. QUALITATIVE CONCLUSIONS

A. *Does the Court Have a CWA Jurisprudence?*

The Court has decided twenty-three cases under the CWA. Even though the Court does not always have a firm grasp on the

⁷⁵ See Lazarus, *Three Years Later*, *supra* note 2, at 658–59 (noting that *Laidlaw* “was a significant victory for the environmental community,” reversing a series of decisions that had progressively narrowed standing for environmental plaintiffs).

⁷⁶ In the first of those decisions, *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700, 703, 709–10 (1994), however, the environmental position coincided with the states' rights position. This lent a note of caution to hopes that Justice O'Connor was becoming an environmental convert. In the second, *South Florida Water Management District v. Miccosukee Tribe of Indians*, 531 U.S. 95 (2003), the Court rejected the anti-environmental position on one issue and hinted that it would reject an anti-environmental argument on a second, but did not reach it, instead remanding it for consideration by the lower courts in light of the facts already found by the lower courts. The dissent suggested the Court easily could have rejected the second argument without remanding it. *Id.* at 112.

⁷⁷ 505 U.S. 557 (1992).

⁷⁸ Her position in *PUD No. 1*, 511 U.S. at 722–23, for instance, could reflect a states' rights bias.

statute, it might be expected to have developed a consistent jurisprudence in the course of those decisions. One indication of the extent to which it has developed a CWA jurisprudence is the frequency with which its CWA opinions cite its earlier CWA opinions. Surprisingly, nine of the opinions do not cite even one other CWA opinion and ten of the opinions are not cited by any subsequent CWA opinion.⁷⁹ On average, a CWA opinion cites fewer than two other CWA opinions.⁸⁰ This lack of interest in previous opinions does not stem from their lack of relevance to the issues at hand. *Tull v. United States (Tull)*⁸¹ did not cite *United States v. Ward (Ward)*,⁸² although both considered the punitive nature of the CWA's civil penalties. *DOE*⁸³ did not cite *EPA v. California ex rel. State Water Resource Control Board (California Board)*,⁸⁴ although both considered the extent of the CWA's waiver of sovereign immunity. *Crown Simpson Pulp Co. v. Costle (Crown Simpson)*⁸⁵ did not cite *E.I. du Pont de Nemours & Co. v. Train (E.I. du Pont)*,⁸⁶ although both interpreted CWA § 509(b), the provision governing judicial review of EPA final agency actions in courts of appeals. *South Florida Water Management District v. Miccosukee Tribe of Indians (Miccosukee)*⁸⁷ did not cite *United States v. Riverside Bayview Homes, Inc. (Riverside Bayview)*⁸⁸ or *Solid Waste Agency of North Cook County (SWANCC) v. U.S. Army Corps of Engineers (SWANCC)*,⁸⁹ although all three interpreted "navigable waters."

Although the Supreme Court may have developed a rudimentary "worldview" of the CWA, the Court can forget that worldview at the drop of a hat when it gets in the way of a decision the Court seems determined to make.⁹⁰ With the complexity of the statute

⁷⁹ See *infra* Table B. These numbers exclude the earliest CWA opinion from the decisions citing no other CWA opinion and the latest CWA opinion from the decisions not cited by other decisions.

⁸⁰ See *infra* Table B.

⁸¹ 481 U.S. 412 (1987).

⁸² 448 U.S. 242 (1980).

⁸³ 503 U.S. 607 (1992).

⁸⁴ 426 U.S. 200 (1976).

⁸⁵ 445 U.S. 193 (1980).

⁸⁶ 430 U.S. 112 (1977).

⁸⁷ 541 U.S. 95 (2004).

⁸⁸ 474 U.S. 121 (1985).

⁸⁹ 531 U.S. 159 (2001).

⁹⁰ In *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 314 (1982), for instance, the Court quipped that "[t]he integrity of the Nation's waters . . . not the permit process" is the purpose of the CWA, while rejecting automatic injunctions against discharging pollutants into navigable waters from point sources without a permit. But in *International Paper Co.*

being interpreted, the Court's deference to the EPA's interpretation could be expected to be considerable and consistent. Indeed, the Court's developing jurisprudence of deference is evident in its CWA decisions.⁹¹ But again, the Court can forget about deference entirely when it gets in the way of a decision the Court seems determined to make.⁹²

Despite the opportunity to develop a consistent view of the CWA in the course of its twenty-three opinions, the Court has not done so. Its decisions are more driven by the presence or absence

v. Ouellette, 479 U.S. 481, 494–96 (1987), the Court found the integrity and administrability of the permit program of sufficient importance that it pre-empted the common law of nuisance for water pollution in states downstream from pollution sources.

⁹¹ The first two decisions giving judicial review to EPA regulations interpreting the CWA did not mention judicial deference to the EPA's interpretation. *Train v. Colo. Pub. Interest Research Group*, 426 U.S. 1 (1976) (sustaining the EPA's interpretation); *Train v. City of N.Y.*, 420 U.S. 35 (1975) (rejecting the EPA's interpretation). In the third such opinion, the Court looked first at the wording, structure, and legislative history of the CWA regarding the interpretation at issue. *E.I. du Pont*, 430 U.S. at 127–30. The Court went on to note that sections 101(d), 33 U.S.C. § 1251(d) & 501(a), 33 U.S.C. § 1361(a), charged the EPA with administering the CWA and promulgating regulations to implement it. *E.I. du Pont*, 430 U.S. at 132. Only then did the Court find the EPA's interpretation to be “sufficiently reasonable to preclude the Court of Appeals from substituting its judgment for that of the Agency.” *Id.* at 135 (quoting *Train v. NRDC*, 421 U.S. 60, 87 (1975)). Not content with that justification, it also noted that the overwhelming majority of decisions of the courts of appeals and the “thorough, scholarly opinions written by some of our finest judges” supported the EPA's position. *Id.* at 135. The next such decision, *Costle v. Pacific Legal Foundation*, 445 U.S. 198 (1980), considered the EPA's procedural rules for permit issuance. The Court held that courts should accord administrative agencies deference with regard to the details of their procedures as long as they met the minimum requirements of the Constitution, the Administrative Procedure Act, and the authorizing statutes. *Id.* at 212–215. In *EPA v. National Crushed Stone Ass'n*, 449 U.S. 64, 73–79 (1989), the Court returned to the methodology of *E.I. du Pont* by thoroughly reviewing the wording, structure, and history of the statute. Only then did it hold that deference should be given to the EPA's “reasonable construction” of the CWA and found that the EPA's construction was reasonable. *National Crushed Stone*, 449 U.S. at 83–84. The Court's last judicial review of the EPA's regulations, in *Chemical Manufacturers Ass'n v. NRDC*, 470 U.S. 116 (1985), is the first time it used the now standard doctrine of *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842–43 (1984) (holding that if the statute is ambiguous, courts should defer to the interpretation of the agency designated by Congress to administer the statute, if that interpretation is reasonable).

In *Riverside Bayview*, 474 U.S. at 131–35, the Court performed a *Chevron* analysis of the Corps of Engineers' interpretation of “navigable waters” in the Corps of Engineers' regulations, upholding them. In *SWANCC*, 531 U.S. at 168, the Court rejected another interpretation of “navigable waters” in the Corps of Engineers' regulations, giving no deference because the interpretation was of recent vintage and contrary to the Corps of Engineers' earlier interpretations.

⁹² In *Illinois v. Milwaukee*, 451 U.S. 304, 332 (1981), for instance, the Court held that the CWA pre-empted the federal common law of nuisance, without mentioning that the government filed an amicus brief arguing that the federal common law of nuisance survived the CWA. Brief for the United States as Amicus Curiae, *Illinois v. Milwaukee*, 451 U.S. 304 (1981) (No. 79-408), 1980 WL 339512.

of a cross-cutting legal issue or by the nature of the parties before it than by its understanding of the statute and its purpose. It often fails to use or cite previous decisions that support its position or entirely disregards previous decisions that do not support its position. This reinforces Professor Lazarus' conclusion that the Court has no appreciation of "environmental law as a distinct area of the law" or "vision of the role of law in environmental protection."⁹³

B. Does the Court Understand the Clean Water Act?

With some ninety sections and over four hundred subsections, the CWA is a long and complex statute, covering some one hundred eighty pages in the United States Code.⁹⁴ Understanding the statute, of course, does not require an intimate knowledge of all of its sections. *California Board* cited seventeen different sections in an attempt to sketch a comprehensive picture of the statute.⁹⁵ The Court frequently cited *California Board* in subsequent CWA decisions as a shorthand guide to the statute.⁹⁶ During the course of its twenty-three CWA decisions, the Court has decided issues under fifteen of the sections⁹⁷ and cited thirty-two sections, covering the most important sections in the statute. But the Court cited only seven sections in the average decision, not a very comprehensive slice of the statute. The Court's often meager examination of only the CWA sections relevant to the cases before it suggests that it may have a less than total understanding of the statute.

Compounding this, sixteen, or two-thirds of the Court's twenty-three CWA decisions, contain an analytical mistake or omission regarding the statute. In some, the Court missed a provision that would have helped its argument or conclusion.⁹⁸ In others, it failed

⁹³ Lazarus, *Thirty Years*, *supra* note 2, at 3, 5.

⁹⁴ In the 2000 version of the United States Code the CWA covered pages 356–533.

⁹⁵ See *infra* Table B.

⁹⁶ Indeed, the Court cited *EPA v. California ex rel. State Water Resources Control Board*, 426 U.S. 200 (1976), in nine of its twenty subsequent CWA decisions, more than it cited any other CWA decision in subsequent CWA opinions. See *infra* Table B.

⁹⁷ See *infra* Table B.

⁹⁸ In *Train v. Colorado Public Interest Research Group*, 426 U.S. 1, 4 (1976), environmental plaintiffs filed a CWA § 505 citizen suit in district court, seeking judicial review of EPA regulations exempting nuclear waste regulated under the Atomic Energy Act, 42 U.S.C. §§ 2011–2281, from the definition of "pollutant" under CWA § 502(6), 33 U.S.C. § 1362(6). This exclusion effectively removed such nuclear waste from regulation by CWA's point source permit program. The Court upheld the EPA's action in an opinion reconciling the two statutes, *Colorado Public Interest*, 426 U.S. at 15–17. However, it could have accomplished the same end result more easily on jurisdictional grounds. CWA § 505(a)(2), 33 U.S.C. § 1365(a)(2), authorizes mandamus actions in district courts against the EPA when it has not taken actions required of it by the CWA. But once the EPA has

to address a provision contrary to its argument or conclusion. While the unaddressed provisions were not necessarily fatal to the

taken the actions, section 505 does not confer jurisdiction for judicial review in district courts or elsewhere. *Colorado Public Interest*, 426 U.S. at 15–17. CWA § 509(b), 33 U.S.C. § 1369(b), authorizes judicial review of specified EPA actions in the courts of appeals, but EPA regulations of the type at issue are not among the listed actions. The Administrative Procedure Act, 5 U.S.C. § 702, however, creates a cause of action for judicial review of such regulations, with federal question jurisdiction in the district courts under 28 U.S.C. § 1331. As a result, in *Colorado Public Interest*, plaintiffs commenced their actions in the right court, but under the wrong claim of jurisdiction, and could have been dismissed on jurisdictional grounds. However, there are important differences between citizen suit jurisdiction and federal question jurisdiction. The former, for instance, provides attorney fee awards for successful plaintiffs, whereas the latter does not.

In *California Board*, 426 U.S. at 213–14 (1976), states challenged the EPA’s disapproval of state permit programs insofar as they applied to polluting federal facilities. Among other things, the states argued they could not effectively include their requirements in water pollution permits for federally owned water pollution sources unless states rather than the EPA issued permits to them. The Court could have avoided its prolonged response to this argument simply by noting that CWA § 401, 33 U.S.C. § 1341, authorized the states to require the EPA to include such state requirements in permits that it issued.

In *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193, 196–97 (1980), the Court held that CWA § 509(b), 33 U.S.C. § 1369(b), granted authority to the courts of appeals for judicial review of EPA action vetoing the issuance, by a state with an EPA approved permit program, of a CWA § 402 permit although § 509(b) does not mention such authority. The Court did so because § 509(b) granted the courts of appeals jurisdiction for judicial review of EPA denial of a permit. *Crown Simpson*, 445 U.S. at 196–97. The effects of the EPA denying a permit and vetoing a state issued permit are the same, and it is irrational to have the form of judicial review of EPA action regarding a permit differ depending on whether the EPA or a state is the permit issuer. *Id.* The Court found it particularly anomalous that such a bifurcation would result in slower review of the EPA’s action with regard to state issued permits than of the EPA’s actions on its own permits. *Id.* The statutory undesirability of that anomaly is underscored by CWA § 101(b), 33 U.S.C. § 1251(b), which states a congressional policy preference for state administration of the permit program. Curiously, the Court did not mention § 101(b).

In *United States v. Ward*, 448 U.S. 242, 257–60 (1980) (Stevens, J., dissenting), Justice Stevens argued in dissent that the criminal sanction for failing to report oil spills in § 311(b)(5), 33 U.S.C. § 1321(b)(5), violated the Fifth Amendment’s guarantee against self-incrimination. The majority could easily have responded to this argument, and Justice Stevens might not have made it, had they recognized the requirement from CWA § 311(b)(5) was to “immediately” notify and that its purpose was to enable the government to effectively contain and control oil spills. One factor in the effectiveness of spill response is how quickly the spill is responded to and one factor governing the speed of spill response is the time that passes before the government learns of the spill. Justice Stevens himself admitted that if the purpose of the requirement was “to assist the Government in its cleanup responsibilities,” it was a permissible requirement. *Ward*, 448 U.S. at 259.

Court's arguments⁹⁹ or its decisions,¹⁰⁰ its failure to address them

⁹⁹ In *Ward*, 448 U.S. at 249–50, the Court acknowledged that one factor in determining whether the penalty for an oil spill under CWA § 311(b)(6), 33 U.S.C. § 1321(b)(6), is criminal or civil is whether oil spills are already criminal acts. It noted they were already criminal acts under the Refuse Act of 1899, 33 U.S.C. § 407. *Ward*, 448 U.S. at 250. While the Court discounted this factor, it failed to note that a negligent or knowing spill is also a criminal act under CWA § 301(a), 33 U.S.C. § 1311(a) and § 309(c), 33 U.S.C. § 1319(c). The Court dealt with this factor without recognizing its full relevance by citing *Helvering v. Mitchell*, which stated that “Congress may impose both a criminal and a civil sanction in respect to the same act or omission.” *Ward*, 448 U.S. at 250 (citing *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938)). The government brief did not mention that the spill might have been a criminal act under § 309(c) of the CWA. See Brief for the United States, *United States v. Ward*, 448 U.S. 242 (1980) (No. 79-394), 1980 WL 339616.

¹⁰⁰ In *Middlesex County Sewerage Commission v. National Sea Clammers Ass'n*, 453 U.S. 1, 22 (1981), the Court held that the CWA was so comprehensive that “the federal common law of nuisance in the area of water pollution is *entirely* pre-empted by the more comprehensive scope of the” (emphasis added) CWA. While this conclusion may be warranted for claims arising from point source pollution, it is not warranted for claims arising from non-point source pollution as implied by the Court’s “*entirely* pre-empted” statement. *Id.* (emphasis added); See discussion *infra* pp. 143–146 and accompanying notes 106–121. Worse, the Court concluded that “the federal common law of nuisance has been *fully pre-empted* in the area of ocean pollution” by the CWA, despite the CWA’s lack of jurisdiction over ocean pollution. *Sea Clammers*, 453 U.S. at 11 (emphasis added). Finally, the Court rejected a private cause of action for damages under 42 U.S.C. § 1983 because the CWA and the Marine Protection, Resources and Sanctuaries Act, 33 U.S.C. §§ 1401-1445 (1976), already authorized more limited private enforcement of statutory violations (without damages) in their respective citizen suit provisions. *Sea Clammers*, 453 U.S. at 2021. The Court, however, entirely ignored the savings provision in CWA § 505(e), 33 U.S.C. § 1365(e), stating that “[n]othing in this section shall restrict any right which any person . . . may have under any statute” *Sea Clammers*, 453 U.S. at 2021.

In *Department of Energy v. Ohio*, 503 U.S. 607, 618 (1992), the Court notes that § 311, 33 U.S.C. § 1321, and § 312, 33 U.S.C. § 1322, of the CWA contain their own definitions of “person,” which both include the United States. In contrast the general definition of “person” in § 502(5), 33 U.S.C. § 1362(5), does not include the United States. The Court offers this in support of its argument that when § 505(a), 33 U.S.C. § 1365(a), authorizes the assessment of civil penalties under § 309(d), 33 U.S.C. § 1319(d), against violators of the CWA, the inclusion of the United States among the “persons” who may be sued under § 505(a) does not carry over to the “persons” against whom civil penalties may be assessed under § 309(d). See *DOE*, 503 U.S. at 619. The Court’s argument is seriously undercut, however, by the fact that both § 311 and § 312 of the CWA are freestanding provisions for oil spills and marine sanitation devices which have their own definitional, standard setting, and enforcement authorities. In addition, they were enacted separately from and prior to the remainder of the CWA, they are not the basis for permit conditions under § 402, and they are not enforceable under § 309. Section 309 and section 505, on the other hand, are part of the woof and warp of the CWA’s point source control program and in this instance are directly interrelated. That may not dispose of the Court’s argument, but it certainly weakens the argument.

In *SWANCC*, 531 U.S. 159, 164–65 (2001), a local waste disposal agency challenged the Corps of Engineers’ determination that isolated ponds, not alleged to be connected or adjacent to navigable waters, were navigable because of their use “as habitat by . . . migratory birds which cross state lines,” under the so-called “migratory bird rule.” The local agency argued isolated wetlands were not within the statutory definition of navigable waters, and, if they were, the assertion of jurisdiction exceeded Congress’ authority to reg-

casts doubt on the Court's grasp of the statute. In some decisions, the Court did not fully understand the very provisions or concepts it was dealing with,¹⁰¹ particularly the significance of the distinction

ulate under the Commerce Clause of the Constitution. *Id.* at 165–66. A sharply divided Court held that isolated wetlands were not “navigable waters” as used in CWA § 404, thus avoiding the constitutional issue. *SWANCC*, 531 U.S. at 174. The Court noted that Congress had unequivocally acquiesced in 1977 to the Corps of Engineers’ amendment of its regulation to include wetlands adjacent to navigable waters, while Congress did not do so with the Corps of Engineers’ subsequent amendment, the migratory bird rule. *Id.* at 167, 169–70. The dissent found this logic disingenuous because the unequivocal acquiescence by Congress in 1977 was to the Corps of Engineers’ interpretation that included both adjacent and isolated wetlands. *Id.* at 184–86 (Stevens, J., dissenting). The Corps of Engineers’ interim regulations in 1975 covered “non-navigable intrastate waters whose use or misuse could affect interstate commerce” and “wetlands that are not contiguous or adjacent to navigable waters.” 40 Fed. Reg. 31,322, 31,325–26 (July 25, 1975). It promulgated its final regulation in 1977, including “isolated lakes and wetlands.” 42 Fed. Reg. 37,127 (July 19, 1977). The migratory bird rule appears merely to put a gloss on this.

¹⁰¹ The Court in *SWANCC* admitted it had noted earlier in *Riverside Bayview* that “navigable” is of “limited import,” for Congress intended to “regulate at least some waters that would not be deemed ‘navigable’ under the traditional understanding of that term.” *SWANCC*, 531 U.S. at 167 (quoting *Riverside Bayview*, 474 U.S. at 133). The Court could not agree that Congress intended to read “navigable” out of the CWA. *Id.* at 172. It did so by focusing almost entirely on § 404, rather than on the definition of “navigable water” in § 502(7) as the “waters of the United States.” *SWANCC*, 531 U.S. at 172. The legislative history of that definition, including its abandonment of any notion of traditional navigability, suggests the Court was wrong in its statutory interpretation and should have addressed the constitutional issue. Prof. Lazarus suggests the Court might well have found isolated wetlands beyond the reach of Commerce Clause jurisdiction. Lazarus, *Three Years*, *supra* note 2, at 660–64.

See *Chem. Mfrs. Ass’n v. NRDC*, 470 U.S. 116 (1985) (examining whether CWA § 309(l), which forbid the EPA to “modify” any requirement of § 301 or § 307(b) for toxic pollutants, applies to “fundamentally different factor” (FDF) variances authorized by § 301(n)). The Court, deferring to the EPA’s interpretation, held that it did not. *Chemical Manufacturers*, 470 U.S. at 134. To do so, the Court first had to find that the term “modify” was ambiguous. To demonstrate that “modify” was ambiguous, the Court noted that § 307(a)(1) required revision of pretreatment standards from time to time to keep up with developing technology. *Chemical Manufacturers*, 470 U.S. at 125–26. This argument may have had some force if § 307(b)(1) used the verb “modify” instead of “revise,” but it did not. Why § 307(b)(1) casts doubt on the meaning of “modify” in § 301 is anyone’s guess. Whatever its merits, the Court appears to have taken the argument from the government’s brief. Brief for the U.S. EPA at 14–18, *Chemical Manufacturers*, 470 U.S. 116 (Nos. 83-1013, 83-1373), 1984 WL 566007.

The Court also noted that both parties agreed the EPA could promulgate a best available technology (BAT) effluent guideline for a single plant subcategory of an industry on the same basis that it could grant a FDF variance from a BAT effluent guideline. *Chemical Manufacturers*, 470 U.S. at 131. That being the case, the Court saw no difference between the two, other than a meaningless procedural formality. The procedural difference, however, is significant. The EPA’s promulgation of a BAT effluent guideline is done through a notice and comment rulemaking, which may be challenged in a court of appeals and governs any like source. The EPA’s issuance of a permit is an adjudicatory process, is initially appealed administratively, and ultimately may be appealed to the court of appeals in the circuit where the plant is located. To get an FDF variance, the applicant must prove that its facility is very different in some respect from one of the factors the EPA studied in other

between point sources and non-point sources,¹⁰² water quality standards,¹⁰³ and the nature of state certification under CWA § 401.¹⁰⁴ Finally, some of the Court's decisions are littered with errors and omissions.¹⁰⁵

1. *The Point/Non-Point Source Distinction*

The CWA's overarching objective "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."¹⁰⁶ The pollution load in the nation's waters is from both point sources and non-point sources, sometimes overwhelmingly from non-point sources.¹⁰⁷ The statute created sophisticated and effective permit, surveillance, and enforcement systems to reduce point source pollution to a minimal level. However, it created no such program to deal with non-point source pollution. It did establish a fund for grants to planning agencies to develop regional pollution control programs, including programs to deal with non-point sources,¹⁰⁸ but that funding has long since ceased. In any event, none of the non-point source controls developed as a result of the program were federally enforceable. Thus, the CWA is not designed to reach its ambitious goal, but only to get part of the way there. Probably because the Court has never seen a non-point source case, it has never indicated an awareness of the significance of the point source versus non-point source distinction and implications.

Beginning with the Court's second CWA decision, *Train v. Colorado Public Interest Research Group* ("*Colorado PIRG*"),¹⁰⁹ and continuing with *California Board*, the Court viewed the CWA as regulating pollution from point sources, with a goal of eliminating

facilities as the basis for its national guideline. In granting the variance, the EPA is really finding that the guideline does not apply to the facility and that the EPA must develop a technology-based standard for the facility on a one-time basis under CWA § 402(a), 33 U.S.C. 1342(a). This is not really modifying the effluent guideline, it is determining that the general standard is inapplicable. Brief for the U.S. EPA at 11, *Chemical Manufacturers*, 470 U.S. 116, 470 U.S. 116 (1985) (Nos. 83-1013, 83-1373), 1984 WL 566007. The Court could have reached the same result more consistently with the CWA had it understood the nature of an FDF variance.

¹⁰² See discussion *infra* pp. 143-146 and accompanying notes 106-121.

¹⁰³ See discussion *infra* pp. 146-151 and accompanying notes 122-151.

¹⁰⁴ See discussion *infra* pp. 151-155 and accompanying notes 153-166.

¹⁰⁵ See discussion *infra* pp. 155-167 and accompanying notes 167-232.

¹⁰⁶ CWA § 101(a), 33 U.S.C. § 1251(a) (2000).

¹⁰⁷ Andreen, *supra* note 29, at 563-564; THE COUNCIL ON ENVIRONMENTAL QUALITY, 9TH ANNUAL REPORT, pp. 118-19 (1978).

¹⁰⁸ CWA § 208, 33 U.S.C. § 1288 (2000). See literature cited *infra* note 33.

¹⁰⁹ 426 U.S. 1, 7 (1976).

the discharge of pollutants by 1985.¹¹⁰ Later, in *Costle v. Pacific Legal Foundation (PLF)*,¹¹¹ the Court again recited the CWA's goal of eliminating the discharge of pollutants by 1985 and noted that the prohibition against adding pollutants to navigable waters from point sources without a permit in § 301(a) was “one means of reaching that goal.”¹¹² In neither decision did the Court note that the 1985 goal pertains only to point source discharges of pollution or that Congress created the 1985 goal as one means of achieving the overarching CWA objective of restoring and maintaining the integrity of the nation's waters. Both decisions treat the 1985 goal as the only CWA objective. Both decisions appear unaware that eliminating discharges by point sources could only partly achieve clean water and that even the zero discharge goal is purely aspirational; the CWA contains no requirement that point source discharges of pollutants cease by 1985. Indeed, the statute allows industrial dischargers until 1989 to achieve the second level of pollution control.¹¹³ Although the statute requires the EPA to identify control measures available to eliminate the discharge of pollutants,¹¹⁴ it does not require the EPA to adopt such measures as technology-based standards and does not require industry to achieve them.¹¹⁵ Moreover, § 301(a), and the permit program it engenders, is the *only* means the CWA provides to reach its overarching objective or any of its water purity goals.

Because Congress's failure to deal with non-point sources is primarily of policy significance and has little impact on the point

¹¹⁰ 426 U.S. 200, 203 (1976) (citing CWA § 101(a)(1), 33 U.S.C. § 1251(a)(1) which notes that the goal of the CWA is to eliminate “the discharge of pollutants into the navigable waters . . . by 1985”). Because CWA § 502(12), 33 U.S.C. § 1362(12), defines the phrases “discharge of a pollutant” and “discharge of pollutants” to mean “any addition of any pollutant to navigable waters from any *point source*,” (emphasis added) the goal speaks only of discharges from point sources.

¹¹¹ 445 U.S. 198 (1980).

¹¹² *Id.* at 202.

¹¹³ CWA § 301(b), 33 U.S.C. § 1311(b)(E) (2000). While the 1972 version of the statute required industrial sources to achieve BAT by 1983, Federal Water Pollution Control Act of 1972, Pub. L. No. 92-500, § 301(b), 86 Stat. 816, Congress in 1987 extended the BAT compliance date to 1989, Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7, 29-30, well after the 1985 goal for zero discharge.

¹¹⁴ CWA § 304(b)(3), 33 U.S.C. § 1314(b)(3) (2000).

¹¹⁵ The statute requires the EPA to develop technology-based standards reflecting the best available technology (BAT), § 304(b)(2), 33 U.S.C. § 1314(b)(2) (2000), and the best conventional control technology (BCT), § 304(b)(4), 33 U.S.C. § 1314(b)(4) (2000). In addition, CWA § 301(b)(2), 33 U.S.C. § 1311(b)(2) (2000), requires industrial dischargers to meet the § 304(b)(2) and (4) levels of technology, but does not mention the measures for eliminating discharges of pollutants from § 304(b)(3).

source regulatory program and the legal issues it raises,¹¹⁶ the Court's failure to grasp the significance of the point/non-point source distinction was of no consequence in *California Board* or *PLF*. But the Court's decisions in *Milwaukee v. Illinois (Milwaukee II)*¹¹⁷ and *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n (Sea Clammers)*¹¹⁸ may have obliterated the distinction without the Court being aware of it. Because the Court believed that the CWA comprehensively addressed water pollution, it concluded in *Milwaukee II* that the CWA displaced the federal common law of nuisance. The Court qualified that conclusion as pertaining "at least so far as concerns the claims of respondents,"¹¹⁹ which were point source claims.¹²⁰ This would have left the door open for the Court to conclude in an appropriate case that the CWA did not displace the federal common law of nuisance for non-point source pollution. Apparently unaware of the implications of the distinction, the Court in *Sea Clammers* re-characterized its decision in *Milwaukee II* as holding that: "the federal common law of nuisance in the area of water pollution is *entirely* pre-empted by the more comprehensive scope of the [CWA]."¹²¹ How can the

¹¹⁶ Congress's failure to legislate on this issue does have some impact. When both point and non-point sources contribute to a water body not achieving a water quality criterion, the permit-issuing agency must develop effluent limitations for the point source permits to achieve the criterion. The result is the statute places the burden of achieving water quality standards solely on point sources. Further, it means that when non-point source pollution must be reduced to achieve water quality standards, water quality standards will not be achieved.

¹¹⁷ 451 U.S. 304 (1981).

¹¹⁸ 453 U.S. 1 (1981).

¹¹⁹ *Milwaukee II*, 451 U.S. at 317.

¹²⁰ *Id.* at 319-20.

¹²¹ *Sea Clammers*, 453 U.S. at 22 (emphasis added). Curiously, the Court also held that damage claims based on the pollution-induced collapse of ocean fisheries were "fully pre-empted [by the CWA] in the area of ocean pollution." *Id.* at 11. The jurisdiction of the CWA, however, extends to the territorial seas, not to the ocean. CWA § 502(7)-(8), 33 U.S.C. § 1362(7)-(8). Not acknowledging this, the Court nevertheless commented that if ocean waters are not within the jurisdiction of the CWA, they are covered by the Marine Protection, Research and Sanctuaries Act of 1972 (MPRSA), 33 U.S.C. §§ 1401-1445 (1976). *Sea Clammers*, 453 U.S. at 22. The Court stated "we see no cause for different treatment for the pre-emption question[;] . . . [t]he regulatory scheme of the MPRSA is no less comprehensive, with respect to ocean pollution, than are other analogous provisions" of the CWA. *Id.* A quick glance comparing the CWA and MPRSA suggests this is not so. MPRSA's twenty-two sections, seventy-seven subsections, and twenty-three pages in the U.S. Code (pp. 533-56 in the 2000 edition), are dwarfed by the CWA's ninety sections, over four-hundred subsections, and one-hundred-eighty pages in the U.S. Code (pp. 356-533 in the 2000 edition). MPRSA regulates only waste sent from the United States to be dumped at sea and U.S. flagships (excluding war ships) dumping waste at sea. 33 U.S.C. § 1401 (2000). It does not address pollution from the operation of vessels, pollution originating from land, pollution originating from non-U.S. flag ships unless they are dump-

CWA pre-empt the federal common law of nuisance for non-point source pollution, when the CWA does not regulate non-point source pollution? While this misperception did not affect the outcome of these two decisions concerning point source pollution, it could negatively affect subsequent cases concerning non-point source pollution.

2. *Water Quality Standards*

The Court also has a shaky understanding of water quality standards. It began well enough in *California Board*, recognizing that the water quality strategy of earlier legislation had failed because it focused “on tolerable effects rather than preventable causes . . . awkwardly shared federal and state responsibility . . . and . . . cumbersome enforcement procedures.”¹²² However, the decision did not deal with water quality standards and did not suggest that the Court actually knew what water quality standards are and how they are implemented. Later, in *International Paper Co. v. Ouellette (Ouellette)*¹²³ the Court confused water quality standards and technology-based standards. It observed that the EPA issues permits “according to established effluent standards [referring to what this article describes as technology-based standards] and water quality standards, that in turn are based upon available technology,”¹²⁴ and that if a state imposed its own standards “it also must consider the technological feasibility of more stringent controls.”¹²⁵ Water quality standards are not based on available technology and the CWA does not require states to consider technological feasibility in establishing their standards.¹²⁶ The only authority the Court cites for these startling propositions is CWA § 302, 33 U.S.C. § 1312, which simply does not support them.¹²⁷

ing waste originating in the United States, or pollution from structures other than vessels, such as oil platforms.

¹²² 426 U.S. 200, 202 (1976).

¹²³ 479 U.S. 481 (1987).

¹²⁴ *Id.* at 494.

¹²⁵ *Id.* at 495.

¹²⁶ The water quality standards section, CWA § 303, 33 U.S.C. § 1313 (2000), does not even hint that water quality standards should look to the availability or feasibility of technology, nor does § 304(a), 33 U.S.C. § 1314(a) (2000), which directs the EPA to issue guidelines for states on how to develop water quality standards, particularly water quality criteria.

¹²⁷ CWA § 302, 33 U.S.C. § 1312 (2000), authorizes the EPA to issue permits with effluent limitations sufficient to achieve BAT and BCT technology-based requirements, but without more stringent effluent limitations to achieve water quality standards if the costs of going beyond BAT or BCT greatly outweigh the benefits. It can do so only with the concurrence of the state. 33 U.S.C. § 1312(b)(2)(A). It cannot do so for more than one period

When the Court did deal with water quality standards, in *Arkansas v. Oklahoma* (*Oklahoma*),¹²⁸ it described them more accurately, but fumbled when it came to the details. Its biggest mistake was to indicate that the “*primary* means for *enforcing* [water quality standards] is the NPDES [permit program], enacted in 1972.”¹²⁹ This wording is unfortunate. Water quality standards are developed under CWA sections 303 and 304¹³⁰ to form the basis of effluent limitations in permits. The CWA enforcement section is directed at violations of permits, not at violations of water quality standards.¹³¹ Thus permits may achieve water quality standards by incorporating effluent limitations calculated to do so, but permits do not enforce water quality standards. Stating that water quality standards are enforceable suggests that enforcers may sue dischargers for violating water quality standards, regardless of whether the discharges violate effluent limitations in permits. This suggestion is reinforced by the Court’s statement that permits are the *primary* means of enforcing water quality standards—indicating that there are other means of enforcing them.¹³² Finally, the Court continues that § 303(d) “allocate[s] the burden of reducing undesirable discharges between existing sources and new sources.”¹³³ But § 303(d) does not mention allocating the pollution reduction needed to meet water quality standards among new and existing sources.¹³⁴ The Court’s misstatement of § 303(d) supports

of five years with regard to toxic pollutants. 33 U.S.C. § 1312(b)(2)(A). The section cited by the Court contains no limitation on state authority to require more stringent requirements. Furthermore, CWA § 401, 33 U.S.C. §§ 1341, and § 510, 33 U.S.C. § 1370, reserve the authority of states to require more stringent standards, with no condition that they be technologically feasible.

¹²⁸ 503 U.S. 91 (1992).

¹²⁹ *Id.* at 101 (emphasis added).

¹³⁰ 33 U.S.C. §§ 1313–1314.

¹³¹ CWA § 309(a)(1), 33 U.S.C. § 1319(a)(1) (2000), and § 309(a)(3), 33 U.S.C. § 1319(a)(3) (2000), authorize the EPA enforcement against violations of listed statutory sections (not including the water quality standards sections, CWA §§ 303-304, 33 U.S.C. §§ 1313-1314 (2000)) and permit conditions.

¹³² *Oklahoma*, 503 U.S. at 101.

¹³³ *Id.* at 108.

¹³⁴ CWA § 303(d)(1)–(3), 33 U.S.C. § 1313(d)(1)–(3) (2000), only require developing the total maximum daily load of pollutants a water-body can carry without exceeding water quality standards; they do not require allocating the reduction of any excess to particular pollution sources. CWA § 303(d)(4), 33 U.S.C. § 1313(d)(4) (2000), however, provides that if a water-body does not meet water quality standards, a “waste load allocation established under this section” may not be revised unless one of two conditions is met. It is unlikely that an allocation would have been established for a source that did not exist when the allocation was made, making it unlikely that allocations would have been made between existing and new sources. However, the statutes suggest the opposite; CWA § 303(e), 33 U.S.C. §§ 1313(e) (2000), and § 304(i), 33 U.S.C. § 1314(i) (2000), address the development

the Court's conclusion that the CWA allows new sources to discharge into waters not meeting water quality standards.¹³⁵ But it could have reached the same result without the misstatement.¹³⁶

In *PUD No. 1 of Jefferson County v. Washington Department of Ecology (PUD No. 1)*¹³⁷ the Court again started down the right path. It noted that § 303, 33 U.S.C. § 1313, requires states, with EPA approval, to “institute comprehensive water quality standards.”¹³⁸ And it noted, no less than three times, that under CWA § 303(c)(2)(A) water quality standards consist of designated uses for a water body and criteria to support those uses.¹³⁹ But it then repeats and compounds its earlier misstatement by saying “[s]tates are responsible for *enforcing* water quality standards on intrastate waters,” citing CWA § 309(a).¹⁴⁰ The next sentence reinforces the error: “[i]n addition to these *primary enforcement* responsibilities”¹⁴¹ Since the Court cites § 309, the EPA enforcement section, it evidently means enforcement, rather than implementation, of water quality standards. However, § 309(a) authorizes EPA enforcement, not state enforcement.¹⁴² Moreover, § 309 says nothing about enforcing water quality standards. Finally, § 309 does not withhold from the EPA the authority to enforce violations related to water quality standards on intrastate waters. Indeed, the

of effluent limitations in permits based on water quality standards which require allocation. CWA § 303(e)(3)(A), 33 U.S.C. § 1313(e)(3)(A) (2000), requires states to submit planning processes to the EPA that will assure “effluent limitations . . . at least as stringent as those required by . . . any applicable water quality standard in effect.” Again, it is not apparent how a state could develop and submit an effluent limitation for a point source that did not yet exist. CWA § 304(l)(1)(C), 33 U.S.C. § 1314(l)(1)(C), is more explicit, requiring states to submit individual control strategies to meet water quality standards for “point sources *discharging* any toxic pollutant” (emphasis added). The present tense verb suggests that allocations are to be made for presently operating point sources.

¹³⁵ *Oklahoma*, 503 U.S. at 108.

¹³⁶ The EPA had found that the new discharge would result in a theoretical but non-detectable impact on water quality at the state line, but the EPA had interpreted the CWA not to require denial of the permit because of such impact. The Court could have deferred to the agency's interpretation of the statute in this regard.

¹³⁷ 511 U.S. 700 (1994).

¹³⁸ *Id.* at 704.

¹³⁹ *Id.* at 704, 714.

¹⁴⁰ *Id.* at 707 (citing CWA § 309(a), 33 U.S.C. § 1319(a) (emphasis added)).

¹⁴¹ *Id.* at 707 (emphasis added).

¹⁴² The Court may have been referring to the notice the EPA is to give the state in advance of a federal enforcement action under CWA § 309(a)(1), 33 U.S.C. § 1319(a)(1), but this does not authorize state enforcement. Indeed, its only direction for the EPA is to enforce if the state does not enforce. While the implication is that if the state does enforce, the EPA should refrain from doing so, the EPA is not obliged to defer to state action, for the EPA can enforce under CWA § 309(a)(3), 33 U.S.C. § 1314(a)(3), without giving the state prior notice.

statute does not distinguish between interstate and intrastate waters for either water quality standards or enforcement purposes. In addition to its mistake on enforcement, the Court states that the EPA establishes technology-based standards, while the states establish, implement, and enforce water quality standards.¹⁴³ This ignores the delicate *pas de deux* Congress established between the EPA and states in establishing water quality standards, in which the EPA plays important and critical roles.¹⁴⁴

PUD No.1 arose in the context of a CWA § 401, 33 U.S.C. § 1341, state certification. Section 401 requires the applicant for a federal license or permit resulting in a discharge to navigable water to secure from the state in which the discharge will occur a certification that it will meet applicable federal and state water pollution control requirements. The applicant in the case proposed to build a hydroelectric project. The state had designated the water quality use for the river in question as salmon propagation. The state included in its § 401 certification a condition that the hydroelectric facility only withdraw from the river an amount of water that would leave a designated minimum flow in the river calculated to be sufficient for fish propagation.

Implementing water quality standards is normally a four step process: 1) designating a use for the water body, 2) developing criteria (usually numeric) for the maximum loading of a pollutant allowed in the water body to assure it is safe for the designated use, 3) determining the maximum daily load of the pollutant that can be present without violating the criteria, and 4) allocating among dischargers to the water body the burden of eliminating any of the pollutant in excess of the maximum daily load. The parties in this

¹⁴³ *PUD No. 1*, 511 U.S. at 704.

¹⁴⁴ States designate uses of water bodies, although the EPA must approve them. However, Congress directed the EPA to develop water quality criteria. CWA § 304(a), 33 U.S.C. § 1314(a) (2000). The EPA has developed criteria for a range of pollutants and water conditions that may be applied with various use designations. See Environmental Protection Agency Water Quality Standards Database, <http://www.epa.gov/wqsdatabase/> (last visited Nov. 21, 2005). The EPA's regulations governing the review and approval of state water quality standards indicate that the EPA will approve a state criterion for which there is a federal criterion only if the state criterion is identical to the federal criterion or if the state demonstrates that the difference is scientifically justified. 40 C.F.R. § 131.11(b) (2002). Congress directed the EPA to establish water quality standards for states if the EPA determines that a state has not established their own water quality standards that meet the CWA's requirements. CWA §§ 303(b), 303(c)(4), and 304(l)(3), 33 U.S.C. §§ 1313(b), 1313(c)(4), and 1314(l)(3) (2000). When the EPA issues a permit under § 402, 33 U.S.C. § 1342 (2000), it uses water quality standards as a basis for effluent limitations. In addition, when the EPA enforces against violations of a permit's effluent limitations, the limitations may be based on water quality standards.

case and the Justices became embroiled in a dispute over whether the state's procedure in *PUD No.1* was in accordance with this four-step process for implementing water quality standards. Petitioners and the minority argued that permit conditions must be based on criteria, while the minimum flow requirement was based on the designated use.¹⁴⁵ The Court ultimately decided that permit conditions could be based on designated uses.¹⁴⁶ But the dispute was groundless. None of the parties or Justices recognized that the state had followed the normal procedure. It designated a use for the river, established flow as a criterion necessary to assure the designated use, and allocated all of the burden for maintaining that minimum flow to the power plant. The only irregularity here was that the state did not submit the flow criterion to the EPA for approval.¹⁴⁷

These misperceptions about water quality standards were not critical to the Court's decision in *PUD No. 1*; the Court could have reached the same conclusions based on a better understanding of the statutory scheme.¹⁴⁸ Its misapplication of "enforcement" to water quality standards, however, again suggests they can be enforced without being translated into a permit effluent limitation.¹⁴⁹ This runs counter to the strategy of the statute in two regards. First, compliance with a permit is compliance with the statute for most purposes.¹⁵⁰ When the EPA issues the permit, the

¹⁴⁵ *PUD No. 1*, 511 U.S. at 714.

¹⁴⁶ *Id.* at 717–18.

¹⁴⁷ Although CWA § 303(d)(2), 33 U.S.C. § 1313(d)(2) (2000), requires states to submit their water quality uses and criteria to the EPA for approval, CWA § 510, 33 U.S.C. § 1360 (2000), also preserves the rights of the states to have water pollution controls more stringent than federal requirements. In the absence of EPA approval of the flow criterion, the state's flow limitation is more stringent than federal requirements. Query whether flow is a legitimate criterion; criteria normally are pollutants. The EPA routinely limits flow as an effluent limitation in permits, although effluent limitations are normally for pollutants as well. For instruction in how flow limitations are used in permits, see OFFICE OF WATER, U.S. ENVTL. PROT. AGENCY, EPA-833-B-96-003, U.S. EPA NPDES PERMIT WRITERS' GUIDE (1998).

¹⁴⁸ The enforceability of water quality standards, except as used to develop conditions in a permit, had nothing to do with the issue before the Court. The question of whether permit conditions can be based on uses rather than criteria is a red herring. Flow is used here as a criterion. The real question is whether the state can use that criterion if the EPA has not approved it; CWA § 510, 33 U.S.C. § 1370 (2000), (preserving the states' authority to have water pollution requirements more stringent than the federal requirements) suggests that it can.

¹⁴⁹ *Northwest Envtl. Advocates v. City of Portland*, 56 F.3d 979, 987 (9th Cir. 1995) (stating that "Congress intended to confer citizens standing to enforce water quality standards" (citing *PUD No. 1*, 511 U.S. at 714–22).

¹⁵⁰ CWA § 402(k), 33 U.S.C. § 1342(k) (2000).

government, the discharger and the public come to closure on what water pollution control is expected of the discharger, who is not to be faced thereafter with different or additional requirements until the permit is modified or reissued. Second, the courts are not to be left enforcing indefinite requirements, as they were when the federal common law of nuisance held sway.¹⁵¹ If enforcers may sue dischargers for violating water quality standards before the administrative agencies have completed the four-step process for developing conditions in permits necessary to achieve water quality standards—thus determining what water quality standards demand from the particular discharger—the courts must complete that process and make that determination. Courts have no expertise for that task, and therefore, Congress has assigned that task to the administrative agencies.

3. Section 401 State Certification

The Court also misunderstands CWA § 401, 33 U.S.C. § 1341. In *California Board*, states challenged the EPA's disapproval of state permit programs insofar as they applied to federally owned water pollution sources.¹⁵² Among other things, the states argued they could not effectively include their requirements in water pollution permits for federally owned sources unless states with approved permit programs issued permits to those sources. The Court could have avoided a protracted analysis¹⁵³ simply by noting that CWA § 401 authorized states to require the EPA to include state requirements in permits that the EPA issues. The Court was aware of § 401; indeed, it cited the section,¹⁵⁴ but it evidently did not know how to use it. The government's brief may have misled the Court in this regard.¹⁵⁵

¹⁵¹ As the Court observed in *Milwaukee II*, "Congress has not left the formulation of appropriate federal standards to the courts through application of often vague and indeterminate nuisance concepts and maxims of equity jurisprudence, but rather has occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency." 451 U.S. 304, 317 (1981). Similarly, the Senate Report for the 1972 legislation commented that citizen suits would not substitute a 'common law' or court-developed definition of water quality. An alleged violation of an effluent control limitation or standard, would not require reanalysis of technological . . . [or] other considerations at the enforcement stage. These matters will have been settled in the administrative procedure leading to the establishment of such effluent control provision. S. Rep. No. 92-414, at 79 (1971).

¹⁵² *EPA v. Cal. ex rel. State Water Res. Control Bd.*, 426 U.S. 200 (1976).

¹⁵³ *Id.* at 211-27.

¹⁵⁴ *Id.* at 227 n.42.

¹⁵⁵ Brief for the United States at 33, *California Board*, 426 U.S. 200 (No. 74-1435), 1975 WL 173540 (stating that § 401 provides "no federal agency 'shall be deemed to be an appli-

cant for the purposes of Section 401(a); in short, unlike other pollutant sources, federal facilities are not to be subject to state certification See Section 401(a)(6)”). The quoted language does not exist in § 401(a)(6) or elsewhere in the section. If it did, it would merely reiterate that § 401(a) places the responsibility for obtaining a § 401 certification on the applicant for a federal permit, rather than on the federal permit issuing agency. It does not alter that allocation of responsibility when the permit applicant is a federal facility.

The government argued that “when Congress had the opportunity to subject federal facilities to state control” it refused to do so. Brief for the United States at 33, *California Board*, 426 U.S. 200 (No. 74-1435), 1975 WL 173540. The main supports for that argument were the exclusions for federal facilities from the EPA’s authority to: first, delegate to states enforcement of new source standards to states, CWA § 306(c), 33 U.S.C. § 1316(c); and second, authorize state inspection and monitoring by states, CWA § 308(c), 33 U.S.C. § 1318 (c). These curious provisions were apparently copied from the Clean Air Act (“CAA”) without considering their appropriateness in the CWA. The initial version of the CAA in 1970 did not establish a federal permit system which qualified states could administer upon EPA approval. The CWA, of course, did establish such a permitting system. Although the Court interpreted the CWA initially to preempt states with approved programs from issuing permits to federal facilities, as noted in *California Board*, 426 U.S. at 215–16, Congress soon amended the statute to make it clear states with approved programs were authorized to do so. See CWA § 313(a)(2)(A), 33 U.S.C. § 1323(a)(2)(A). How are states to issue permits to federal new sources without applying the new source standards required by the CWA consistently with § 306(c), 33 U.S.C. § 1316(c)? On its face, there appears to be no need for delegating the EPA’s inspection authority in CWA § 308, 33 U.S.C. § 1318, to states. States have their own statutory inspection authorities and the state authorities must be comparable to the federal authorities for the EPA to approve a state permit program. CWA § 401(b)(2)(B), 33 U.S.C. § 1341(b)(2)(B). On the other hand, the waiver of sovereign immunity in CWA § 313, 33 U.S.C. § 1323, does not include a waiver for state inspections. Perhaps CWA § 308(c), 33 U.S.C. § 1318(c), is a waiver of sovereign immunity if the EPA approves a state inspection program. This is the only possible interpretation that would lead a state to secure the EPA’s approval for such a program. The EPA has never promulgated procedures for states to secure such approval. In any event, the specific exclusion of federal facilities from approved state programs in approved state § 306 and § 308 programs cuts against the government’s argument that § 401 does not include state certification for federal facilities when § 401 contains no specific exclusion for federal facilities.

The government’s secondary support was the provision in § 401(a)(6) that a federal agency not “be deemed to be an applicant for the purpose of § 401(a),” depriving states the authority to certify conditions in permits issued to federal facilities. Brief for the United States at 33, *California Board*, 426 U.S. 200 (No. 74-1435), 1975 WL 173540. The brief implies that the purpose of CWA § 401 is for states to certify that § 402 permits meet federal standards, not mentioning that it applies to permits issued under all federal statutes, not just under CWA § 402, or that states are also to certify that applicants meet the requirements of state law. *Id.* CWA § 401(a) requires the applicant for a federal permit, not the federal permitting authority, to secure the state certification. Taken in context, the passage in CWA § 401(a)(6) that the government quotes in its brief merely reiterates that the onus is not on the federal permit issuing agency but on the permit applicant to apply for a state certification. Accepting the government’s main argument that Congress did not intend in CWA § 313, 33 U.S.C. § 1323, to waive federal sovereign immunity for states to issue permits to federal facilities, Congress clearly did intend to waive sovereign immunity for the application of appropriate state laws to federal facilities, which the government admits in its brief. *Id.* at 15–16. Interpreting § 313 to exempt federal facilities from § 401 certifications makes no sense, for it robs states of their only opportunity to assert those state laws.

In *California Board*, the Court merely failed to use CWA § 401. In *PUD No. 1*, the only opinion interpreting the section, the Court misunderstood it. CWA § 401(a) requires applicants for federal licenses and permits involving a discharge to navigable water to secure from the state in which the discharge originates a certification that it will meet federal and state water pollution requirements. Subsection (d) authorizes the certifying state to set forth effluent and other limitations necessary to assure the applicant will meet the requirements of the CWA and other appropriate state laws. The certificate conditions must become conditions of the federal permit. The first major issue in *PUD No. 1* was whether conditions in a § 401 certification must relate to the discharge resulting in § 401 jurisdiction or may be related to non-discharge aspects of the permit.¹⁵⁶

The hydroelectric project had two discharges: the discharge into a river of material to construct a dam and the post-construction discharge into the river of water that had been diverted from the river to generate electricity.¹⁵⁷ The certification condition had nothing to do with either discharge; instead, it specified the amount of water that had to remain in the river between the diversion of water to generate electricity and its return to the river.¹⁵⁸ In essence, this was a condition on intake rather than discharge, i.e., no water may be withdrawn from the river that would reduce its flow below the minimum necessary to sustain the propagation of fish.

Subsection 401(a) requires license or permit applicants to secure certifications that “any such *discharge* will comply,” while § 401(d) authorizes a certification “to set forth any effluent limitations and other limitations . . . necessary to assure that any *applicant* . . . will comply” (emphasis added). The dissent points out the logical implication that if only discharges require certifications, certifications may impose conditions only on discharges. The Court, however, held that (a) was § 401’s jurisdictional provision, establishing the type of activities that required the applicant to secure a certification, while (d) was its implementing provision, establishing the type of conditions states could impose on applicants in certifications.¹⁵⁹

¹⁵⁶ *PUD No. 1 of Jefferson County v. Wash. Dept. of Ecology*, 511 U.S. 700, 708–11 (1994).

¹⁵⁷ *Id.* at 711.

¹⁵⁸ *Id.* at 709–11.

¹⁵⁹ *Id.* at 711–14.

While the Court's interpretation appears to hang together, it ignores two important aspects of § 401. First, Congress initially enacted § 401(a) without § 401(d).¹⁶⁰ Did the Court assume that the section could not be implemented until Congress added § 401(d)? On the contrary, from the outset § 401 provided that no federal license or permit requiring certification can issue unless the state grants a certification or waives its right to certify. This meant that if an applicant did not comply with a relevant requirement, no certification could be made and no permit could issue, even though an applicant not then meeting a requirement could come into compliance if given a reasonable compliance schedule. That fully implemented § 401(a). Under the amended provision, a state could include in its certification a condition that an applicant, not then in compliance, come into compliance with the required standard within a reasonable time. While the addition of § 401(d) makes it easier for applicants to obtain § 401 certifications, the Court interpreted it to expand states' authority to include certification conditions not related to the discharge. Nothing in the legislative history of either the original § 401 in 1970 or the addition of § 401(d) in 1972 hints that Congress thought § 401 was unimplemented as initially enacted, or intended § 401 (d) to implement the remainder of the section. Finally, the scant legislative history suggests that Congress intended § 401(d) to relate to discharges.¹⁶¹

Second, both § 401(a) and (d) list specific sections of the statute for which the state is to certify compliance and develop conditions required for compliance. The first sentence of § 401(a) requires the state to certify that the discharge will comply with sections 301, 302, 303, 306, and 307.¹⁶² All of these sections relate to dis-

¹⁶⁰ Congress initially enacted § 401(a) in the Water and Environmental Quality Improvement Act of 1970, Pub. L. No. 91-244, 84 Stat. 91, 107-10, designating it as § 21(b) in § 103. In 1972, Congress redesignated § 21(b) as § 401 and added § 401(d), Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, 877-80.

¹⁶¹ The chief sponsor of the 1972 legislation commented that "Sections 401 and 402 provide for controls over discharges." 117 CONG. REC. 38,797, 38,855 (1971) (statement of Sen. Muskie). The Senate Report saw little change in the 1970 legislation by the 1972 amendments. "This is substantially § 21(b) of existing law . . . amended to assure the bill's changed emphasis from water quality standards to effluent limitations." S. REP. NO. 92-414, at 69 (1971). It evidently considered the addition of § 402(d) to flesh out the earlier part of the section. "Existing law is further modified by section 401 of this bill to include a definition of certification." *Id.* The EPA did not see a significant change either. "Section 401 is essentially the same as the present section 21(b)." H. REP. NO. 92-911, at 165 (1972).

¹⁶² 33 U.S.C. §§ 1311-1313, 1316 and 1317 (2000).

charges.¹⁶³ Subsection (d) omits § 303 (relating to water quality standards) from its list but adds “any other appropriate requirement of state law.” This raises two issues. First, could it mean that § 401(a) requires denial of a permit to a source presently out of compliance with water quality standard-based requirements, without the possibility of a § 401(d) condition that it come into compliance with those requirements? That would undercut § 401(d)’s effect of making it easier for permit applicants to obtain certifications. It also appears to be contrary to the scant legislative history.¹⁶⁴ Second, what is an “other appropriate requirement of state law” in § 401(d)? That is a potentially open-ended field.¹⁶⁵ The easiest answer to both questions is that water quality standards developed under § 303 and “appropriate requirements of state law” are the same thing. This allows states to issue certifications to sources not presently meeting water quality standard requirements by conditioning permits on meeting them with a reasonable compliance schedule. It also bounds a potentially open-ended field of state requirements. In any event, sections 301, 302, 303, 306 and 307 all define effluent limitations for point source discharges. The familiar canon of statutory interpretation, *ejustem generis*, suggests that the last of five items in a list be read as similar to the preceding four items,¹⁶⁶ i.e., that “appropriate requirement of state law” also be read as relating to discharges.

4. Multiple Mistakes and Omissions

The interpretive errors discussed above involve the most difficult concepts in the CWA, those revolving around water quality standards and one of the more arcane concepts in the statute, state certification. If the Court had trouble with them, it is not surpris-

¹⁶³ CWA § 301, 33 U.S.C. § 1311, establishes effluent limitations to be met by point source discharges. CWA § 302, 33 U.S.C. § 1312 (2000), authorizes variances for point source discharges. CWA § 303, 33 U.S.C. § 1313 (2000), establishes water quality standards, but the only place the CWA uses them is in determining effluent limitations for point source permits in § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C) (2000). CWA § 306, 33 U.S.C. § 1316 (2000), establishes performance standards for new point source discharges. CWA § 307, 33 U.S.C. § 1317 (2000), authorizes toxic discharge standards for point source discharges and pretreatment standards for industries discharging into municipal sewage treatment point source discharges.

¹⁶⁴ “[A] state may attach to any Federally issued license or permit such conditions as may be necessary to assure compliance with water quality standards in that state.” 117 CONG. REC. 33,692, 33,698 (1972).

¹⁶⁵ In *American Rivers Inc., v. Federal Energy Regulatory Commission*, 129 F.3d 99, 103 (2nd Cir. 1997), for instance, the state certification required construction of a fish passage, a canoe portage, and both minimum and maximum flow rates.

¹⁶⁶ See WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION*, 323 (1994).

ing. But they are not the only provisions of the CWA that the Court misunderstood.¹⁶⁷ More disturbing are decisions in which the Court made multiple errors in construing the statute. *Weinberger v. Romero-Barcelo (Romero-Barcelo)*¹⁶⁸ and *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation (Gwaltney)*¹⁶⁹ are the primary examples of this. Although *Sea Clammers*¹⁷⁰ and *Dague*¹⁷¹ made serious errors, they did not make multiple errors. Moreover, *Dague* did not butcher the statute directly as did the other decisions, but it is based on such a self-serving fantasy it is worth noting.¹⁷²

¹⁶⁷ See *supra* notes 98–101.

¹⁶⁸ 456 U.S. 305 (1982).

¹⁶⁹ 484 U.S. 49 (1987).

¹⁷⁰ *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 64 (1989).

¹⁷¹ *City of Burlington v. Dague*, 505 U.S. 557 (1992).

¹⁷² In *Dague* the Court held that the award of costs “(including reasonable attorney . . . fees)” to successful citizen suit plaintiffs under § 505(d), 33 U.S.C. § 1365(d), is to be calculated by multiplying reasonable hours spent on the case by reasonable hourly rates, with no enhancement for success. *Dague*, 505 U.S. at 561–62. The argument for an enhancement for success is that it compensates for time spent on unsuccessful cases, for which no fee awards are authorized. This is similar to contingent fee arrangements for plaintiffs’ attorneys in torts cases.

The Court did not examine the words or structure of the statute or determine the legislative intent behind the “reasonable attorney’s fees” language found in CWA § 505(d), 33 U.S.C. § 1365(d). The Court did not even take into account the American Rule that each party pays its own attorney fees or the Court’s own gloss that statutory departures from this rule should be interpreted narrowly. *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 269–71 (1975). Instead, the Court constructed an opinion based on fantasy economics of legal practice. The opinion began reasonably enough by acknowledging the two common types of attorney fee arrangements. *Dague*, 505 U.S. at 560–61. The first is the lodestar fee arrangement, used by most defense lawyers and lawyers engaged in non-litigation matters. In lodestar arrangements, hours spent on the matter are multiplied by the lawyer’s hourly rate without regard to outcome. The second is the contingent fee arrangement, which is used by most plaintiffs’ lawyers, especially in tort cases. In contingent fee arrangements, lawyers are paid an agreed upon percentage of the award in successful cases and are not paid in unsuccessful cases.

The Court notes that enhancement of lodestar fees is meant to compensate for risk of loss. *Id.* at 562. It posits that risk is a product of “(1) the legal and factual merits of the claim, and (2) the difficulty of establishing those merits.” *Id.* Because these two factors are closely related, it is not apparent how they can be multiplied. That aside, the Court assumes, with no authority, that the second factor is already calculated into the lodestar, either in the hourly rate charged or the number of hours spent. If that assumption were true, to enhance the lodestar for risk would be duplicative. This, of course, addresses only lodestar fees, not contingent fees. But even with lodestar fees, it is pure fantasy. Attorneys using the lodestar fee arrangement establish their hourly rates based on experience or prominence in the field, not by the difficulty of the case. Moreover, the hours spent on a case are more related to the number and complexity of legal or factual issues than to risk of loss. The Court’s articulated concern was that lodestar enhancement in successful cases would encourage counsel to accept unmeritorious cases. *Id.* at 563. That fear, however, is purely theoretical and does not take into account real world variables: lawyers may lose meritorious cases; fee awards in successful cases are discretionary; and judges may disallow

In *Romero-Barcelo* the Court held that the CWA citizen suit provision did not require courts to issue injunctions immediately restraining violations, but left the courts to their traditional equitable discretion to fashion appropriate relief.¹⁷³ The Governor of Puerto Rico sued the Secretary of Defense to enjoin practice bombing by the Navy into the ocean adjacent to an island off the coast of Puerto Rico, adding pollutants (bombs) to navigable water (the ocean) from point sources (airplanes) without a CWA permit.¹⁷⁴ The trial court held that the Navy violated the CWA, found that the violations caused no harm to water quality, refused to immediately enjoin the bombing, and ordered the Navy to immediately apply for a CWA permit.¹⁷⁵ In affirming the trial court's injunction, the Court rested its opinion on: 1) interpreting the EPA enforcement provision rather than the citizen suit provision at issue in the case, 2) repeatedly misinterpreting or ignoring CWA provisions, 3) misrepresenting legislative history, and 4) ignoring its characterizations of the CWA in its earlier opinions.¹⁷⁶ Moreover, as the dissent notes, it mischaracterizes the appellate court's opinion as the "premise for its essay on equitable discretion."¹⁷⁷ The Court's opinion might simply reflect the maxim that bad facts make bad law. The opinion might also reflect the Court's discomfort with its then recent decision in *TVA v. Hill*¹⁷⁸ that because sec-

portions of fees if they determine that there were unsuccessful or unnecessary excursions from successful parts of the case. Furthermore, judges may impose sanctions on lawyers for presenting cases that judges determine are without merit.

The dissent had no trouble determining that the legislative intent of the fee-shifting provision of the citizen suit provision was to ensure "private persons seeking to enforce [environmental] laws could retain competent counsel." *Id.* at 568 (Blackmun, J., dissenting). The dissent recognized that many plaintiffs in such cases could not afford counsel that charged normal hourly rates in lodestar arrangements. It also recognized that most citizen suit cases did not involve large money damages paid to successful plaintiffs, making contingent fee arrangements unattractive for attorneys in those cases. It correctly concluded that only a lodestar with an enhancement for success would encourage competent counsel to accept these cases.

¹⁷³ *Romero-Barcelo*, 456 U.S. at 306.

¹⁷⁴ *Id.* at 307-08.

¹⁷⁵ *Id.* at 308-12.

¹⁷⁶ *Id.* at 311-20.

¹⁷⁷ *Id.* at 322 (Stevens, J., dissenting). As Justice Stevens pointed out, contrary to the Court's description, the appellate court "did not hold that the District Court had no discretion in formulating remedies for statutory violations." *Id.* at 324. Instead, the Court of Appeals held that the District Court was not free to deny an injunction—by authorizing a presidential exemption in § 313(a), 33 U.S.C. § 1323(a), for national security purposes—where the violation of the statute was blatant and not merely technical and the violator's "predicament was foreseen and accommodated by Congress" *Id.* at 324-25.

¹⁷⁸ 437 U.S. 153 (1978).

tion 7 of the Endangered Species Act (ESA)¹⁷⁹ contained a flat prohibition on the destruction of critical habitats of endangered species, the trial court had no choice but to enjoin operation of the TVA's Tellico Dam because it would destroy the sole habitat of the endangered snail darter. It might also reflect the fact that the Department of Justice was defending the Secretary of Defense as a violator of the CWA rather than advocating for the Administrator of the EPA as the implementer and enforcer of the CWA.¹⁸⁰

The Court's main challenge in *Romero-Barcelo* was to distinguish *TVA v. Hill*. To do so, it had to demonstrate that the ESA directed courts to enjoin violations while the CWA did not. The Court got no help from the citizen suit provisions of the two statutes, under which the plaintiffs in the cases sued, because the provisions in both are virtually identical.¹⁸¹ Instead, the Court examined the purposes and prohibitions of the two statutes as they relate to the two cases. The Court stated that the purpose of the ESA is to preserve endangered species and the only way to protect the snail darter was to enjoin operation of the Tellico Dam. By contrast, the Court stated that the goal of the CWA is clean water and the CWA may be enforced with either civil penalties or criminal fines.¹⁸² This is an apples to oranges comparison. Moreover, it is flawed. The Court implies that injunctive relief was the only enforcement remedy available under the ESA while other options were available under the CWA. However, the ESA authorizes enforcement by civil penalties and criminal fines just as the CWA does.¹⁸³ Furthermore, the plaintiff could not have used civil penalties or criminal fines as enforcement mechanisms under either statute. The statutes simply do not authorize private citizens, even governors, to initiate federal criminal prosecutions. Additionally, the Court has held that there is no waiver of sovereign immunity by the United States for the assessment of civil penalties for violations of the CWA by federal facilities.¹⁸⁴

¹⁷⁹ 16 U.S.C. § 1536.

¹⁸⁰ The author first developed this analysis of *Romero-Barcelo* in JEFFERY G. MILLER, THE LAW OF ENVIRONMENTAL PROTECTION (Sheldon Novick ed., Clark Boardman 1987) § 8.01(8)(b)(iii).

¹⁸¹ See ESA § 11(g)(1), 16 U.S.C. § 1540(g)(1), and CWA § 505(a), 33 U.S.C. § 1365(a). Both statutes authorize courts to "enforce" the statutes, although the ESA's provision authorizes citizens to commence actions to "enjoin" violations of the statute.

¹⁸² *Romero-Barcelo*, 456 U.S. at 314. The Court used the phrase "fines and criminal penalties" rather than the usual nomenclature of fines for criminal sanctions and penalties for civil sanctions.

¹⁸³ ESA § 11(a)-(b), 16 U.S.C. § 1540(a)-(b).

¹⁸⁴ *United States Dep't of Energy v. Ohio*, 503 U.S. 607 (1992).

To be sure, the prohibitory injunction was necessary in *TVA v. Hill* to accomplish the purpose of the ESA, the preservation of an endangered species, while a prohibitory injunction was not necessary in *Romero-Barcelo* to accomplish the purpose of the CWA, the preservation of water quality, because the trial court found that the practice bombing did not adversely affect water quality. The decisions do not reflect differences between the statutes; they reflect a difference in the facts. While the bombing with no permit may not have disturbed water quality, it thumbed its nose at the basic prohibition of the CWA and was an affront to the CWA's permit system. The Court dismissed this concern with a terse "[t]he integrity of the Nation's waters . . . not the permit process, is the purpose of the" CWA.¹⁸⁵ While this is undoubtedly true, it ignores the centrality of the permit system in achieving the integrity of the Nation's waters, a centrality critical to the Court's analysis and outcome in other CWA decisions.¹⁸⁶ As the dissent in *Romero-Barcelo* points out, the effect of the decision, in essence, is to allow courts to amend the basic prohibition of the statute by authorizing particular discharges to continue without permits.¹⁸⁷ Moreover, it does so when courts find that the discharges do not adversely affect water quality, a determination Congress committed to the EPA and its state counterparts rather than to courts.¹⁸⁸

The Court also reasoned that judicial discretion in granting injunctions is consistent with the structure of the statute, finding support in the sequential requirements that industry achieve BPT in 1977 and BAT in 1983 coupled with the goal of eliminating the discharge of pollutants by 1985.¹⁸⁹ The Court concluded that "[t]his scheme of phased compliance further suggests that this is a

¹⁸⁵ *Romero-Barcelo*, 456 U.S. at 314.

¹⁸⁶ The Court first noted the centrality of the permit system in achieving the CWA's purpose in *EPA v. California ex rel. State Water Resources Control Board*, 426 U.S. 200 (1976). In *Milwaukee II*, the Court found the CWA, as manifested in the permit system, so comprehensively addressed water pollution that it preempted the operation of a federal common law of nuisance in interstate water pollution. *Illinois v. Milwaukee*, 451 U.S. 304 (1981). Finally, in *Ouellette*, the Court found the CWA preempted the common law of nuisance of states affected by water pollution originating in other states, because it would interfere with the administration of the CWA's permit system. *Int'l Paper Co. v. Ouellette*, 479 U.S. 481 (1987).

¹⁸⁷ 456 U.S. at 323.

¹⁸⁸ The permit writer is to include in permits effluent limitations sufficient to achieve water quality standards. CWA § 301(b)(1)(B), 33 U.S.C. § 1311(b)(1)(B). The state is to certify what permit conditions will achieve water quality standards. CWA § 401, 33 U.S.C. § 1341.

¹⁸⁹ *Romero-Barcelo*, 456 U.S. at 316-17 (discussing CWA § 301(b), 33 U.S.C. §§ 1311(b)).

statute in which Congress envisioned, rather than curtailed, the exercise of discretion.”¹⁹⁰ Another non sequitur. Congress did not include one bit of discretion in its requirements that industry achieve BPT by 1977 or BAT by 1983, and it did not incorporate its zero discharge objective by 1985 into any requirement of the statute. Indeed, the Court acknowledged that it had held “some standards related to phased compliance” to be absolute, citing *EPA v. National Crushed Stone Ass’n* (“*Crushed Stone*”).¹⁹¹ While Congress granted EPA some discretion to vary these deadlines,¹⁹² it did not grant courts the discretion to do so, a distinction acknowledged by the Court in an earlier action.¹⁹³

The Court next posits that a wording difference between two EPA injunctive authorities, CWA sections 309 and 504, evidence retention of traditional judicial equitable discretion to issue injunctions under section 309. The Court does not explain how these two EPA authorities govern injunctive relief in citizen suits. Worse, the distinction the Court makes between sections 309 and 504 simply does not exist. The Court observes that section 504 “directs . . . EPA to seek an injunction to restrain immediately discharges of pollutants [it] finds to be presenting ‘an imminent and substantial endangerment.’”¹⁹⁴ The Court then notes that § 504 “is limited to the indicated class of *violations*” while other types of *violations* are addressed by § 309(b), which authorizes EPA to seek “appropriate relief, including a permanent or temporary injunction.”¹⁹⁵ “The provision makes clear that Congress did not anticipate that all dischargers would be immediately enjoined.”¹⁹⁶ However, in § 504,

¹⁹⁰ *Id.* at 316.

¹⁹¹ *Id.* at 316 n.11 (citing *EPA v. Nat’l Crushed Stone Ass’n*, 449 U.S. 64 (1980)).

¹⁹² Congress granted the EPA discretion to extend the date for achieving BAT under some circumstances in CWA §§ 301(c) and 302, 33 U.S.C. §§ 1311(c) and 1312. Similarly, when the 1977 deadline for BPT passed with some dischargers failing to comply through no fault of their own, Congress granted the EPA discretion to extend the compliance deadline to dischargers meeting specified factors in CWA §§ 301(i) and 309(a)(5)(B), 33 U.S.C. §§ 1311(i) and 1319(a)(5)(B).

¹⁹³ *Republic Steel Corp. v. Costle*, 434 U.S. 1030 (1978). The EPA vetoed a state-issued permit because it allowed compliance with BPT after 1977. The Sixth Circuit overturned the EPA’s veto as improper. On appeal by the EPA, the Court remanded the case to the Sixth Circuit to be reconsidered in light of a recent amendment to the CWA, giving the EPA discretion to extend the deadline in consideration of specified factors, implying that Congress gave the EPA, not courts, discretion to extend the deadline. The Sixth Circuit ultimately reversed itself, holding that the 1977 deadline could not be extended by courts. *Republic Steel Corp. v. Costle*, 581 F.2d 1228 (6th Cir. 1978).

¹⁹⁴ *Romero-Barcelo*, 456 U.S. at 317.

¹⁹⁵ *Id.* (emphasis added)

¹⁹⁶ *Id.* at 317-18.

Congress merely provided that the EPA “*may* bring suit . . . to immediately restrain” an endangerment.¹⁹⁷ Congressional use of “*may*” authorizes the EPA to seek an injunction; it does not mandate that it do so. Also, it does not require the court to grant one. Moreover, § 504 authority does not arise when a statutory *violation* causes an endangerment, as the Court stated, but rather whenever water pollution causes an endangerment, regardless of whether it violates the CWA.

The final piece of evidence that the Court adduced was that the Senate Report for the 1972 Amendments indicated the “enforcement procedures” of the CWA were drawn extensively from the “enforcement provisions of the Refuse Act of 1899” and that “[v]iolations of the Refuse Act have not automatically led courts to issue injunctions.”¹⁹⁸ There are four problems with this argument. First, the quoted language from the Senate Report discussed the CWA’s EPA enforcement provisions in § 309, not the CWA citizen suit provision in § 505, under which the *Romero-Barcelo* case was filed and decided. Second, the Refuse Act of 1899 provided enforcement remedies for the government, not for citizens, while *Romero-Barcelo* was a citizen suit. Third, the Refuse Act cases the Court cited all post-dated the 1972 CWA amendments; thus, the proposition that injunctions were not automatic under the Refuse Act was not before Congress when it enacted the CWA.¹⁹⁹ Finally, the proposition for which the Court cited the Senate Report simply was not in the Senate Report.²⁰⁰

The opinion’s penultimate paragraph states:

¹⁹⁷ CWA § 504, 33 U.S.C. § 1364 (emphasis added).

¹⁹⁸ *Id.* at 319 (citing S. REP. NO. 92-414, at 62 (1971)).

¹⁹⁹ *Id.* (citing *Reserve Mining Co. v. EPA*, 514 F.2d 492 (8th Cir. 1975), *U.S. v. Rohm & Haas Co.*, 500 F.2d 167 (5th Cir. 1974), and *U.S. v. Kennebec Log Driving Co.*, 491 F.2d 572 (1st Cir. 1973)).

²⁰⁰ The Court quoted the Senate Report as saying “[i]n writing the enforcement procedures involving the Federal Government the Committee drew extensively . . . upon the existing enforcement provisions of the Refuse Act of 1899.” *Romero-Barcelo*, 456 U.S. at 319. The Report actually says that the Committee based the EPA’s enforcement provision in the CWA on the Refuse Act *and* the EPA’s enforcement provision in the then recently enacted Clean Air Act. S. REP. NO. 92-414, at 63 (1971). Neither The Refuse Act nor the CAA specified that courts had discretion in issuing injunctions. Moreover, there was a significant difference between the enforcement provisions of the CAA and the Refuse Act. The CAA authorized the EPA to enforce only if it gave notice of its intent to the state thirty days in advance and the violation continued beyond the thirtieth day with the state taking no action. Clean Air Amendments of 1970, Pub. L. No. 91-604, § 113(a), 84 Stat. 1676, (codified as amended at 42 U.S.C. § 7413(a)). The Refuse Act had no such notice requirement. *See* 33 U.S.C. § 407. Read in context, the Senate Committee Report indicates that it relied on the Refuse Act to give the EPA authority in the CWA to enforce without the prior notice required under the CAA. Nowhere in the quoted portion of the

[t]he District Court did not face a situation in which a permit would very likely not issue, and the requirements and objective of the statute could therefore not be vindicated if discharges were permitted to continue. Should it become clear that no permit will be issued and that compliance with the [CWA] will not be forthcoming, the statutory scheme and purpose would require the court to reconsider the balance it had struck.²⁰¹

This rescues the Court's decision, if not its reasoning. Ultimately, courts must require compliance with the CWA; if they do not, they effectively amend it, violating separation of powers principles.²⁰²

Taken as a whole, the Court's opinion suggests that when an injunction is sought to require compliance with a federal statute, courts have an obligation to require compliance with the statute, but have considerable discretion in how they achieve that end. That is not a startling proposition. The perplexing question is why the Court so mangled the CWA to get this conclusion. The probable answer is that the United States suggested all of the misinterpretations of the CWA in its brief.²⁰³ Why would the EPA suggest such blatant misinterpretations of a statute it administers creating misinterpretations that could come back to haunt it? The answer is that the EPA did not and probably would not. The Department of the Navy was a party to the brief with the Solicitor General while the EPA was not. Congress entrusted the EPA, not the Depart-

Senate Report is there a suggestion that courts have discretion in issuing injunctions. See S. REP. NO. 92-414, at 63-65 (1971).

²⁰¹ *Romero-Barcelo*, 456 U.S. at 320.

²⁰² The Court implied as much in its remand of *Republic Steel Corp. v. Costle*, 434 U.S. 1030 (1978). See also *Bethlehem Steel Corp. v. Train*, 544 F.2d 657 (3rd Cir. 1976).

²⁰³ "The different result in *TVA v. Hill* was due to the *specific characteristics of the statute* and the factual situation there before the Court" Brief for Petitioner United States at 11, *Romero-Barcelo*, 456 U.S. 305 (No. 80-1990), 1981 WL 390223 (emphasis added). Unfortunately, page 12 in the original document is missing. However, on page 13, the brief explained the factual differences between the two cases. Presumably the brief gave the Court its template for the legal differences. "The Act sets out a . . . phased system of pollution abatement . . . [R]emedial flexibility will sometimes be needed to avoid unnecessary hardship." *Id.* at 16. "Congress . . . provided for a phased program . . . [i]t is entirely consistent with this statutory scheme for the district courts to provide for some flexibility in the timing of compliance." *Id.* at 19. The brief also contrasted enforcement under CWA sections 309 and 504 on page 15, note 16. It accurately rephrased and quoted § 504 without making the same mistakes as the Court. *Id.* at 15-16. Furthermore, the brief suggested that the Senate Report indicated that CWA § 309 was based on the Refuse Act of 1899 and the injunctions were not automatic under the Refuse Act. *Id.* at 16. In support of this proposition the brief cited the same post-1972 Refuse Act decisions cited by the Court. See *supra* note 200.

ment of the Navy, or the Solicitor General, with interpreting and implementing the CWA. The problem here is that the United States was a defendant in a CWA enforcement action, making all of the arguments a defendant would ordinarily make, regardless of their implications for the integrity of the statute that it administers as a plaintiff in an enforcement action or as a defendant in a judicial review action.²⁰⁴

Six years later, the Court in *Gwaltney* held that CWA § 505(a)(1)²⁰⁵ limited citizen suits to violations that are continuing or likely to recur.²⁰⁶ The first and primary justification for this holding is the plain meaning of the present tense verbal phrase “to be in violation.”²⁰⁷ The Court reasoned that by using a present tense verb, Congress intended to authorize citizen suits for existing violations and not for wholly past violations.²⁰⁸ The Court bolstered this argument by observing that Congress used the present tense throughout § 505.²⁰⁹ It observed that the citizen suit provisions of most other environmental statutes also used the present tense verbs, demonstrating a consistent legislative intent that citizens could sue only for continuing violations.²¹⁰ Finally, it noted that when Congress wanted to authorize citizens to sue for wholly past violations, it knew how to use language that explicitly “targets wholly past violations.”²¹¹ The examples the Court used to support this assertion are not persuasive.²¹² Nevertheless, had the Court

²⁰⁴ Michael Herz & Neal Devins, *The Consequences of Department of Justice Control of Litigation on Agencies' Programs*, 52 ADMIN. L. REV. 1345 (2000).

²⁰⁵ 33 U.S.C. § 1365(a)(1) (authorizing a suit against any person who is alleged “to be in violation” of the CWA).

²⁰⁶ *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987).

²⁰⁷ *Id.* at 49, 57.

²⁰⁸ *Id.* at 57.

²⁰⁹ *Id.* at 59–60.

²¹⁰ *Id.* at 57.

²¹¹ *Id.*

²¹² The Court cited the citizen suit provision of the Resource, Conservation and Recovery Act, 42 U.S.C. § 6972(a)(1)(B), authorizing citizens to sue for abatement of present or future endangerments caused by past or present handling of hazardous waste. *Gwaltney*, 484 U.S. at 57. This provision does not target wholly past violations, as suggested by the Court. *Id.* Instead it authorizes suits to abate endangerments, not violations, and the endangerments do not have to be caused by violations. The word “violate” and its derivatives occur nowhere in the subparagraph. Moreover, the provision authorizes suits to abate present or future endangerments, not wholly past endangerments. The Court also cited EPA authority to assess administrative penalties against a person who “has violated” the CWA in § 309(g). *Id.* at 58. Of course, this is an EPA enforcement provision, not a citizen suit provision. Moreover, the Court interpreted EPA’s enforcement authority to reach wholly past and continuing violations, regardless of the tense Congress used in § 309, undercutting the Court’s argument that the present tense in § 505 is limited to continuing violations. See *infra* note 213.

stopped there, its analysis would have been unexceptional and not troubling.²¹³ Unfortunately, the Court continued with three subsidiary arguments that are faulty and destructive of citizen suits.²¹⁴

The Court's first subsidiary argument is that the purpose of the requirement that citizens give a violator notice of their intent to sue sixty days before filing suit²¹⁵ is to give the violator the opportunity to avoid suit by coming into compliance, a purpose that would not be served if citizens could sue for wholly past violations.²¹⁶ But the provision requires citizens to give notice to the EPA, the state, and the violator. Notice to the various governments has nothing to do with allowing the violator to avoid suit by coming into compliance. The legislative history suggests the purpose of prior notice is to provide government prosecutors the first chance to enforce obviating the need for a citizen suit, not to allow the violator an opportunity to avoid suit.²¹⁷ Indeed, giving prior notice to a violator serves several purposes whether its alleged vio-

²¹³ The Court's holding that citizen suits are limited to continuing violations, based on the present tense of "alleged to be in violation," *Gwaltney*, 484 U.S. at 57, presents a problem in that Congress also used the phrase "is in violation" in CWA § 309(a), the EPA enforcement section. Is the EPA also barred from enforcing against wholly past violations? Plaintiffs in *Gwaltney* argued that it is "little questioned" that the EPA may do so. *Gwaltney*, 484 U.S. at 58. The Court apparently agreed. *Id.* The Court distinguished the two situations, by noting that § 309 authorized injunctions and penalties in separate subsections, while § 505 authorized them in the same sentence, making them independent remedies in § 309 and "intertwined" in § 505. *Id.* at 58–59. Since injunctions are not warranted for wholly past violations and injunctions and penalties are intertwined in citizen suits, the Court reasoned, both injunctions and penalties are appropriate only for continuing violations in citizen suits. *Id.* at 58. While this argument seems metaphysical, the Court based its opinion in *Tull v. United States* on this basis. 481 U.S. 412, 425 (1987). However, in *Tull* the Court made a distinction in the context of the role of the judge and jury in EPA enforcement actions. *Id.* Does the Court in *Gwaltney* suggest the role of the judge and jury are different depending on whether the EPA or citizens bring an enforcement action? Nothing in *Gwaltney* or *Tull* suggests that conclusion.

²¹⁴ The author first developed this analysis in Jeffrey G. Miller, *Theme and Variations in Statutory Preclusions Against Successive Environmental Enforcement Actions by EPA and Citizens Part One: Statutory Bars in Citizen Suit Provisions*, 28 HARV. ENVTL. L. REV. 401, 484–91 (2004).

²¹⁵ CWA § 505(b)(1)(A), 33 U.S.C. § 1365(b)(1)(A).

²¹⁶ 484 U.S. 59–60.

²¹⁷ The citizen suit provisions of the CWA and other environmental statutes were modeled on the CAA citizen suit provision and courts commonly resort to the legislative history of the latter to inform the former. *Gwaltney*, 484 U.S. at 62; *United States Dep't of Energy v. Ohio*, 503 U.S. 607, 615 (1992). The notice and delay provision in the CAA citizen suit provision originated in the Senate bill and the Senate Report accompanying that bill explained that the notice "should motivate government agencies . . . to bring enforcement and abatement proceedings." S. REP. NO. 91-1196, at 36–37 (1970), *reprinted in* 1 CLEAN AIR ACT LEGISLATIVE HISTORY 436–37 (1974). The Senate Committee intended the thirty-day prior notice to "further encourage and provide for agency enforcement," giving the government "an opportunity to act on the alleged violation." *Id.* at 437.

lations are present or wholly past. In either case it allows the violator to convince the citizen enforcer that the alleged violations did not or do not exist, that they were not or are not serious, or that they have ceased or soon will cease, making a lawsuit pointless. Even if the violator fails to dissuade a citizen from filing suit, the notice affords the violator the opportunity to begin negotiating a settlement, sparing itself and the courts prolonged litigation.

While the Court's first subsidiary argument is not as convincing as its plain meaning analysis, its second subsidiary argument is seriously flawed and has had a pernicious effect on citizen suit jurisprudence. The focus of this argument is that citizen suits "supplement rather than . . . supplant government action"²¹⁸ and the citizen suit provision should not be interpreted to change the "nature of the citizen's role from interstitial to potentially intrusive."²¹⁹ The Court's contrast between the meanings of "supplement" and "supplant" implies a linguistic precision that does not exist. According to the Court, citizen suits are to "supplement" government enforcement. "Supplement" means "to add to."²²⁰ Citizen enforcers add to government enforcers. A citizen action cannot add to a government action unless the government has taken an action; if the government has not taken an action, there is nothing for the citizen suit to add to. But § 505(b)(1)(B) bars the citizen suit if the government has already taken an enforcement action in court.²²¹ "Supplant" means "to take the place of."²²² If the government does not take an enforcement action against a violation and a citizen does so, has not the citizen suit taken the place of a government action? The distinction the Court makes between "supplement" and "supplant," in the context of citizen suits, does not support its characterization of citizen suits as secondary enforcement mechanisms.

The Court's observation that the citizen suit provision should not be interpreted to allow intrusion on government enforcement

²¹⁸ *Gwaltney*, 484 U.S. at 60.

²¹⁹ *Id.* at 61. The Court had commented in *Sea Clammers* that the EPA enforcement authority is "supplemented" by the citizen suit provision. *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n* 453 U.S. 1, 14 (1981). However, the Court in *Gwaltney* did not cite *Sea Clammers* as precedent in this regard. This suggests an engrained view of citizen enforcement by the Court. As the dissent in *Sea Clammers* commented, the Court "has been more and more reluctant to open the courthouse door to the injured citizen." *Id.* at 25 (Stevens, J., dissenting).

²²⁰ WEBSTERS'S SEVENTH NEW COLLEGIATE DICTIONARY 884 (1999).

²²¹ The extent of this bar is not entirely settled. See Miller, *supra* note 214, at 426-28.

²²² WEBSTERS'S SEVENTH NEW COLLEGIATE DICTIONARY 884 (1999).

ignores the very nature of citizen suits. A citizen suit notice may cause the government to enforce when it otherwise would not have. When the government does commence a civil action against a violation in federal court, the citizen suit provision authorizes citizens to intervene in the government's action.²²³ The citizen suit provision allows citizens to second-guess the government's prosecutorial decisions: decisions not to enforce and decisions to enforce administratively rather than judicially. These outcomes may be intrusive, but are they not what Congress intended?

Finally, the Court's conclusion that citizen suits for present violations supplement government action and do not intrude on it, while citizen suits for wholly past violations supplant government action and do intrude on it, is simply a non sequitur. Citizen suits have the same effect on government enforcement actions whether the violations at issue are present or wholly past. While the Court's second subsidiary argument does not hold together logically or on its face, the evidence the Court offers to support it is little short of outrageous: a mischaracterized piece of legislative history;²²⁴ an

²²³ CWA § 505(b)(1)(B), 33 U.S.C. § 1365(b)(1)(B).

²²⁴ The Court quoted from the Senate Report accompanying the enactment of the CWA: "[t]he Senate Report noted that '[t]he Committee intends the great volume of enforcement actions [to] be brought by the State,' and that citizen suits are *proper only* 'if the Federal, State, and local agencies fail to exercise their enforcement responsibility.'" *Gwaltney*, 484 U.S. at 60 (quoting S. REP. NO. 92-414, at 64 (1971), reprinted in 2 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 1482 (1973)) (emphasis added). The Court uses the two quoted fragments of the Report as if they are linked and they explain congressional intent regarding citizen suits. In fact, they are drawn from different paragraphs and are parts of the Committee's comments on the EPA's enforcement provision, CWA § 309, rather than on the citizen suit provision, CWA § 505. The two paragraphs read:

The Committee . . . notes that the [enforcement] authority of the Federal Government should be used judiciously by the Administrator in those cases deserve [sic] Federal action because of their national character, scope, or seriousness. The Committee intends the great volume of enforcement actions be brought by the State. It is clear that the Administrator is not to establish an enforcement bureaucracy but rather to reserve his authority for the cases of paramount interest.

It should be noted that if the Federal, State, and local agencies fail to exercise their enforcement responsibility, the public is provided the right to seek vigorous enforcement action under the citizen suit provisions of section 505.

S. REP. NO. 92-414, at 64 (1971), reprinted in 2 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 1482 (1973). The first paragraph provides congressional intent regarding the relationship between federal and state enforcement, not that citizen suits supplement rather than supplant government enforcement. The second paragraph does not state or imply that citizen suits are *proper only* if the various governments fail to exercise their enforcement responsibilities. Neither paragraph suggests that citizen suits are appropriate against continuing but not against wholly past violations.

illogical deduction from that evidence;²²⁵ and an illogical hypothetical.

To illustrate the parade of horrors that would ensue if citizens were allowed to sue for wholly past violations, the Court poses a hypothetical in which a violator agrees with the EPA to install unusually expensive and advanced pollution control equipment, not only bringing the violator into compliance, but protecting the environment far beyond the applicable legal requirement. In consideration for this action, the EPA agrees not to seek penalties. The Court concluded that “[i]f citizens could file suit months or years later, in order to seek civil penalties that the Administrator chose to forgo, then the Administrator’s discretion to enforce the Act in the public interest would be curtailed considerably.”²²⁶ This hypothetical does not support the distinction between citizen suits for continuing and wholly past violations for several reasons.

First, the Court’s argument is misdirected. By enacting CWA § 505, Congress curtailed the government’s ability to assure a violator that it would not be the subject of enforcement. The proper question is whether Congress curtailed this for wholly past violations. Second, the hypothetical is a red herring. Reported citizen suit cases simply do not reveal citizens suing in such a situation.²²⁷ Third, if the violator spent more on its pollution control equipment than would normally have been required, it in essence came into compliance and paid a penalty in the amount of its extra costs. A court assessing a penalty in a subsequent citizen suit could offset this amount against the penalty it assesses in the citizen suit, as a matter which “justice may require,” one of the factors courts are to consider in assessing penalties.²²⁸ Fourth, the interference by the citizen suit with the government’s promise not to impose penalties is the same whether the suit involves continuing or wholly past violations. Fifth, the hypothetical falls apart by simply altering the hypothetical to reflect a possible scenario in which the government

²²⁵ The Court does not explain why citizen suits for wholly past violations undermine the supplementary role of citizen enforcement, while citizen suits against continuing violations do not.

²²⁶ *Gwaltney*, 484 U.S. at 61.

²²⁷ None of the 125 citizen suit cases surveyed in the article and cited in Miller, *supra* note 215, resemble this fact pattern.

²²⁸ CWA § 309(d), 33 U.S.C. § 1319(d). See *Public Interest Research Group, Inc. v. Hercules, Inc.*, 830 F. Supp. 1525, 1538–40 (D.N.J. 1993), *rev’d on other grounds*, 50 F.3d 1239 (3rd Cir. 1995), in which plaintiffs seeking penalties in a citizen suit argued the court, in assessing penalties, should take into account penalties the defendant had already paid to the government.

agrees to forego penalties in consideration for the violator installing pollution control equipment that is cheap, outmoded, barely complies with the permit's current requirements, under-performs equipment used by the rest of the industry, and is destined to fail in the near future. Does a citizen suit in that situation offend the structure or policy of the statute?

Sixth, allowing citizen suits in the situation posed by the Court does not undercut the government's ability to settle cases on terms it deems favorable. In the Court's situation, the government got the benefit of its bargain and the citizen suit does not disturb that result. If the citizens succeed in having a court assess penalties, they are paid to the Treasury and the government is doubly benefited. If the government fears that this example will discourage other violators from entering into settlements with it, the government has sufficiently greater authority than citizen enforcers.²²⁹ As a result, violators failing to deal with the government do so at their peril. Finally, if the government wants to insulate a violator from a citizen suit, Congress has provided it can do so by embodying the settlement in a consent decree entered a federal court.²³⁰

While the holding in *Gwaltney* may be justified on plain English grounds, it is not justified by the Court's other arguments. Yet these arguments, particularly the characterization of citizen suits as of secondary importance, have haunted subsequent citizen suits and been cited by court after court as justification for negative citizen suit rulings.²³¹ The decision evidences either an extremely sloppy job of statutory interpretation or an unstated desire to close the courthouse door to injured citizens.²³²

²²⁹ For example, the government may prosecute violators criminally via CWA § 309(c), 33 U.S.C. § 1319 (2000); it may inspect violating facilities daily via CWA § 308, 33 U.S.C. § 1318 (2000); it may terminate a violator's permit via CWA § 402(b)(1)(C), 33 U.S.C. § 1342(b)(1)(C) (2000) (incorporated into the EPA's authority by CWA § 402(a)(3)); or it may bar a violator from receiving government grants or contracts via CWA § 507, 33 U.S.C. § 1367 (2000).

²³⁰ Under CWA § 505(b)(1)(B), 33 U.S.C. § 1365(b)(1)(B) (2000), government actions in court do foreclose citizen suits. There is good reason why a judicial action can bar a citizen suit, while an administrative order will not. Judicial actions are public, administrative actions may not be. Even a consent decree filed in court is a public document and, under Department of Justice procedures, requires a public notice and comment period before entry as a judicial order. 28 C.F.R. § 50.7 (2004).

²³¹ See Miller, *supra* note 215, at n.439–441 and accompanying text.

²³² Justice Scalia's concurrence, joined by Justices O'Connor and Stevens, was even more restrictive. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 67–71 (1987) (Scalia, J., concurring). While the Court's opinion required the plaintiff to allege continuing violations in good faith, the concurrence would have required plaintiff to prove violations occurred at the time the complaint was filed, as a requirement of subject

V. EXPLAINING THE DECISIONS WITH ANTI-ENVIRONMENTAL RESULTS

Some might say that the thirteen to ten count of anti- and pro-environmental results in the Court's decisions²³³ self-evidently demonstrates the Court's anti-environmental bias. They might say that bias is more self-evident in the eleven to four count of decisions since 1980. That broad proposition, however, does not withstand scrutiny. Two of the thirteen decisions with anti-environmental results involved or avoided constitutional protections or limitations.²³⁴ They do not reflect an anti-environmental bias by the Court unless the proponent argues that the Court applies the Constitution more strictly under environmental statutes than under other statutes or that the Constitution should be applied less stringently under environmental statutes than under other statutes. Both are dubious propositions. Two of the remaining eleven decisions with anti-environmental results apply federal sovereign immunity from suits by states,²³⁵ derived from the Supremacy Clause of the Constitution,²³⁶ and invoke the accompa-

matter jurisdiction. *Id.* It further suggested that if violations did not occur at that time, the plaintiff suffered no injury at that time and had no standing to file the suit. *Id.*

²³³ See *infra* Table B.

²³⁴ See *Tull v. United States*, 481 U.S. 412 (1987); *Solid Waste Agency of N. Cook County (SWANCC) v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001). In *Tull* the Court decided that the Seventh Amendment to the U.S. Constitution required the opportunity for a jury decision on whether a defendant violated the CWA before a court could assess a civil penalty, although the judge retained equitable discretion to fix the amount of the penalty. 481 U.S. at 425–26. In *SWANCC* the Court interpreted CWA § 404 not to require permits to fill isolated wetlands to avoid deciding whether the regulation of isolated wetlands is within congressional authority under the Commerce Clause of the U.S. Constitution, U.S. CONST. art. I, § 8, cl. 2. *SWANCC*, 531 U.S. at 174. As an interpretation of the CWA's "navigable waters" jurisdiction, the opinion is questionable and can be labeled as having an anti-environmental result. As a means of avoiding the constitutional issue, however, it follows traditional judicial doctrine. *ESKRIDGE*, *supra* note 166, at 325. Moreover, Professor Lazarus suggests the Court might well have held isolated wetlands were not within Congress' Commerce Clause jurisdiction. Lazarus, *Three Years Later*, *supra* note 2, at 660–64. Such an outcome would follow in the footsteps of recent decisions in *United States v. Lopez*, 514 U.S. 549 (1995) (involving a federal statute outlawing possession of firearms near schools), and *United States v. Morrison*, 529 U.S. 598 (2000) (involving a federal statute providing a civil remedy for victims of gender-motivated violence), where the Court found that both of these statutes were beyond Congress' Commerce Clause jurisdiction. Under this logic the Court could have held that Commerce Clause jurisdiction did not extend to isolated wetlands and this holding could not then be viewed as motivated by anti-environmental bias as much as by a generally restrictive view of federal authority.

²³⁵ *United States Dep't of Energy v. Ohio* ("DOE"), 503 U.S. 607 (1992); *EPA v. Cal. ex rel. State Water Res. Control Bd.*, 426 U.S. 200 (1976).

²³⁶ U.S. CONST. art. VI, § 2.

nying cross-cutting judicial doctrine that waivers of sovereign immunity should be interpreted narrowly.²³⁷ Again, they do not reflect an anti-environmental bias by the Court unless the proponent argues that the Court interprets waivers of sovereign immunity more strictly in environmental statutes than in other statutes or the proponent argues the Court should interpret waivers of sovereign immunity less strictly in environmental statutes than in other statutes.²³⁸ Again, both arguments are dubious. Three of the remaining nine decisions with anti-environmental results are in judicial review of EPA final actions.²³⁹ Each of the three decisions upheld the EPA's action, reflecting judicial deference to the agency's interpretation of the statute it implements. If they reflect an anti-environmental bias, the bias begins with the EPA, not the Court. These seven decisions don't reflect an anti-environmental bias. Instead, they reflect the normal interplay between a statute and the rest of the legal system.

The remaining six decisions with anti-environmental results²⁴⁰ have much in common. All six were citizen suits or private federal common law of nuisance actions. By contrast, only one of the Court's ten decisions with pro-environmental results was a citizen suit or private federal common law of nuisance action.²⁴¹ All six of the decisions contained analytical errors, including all of the serious or multiple errors noted.²⁴² By contrast, only four of the Court's ten decisions with pro-environmental results contained analytical errors and none of them were serious or multiple.²⁴³ Finally, the EPA was not a party in five of the six decisions. By contrast, the EPA was a party in six of the Court's ten decisions with pro-environmental results.²⁴⁴ While some of these three factors are also at play in the seven other decisions with anti-environ-

²³⁷ *Ruckleshaus v. Sierra Club*, 463 U.S. 680, 685–86 (1983) (citing *McMahon v. United States*, 342 U.S. 25, 27 (1951)).

²³⁸ Justice White's separate opinion, in *DOE*, 503 U.S. 607, 629 (1992) (White, J., concurring in part and dissenting in part), however, suggests that if the Court were more attuned to environmental values, it could have come to a different conclusion.

²³⁹ *Arkansas v. Oklahoma*, 503 U.S. 91 (1992); *Chem. Mfrs. Ass'n v. NRDC*, 470 U.S. 116 (1985); and *Train v. Colorado Public Interest Research Group, Inc.*, 426 U.S. 1 (1976).

²⁴⁰ *City of Burlington v. Dague*, 505 U.S. 557 (1992); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.* 484 U.S. 49 (1987); *Int'l Paper Co. v. Ouellette*, 479 U.S. 481 (1987); *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982); *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981); *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981).

²⁴¹ See *infra* Table B.

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

mental results and cross-cutting issues, their influence does not appear to be as great as the nature of the legal issues involved in those seven decisions.²⁴⁵

This analysis suggests that the anti-environmental bias of the Court is less than it seems. More than half of its CWA decisions with anti-environmental results are adequately explained by the nature of the issues involved, constitutional protections or limitations, sovereign immunity, or judicial review of agency action. In the remainder of the decisions the results may be explained less by an anti-environmental bias than by combinations of three other factors: the nature of the action as a citizen suit or private federal common law of nuisance action, the EPA's absence as a party, and the presence of an analytical error.

While this analysis suggests the apparent anti-environmental bias of the Court is much less than it seems or may not even exist, the analysis raises two equally disturbing suggestions. One is the apparent bias of the Court against private enforcement, leading to anti-environmental decisions and analytical errors. The other is that the EPA's absence as a party from a case contributes to the anti-environmental results, particularly when other federal parties are present as polluting defendants. The most likely redress to a bias against private enforcement is legislation re-enforcing the importance of citizen suits, although citizen suit initiatives in today's Congress probably would not have positive results. The most likely redress to the absence of the EPA as the federal party in a suit is legislation requiring federal parties who are violating defenders to hire special counsel to represent them, leaving the Solicitor General to represent the EPA as amicus or allowing EPA to represent itself as amicus. The Department of Justice has an internal procedure to allow agencies to comment on the Solicitor's positions regarding statutes they administer, but it does not assure their interpretations will be adopted by the Solicitor.²⁴⁶

²⁴⁵ At least one of the three factors was present in all seven decisions. In addition, five had analytical errors, three did not have the EPA as a party, and one was a citizen suit. See *infra* Table B.

²⁴⁶ Interview with John Crudin, Deputy Assistant Att'y General, Env'tl. and Natural Res. Div., Dep't of Justice, in Chi., Ill. (Aug. 7, 2005).

TABLE A: SUPREME COURT DECISIONS UNDER
ENVIRONMENTAL PROTECTION AGENCY
ADMINISTERED STATUTES

Clean Water Act

Arkansas v. Oklahoma, 503 U.S. 91 (1992) (“Arkansas v. Oklahoma”).

Chemical Manufacturers Ass’n v. NRDC, 470 U.S. 116 (1985) (“CMA”).

City of Burlington v. Dague, 505 U.S. 557 (1992) (“Dague”).

City of Milwaukee v. Illinois, 451 U.S. 304 (1981) (“Milwaukee II”).

Costle v. Pacific Legal Foundation, 445 U.S. 198 (1980) (“Pacific Legal Found.”).

Crown Simpson Pulp Co. v. Costle, 445 U.S. 193 (1980) (“Crown Simpson”).

E.I. du Pont de Nemours and Co. v. Train, 430 U.S. 112 (1977) (“E. I. du Pont”).

EPA v. California *ex rel.* State Water Resources Control Board, 426 U.S. 200 (1976) (“California Water Board”).

EPA v. National Crushed Stone Assn., 449 U.S. 64 (1989) (“Crushed Stone”).

Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167 (2000) (“Laidlaw”).

Gwaltney of Smithfield, Ltd., v. Chesapeake Bay Foundation, 484 U.S. 49 (1987) (“Gwaltney”).

International Paper Co. v. Ouellette, 479 U.S. 481 (1987) (“Ouellette”).

Middlesex County Sewerage Authority v. National Sea Clammers Ass’n, 453 U.S. 1 (1981) (“Sea Clammers”).

PUD No. 1 of Jefferson County v. Washington Dept. of Ecology, 511 U.S. 700 (1994) (“PUD No. 1”).

Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001) (“SWANCC”).

South Florida Water Management District v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004) (“Miccosukee”).

Train v. City of New York, 420 U.S. 35 (1975) (“City of New York”).

Train v. Colorado Public Interest Research Group, Inc., 426 U.S. 1 (1976) (“Colorado PIRG”).

Tull v. United States, 481 U.S. 412 (1987) (“Tull”).

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) (“Riverside Bayview”).

United States v. Ward, 448 U.S. 242 (1980) (“Ward”).

United States Department of Energy v. Ohio, 503 U.S. 607 (1992) (“DOE”).

Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982) (“Romero-Barcelo”).

Clean Air Act

Adamo Wrecking Co. v. U.S., 434 U.S. 566 (1978).

Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984).

Department of Transportation v. Public Citizen, 541 U.S. 742 (2004).

Dow Chemical Co. v. United States, 476 U.S. 227 (1986).

Engine Manufacturers Ass’n v. South Coast Air Quality Management District, 541 U.S. 246 (2004).

EPA v. Brown, 431 U.S. 99 (1977).

General Motors Corp. v. United States, 496 U.S. 530 (1990).

Harrison v. PPG Industries, Inc., 446 U.S. 578 (1980).

Pennsylvania v. Delaware Valley Citizens’ Council for Clean Air, 483 U.S. 711 (1987).

Pennsylvania v. Delaware Valley Citizens’ Council for Clean Air, 478 U.S. 546 (1986).

Ruckleshaus v. Sierra Club, 463 U.S. 680 (1983).

Whitman v. American Trucking Ass’ns, 531 U.S. 457 (2001).

Resource Conservation and Recovery Act

Burlington v. Dague, 505 U.S. 557 (1992).

City of Chicago v. Environmental Defense Fund, 511 U.S. 326 (1994).

City of Philadelphia v. New Jersey, 437 U.S. 617 (1978).

Hallstrom v. Tillamook County, 493 U.S. 20 (1989).

Key Tronic Corp. v. United States, 511 U.S. 809 (1994).

Meghrig v. KFC Western, Inc., 516 U.S. 479 (1996).

Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370 (1987).

United States Department of Energy v. Ohio, 503 U.S. 607 (1992).

Comprehensive Environmental Response, Compensation and Liability Act

Cooper Industries, Inc. v. Aviall Services, Inc., 125 Sup. Ct. 577 (2004).

Exxon Corp. v. Hunt, 475 U.S. 355 (1986).

Key Tronic Corp. v. United States, 511 U.S. 809 (1994).

Meghrig v. KFC Western, Inc., 516 U.S. 479 (1996).

Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989).

Thomas v. Outboard Marine Corp., 479 U.S. 1002 (1986).

United States v. Best Foods, 524 U.S. 51 (1998).

Federal Insecticide, Fungicide and Rodenticide Act

Bates v. Dow Agrosiences LLC, 125 Sup. Ct. 1788 (2004).

Mobay Chemical Corp. v. Costle, 439 U.S. 320 (1979)

Ruckelshaus v. Monsanto Col, 467 U.S. 986 (1984).

Thomas v. Union Carbide Agricultural Products, 473 U.S. 568 (1985).

Wisconsin Public Intervener v. Mortier, 501 U.S. 597 (1991).

Oil Pollution Act

United States v. Locke, 529 U.S. 89 (2000).

Marine Protection, Research and Sanctuaries Act

Middlesex County Sewerage Authority v. National Sea Clammers Ass'n, 453 U.S. 1 (1981).

Emergency Planning and Community Right to Know Act

Safe Drinking Water Act

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998).

Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370 (1987).

National Environmental Policy Act

Aberdeen & Rockfish R. Co. v. Students Challenging Regulatory Actions Procedures (S.C.R.A.P.), 422 U.S. 289 (1975).

Baltimore Gas & Electric Co. v. NRDC, 462 U.S. 87 (1983).

Department of Transportation v. Public Citizen, 541 U.S. 752 (2004).

Flint Ridge Development Co. v. Scenic Rivers Ass'n of Oklahoma, 426 U.S. 776 (1976).

Kleppe v. Sierra Club, 427 U.S. 390 (1976).

Lujan v. National Wildlife Federation, 497 U.S. 871 (1990).

Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

Marsh v. Oregon Natural Resources Council, 490 U.S. 360 (1989).

Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766 (1983).

Middlesex County Sewerage Authority v. National Sea Clammers Ass'n, 453 U.S. 1 (1981).

Robertson v. Methew Valley Citizens Council, 490 U.S. 332 (1989).

Stryker's Bay Neighborhood Council v. Karlen, 444 U.S. 223 (1980).

United States v. Students Challenging Regulatory Actions Procedures (SCRAP), 412 U.S. 669 (1973).

Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978).

Weinberger v. Catholic Action of Hawaii/Peace Education Project, 454 U.S. 139 (1981).

TABLE B: SUPREME COURT DECISIONS UNDER THE CLEAN WATER ACT

	Decision	Year	Author (Majority*)	Concur**	Dissent**	Sections at Issue	Sections Cited
1	Train v. City of New York	1975	White (BL, BR, BU, M, P, R, STE)	Douglas		205, 207	101, 201, 203, 204, 205, 207, 301
2	Train v. Colorado PIRG	1976	Marshall (BL, BR, BU, P, R, STE, W)			502	101, 103, 301, 306, 402, 502, 505, 510
3	EPA v. California Water Board	1976	White (BL, BR, BU, M, P, STE)		Stewart Rehnquist	313	101, 212, 301, 302, 303, 304, 306, 307, 308, 309, 313, 401, 402, 502, 505, 509, 510
4	duPont v. Train	1977	Stevens (BL, BR, BU, M, P, R, STW, W)			301, 304, 509	101, 301, 302, 304, 306, 402, 501, 502, 505, 509, 510
5	Crown Simpson v. Costle	1980	Per Curiam (BL, BR, BU, M, P, R, STE, STW, W)			509	301, 402, 509
6	Costle v. Pacific Legal Foundation	1980	Blackmun (BR, BU, M, P, R, STE, STW, W)			402	101, 301, 402, 403
7	U.S. v. Ward	1980	Rehnquist (BR, BU, P, STW, W)	Blackmun** Marshall	Stevens**	311	311
8	EPA v. Crushed Stone	1980	White (BL, BR, BU, M, R, STE, STW)			301, 304	101, 301, 304, 402, 507, 509
9	Milwaukee v. Illinois	1981	Rehnquist (BR, BU, P, STW, W)		Blackmun** Marshall Stevens	505, 510	201, 212, 301, 402, 502, 505, 510
10	Middlesex County v. National Sea Clammers	1981	Powell (BR, BU, M, R, W)		Stevens** Blackmun	505, 510	101, 301, 302, 303, 304, 305, 306, 307, 309, 402, 505, 509
11	Weinberger v. Romero-Barcelo	1982	White (BL, BR, BU, M, O, P, R)		Stevens**	309, 505	213, 301, 309, 313, 401, 402, 404, 502, 504, 505, 509
12	CMA v. NRDC	1985	White (BR, BU, P, R)		Marshall** Blackmun Stevens O'Connor**	301	301, 304, 307

* Justices joining majority opinion without concurrence (BL = Blackmun, BR = Brennan, BRY = Breyer, BU = Burger, D = Douglas, G = Ginsburg, K = Kennedy, M = Marshall, O = O'Connor, P = Powell, R = Rehnquist, SC = Scalia, SO = Souter, STW = Stewart, STE = Stevens, T = Thomas, W = White)

** Author of concurring or dissenting opinion

TABLE B: CONTINUED

	Decision	Year	Author (Majority*)	Concur**	Dissent**	Sections at Issue	Sections Cited
13	U.S. v. Riverside Bayview	1985	White (BL, BR, BU, O, P, R, STE)			404, 502	101, 301, 404, 502
14	International Paper v. Ouellette	1987	Powell (O, R, SC, W)		Brennan** Marshall Blackmun Stevens**	505, 510	101, 301, 302, 304, 309, 313, 401, 402, 502, 505, 510
15	U.S. v. Tull	1987	Brennan (BL, M, O, P, R, W)		Scalia** Stevens	309	301, 309, 404, 502
16	Gwaltney v. Chesapeake Bay Foundation	1987	Marshall (BL, BR, P, R, W)	Scalia** Stevens O'Connor		505	101, 301, 303, 304, 309, 313, 401, 402, 502, 505, 510
17	Arkansas v. Oklahoma	1992	Stevens (BL, K, O, R, SC, SO, T, W)			303, 402	101, 208, 301, 303, 309, 401, 402, 510
18	Dept. of Energy v. Ohio	1992	Souter (K, O, R, T)		White** Blackmun Stevens	313	309, 311, 312, 313, 402, 502, 505, 510
19	Burlington v. Dague	1992	Scalia (K, O, R, SO, T)		Blackmun** Stevens O'Connor**	505	505
20	PUD #1 v. Washington DOI	1994	O'Connor (BL, G, K, R, SO)	Stevens**	Scalia Thomas**	303, 401	101, 301, 302, 303, 304, 401, 402, 404, 510
21	Friends of the Earth v. Laidlaw	2000	Ginsberg (BRY, O, R, SO)	Stevens** Kennedy**	Scalia** Thomas	505	309, 402, 505
22	SWANCC v. Army Corps of Engineers	2001	Rehnquist (K, O, SC, T)		Stevens** Souter Ginsberg Breyer	404, 502	101, 402, 309, 502
23	South Florida v. Miccosukee Tribe	2004	O'Connor (BRY, G, K, R, SO, STE, T)		Scalia**	502	101, 301, 303, 304, 402, 502

TABLE B: CONTINUED

	Decisions Cited	Decisions Citing	Judicial Review	Government Enforcement	Citizen Suit	Common Law	Cross Cutting Issue	EPA a Party	Error	EPA Win	Env'tl Win
1		# 9	EPA Regulation					✓		L	W
2			EPA Regulation		✓		✓	✓	Yes	W	L
3		#s 4, 6, 8, 9, 10, 11, 14, 17, 20	EPA State Program Approval				✓	✓	Yes	W	L
4	# 3	#s 6, 8, 11, 12	EPA Regulation					✓		W	W
5			EPA Permit Veto					✓	Yes	W	W
6	#s 3, 4		EPA Permit				✓	✓	Yes	W	W
7			EPA Penalty				✓		Yes		W
8	#s 3, 4	#s 11, 12	EPA Regulation					✓		W	W
9	#s 1, 3	#s 10, 11, 14, 17				✓	✓		Yes		L
10	#s 3, 9	# 14			✓		✓	✓	Serious	W	L
11	#s 3, 4, 8, 9				✓		✓		Multiple		L
12	#s 4, 8	# 13	EPA Regulation					✓	Yes	W	L
13	#12	#s 14, 22		✓							W
14	#s 3, 9, 10, 13	# 17				✓	✓		Yes		L
15		#s 16, 21		✓			✓				L
16	# 15	# 21			✓				Multiple		L
17	#s 3, 9, 14	# 20	EPA Permit					✓	Yes	W	L
18					✓		✓		Yes		L
19					✓		✓		Serious		L
20	#s 3, 17		State Certification						Yes		W
21	#s 15, 16				✓		✓				W
22	#13		COE Permit Denial				✓		Yes		L
23					✓						W