

Enforcement of Environmental Law in a Triangular Federal Systemj: Can Three Not Be a Crowd When Enforcement Authority is Shared by the United States, the States, and Their Citizens?

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Recommended Citation

D. R. Hodas, *Enforcement of Environmental Law in a Triangular Federal Systemj: Can Three Not Be a Crowd When Enforcement Authority is Shared by the United States, the States, and Their Citizens?*, 54 Md. L. Rev. 1552 (1995)

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**ENFORCEMENT OF ENVIRONMENTAL LAW IN A
TRIANGULAR FEDERAL SYSTEM: CAN THREE NOT
BE A CROWD WHEN ENFORCEMENT
AUTHORITY IS SHARED BY THE
UNITED STATES, THE STATES, AND THEIR CITIZENS?**

DAVID R. HODAS*

[V]igorous enforcement . . . is pivotal in promoting improved water quality. Waste water facilities will operate within their permit limitations if Federal agencies or States are serious about compliance. But as long as EPA and the States continue to take ineffective enforcement actions and reduce proposed fines down to insignificant amounts, the companies and local governments that comply with environmental laws are the ones being penalized, not the violators.

—John Martin, Inspector General, U.S. EPA¹

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INTRODUCTION

We look to our environmental laws to improve the quality of our air, water, and land; enhance ecosystem health; reduce the adverse public health effects from pollution; provide a level playing field in competition among states; and to internalize pollution costs into a discharger's activities. However, laws by themselves do not accomplish any of these goals; only widespread compliance with the law can bring about the desired ends. Unfortunately, polluters have no economic incentive to comply with environmental laws because noncompliance results in economic benefits—the free use of water or air for waste disposal—while compliance exacts an economic cost—the internaliza-

tion of waste disposal costs. Therefore, the degree to which laws protect the public health and improve the quality of our environment depends not only on the soundness of the laws, but also on the effectiveness of enforcement. Unfortunately, as one commentator has noted, "[E]nforcement of our nation's water quality laws continues to be weak and sporadic."²

Our pre-1972 water pollution law proved the point; it represented "fundamentally symbolic enforcement that accomplished very little environmental protection."³ Before 1972, the federal water pollution law was based upon state water quality designations for interstate waters,⁴ but there was no enforcement against a discharger unless the government could prove that the discharge caused a violation of the relevant water quality standards.⁵ The law, which focused solely on ambient water quality, imposed no specific requirements on dischargers and made enforcement so difficult for the government that it essentially never occurred.⁶ For example, only when the Cuyahoga River in Ohio, which was designated under the law for waste disposal, caught fire did the river's quality level dip below its designated use level. Furthermore, the government could only bring enforcement actions against those dischargers that it could show had caused the river to ignite.⁷ Moreover, the pre-1972 law had no effective means of enforcement even if the water quality goals had been for the protec-

2. *Senate Hearings*, *supra* note 1, at 689 (statement of Richard L. Hembra, Director, Environmental Issues, General Accounting Office (GAO)); *see also* Wendy Naysnerski & Tom Tietenberg, *Private Enforcement*, in *INNOVATION IN ENVIRONMENTAL POLICY* 109 (T.H. Tietenberg ed., 1992).

3. PETER CLEARY YEAGER, *THE LIMITS OF LAW: THE PUBLIC REGULATION OF PRIVATE POLLUTION* 83 (1991).

4. *See id.* at 78 (discussing the limited jurisdiction of the pre-1972 law, and noting the retreat from the use of the term "navigable waters" in the first offering of the legislation).

5. *Id.*

6. *See id.* at 82 (noting "the federal government made previous few attempts to enforce the law").

7. ZYGMUNT J.B. PLATER ET AL., *ENVIRONMENTAL LAW & POLICY: NATURE, LAW AND SOCIETY* 828 (1992). By the early 1970s, burning rivers, such as the Cuyahoga and the Rouge River in Dearborn, Michigan, were so common that courts would take judicial notice of the condition. *See, e.g.*, *United States v. Ashland Oil & Transport Co.*, 504 F.2d 1317, 1326 (6th Cir. 1974). In *Kerman v. American Dredging Co.*, 355 U.S. 426 (1958), the Supreme Court vividly described this environmental disaster:

The seaman lost his life on the tug . . . , which, on the night of November 18, 1952, while towing a scow on the Schuylkill River in Philadelphia, caught fire when an open-flame kerosene lamp on the deck of the scow ignited highly flammable vapors lying above an extensive accumulation of petroleum products spread over the surface of the river. Several oil refineries and facilities for oil storage, and for loading and unloading petroleum products, are located along the banks of the Schuylkill River.

Id. at 427.

tion of human health and the environment rather than merely for waste disposal.⁸

As a result, in 1972, Congress amended the Federal Water Pollution Control Act (FWCPA)⁹ by enacting what is now known as the Clean Water Act¹⁰ (CWA)¹¹ "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" by first achieving fishable and swimmable water, and ultimately, eliminating the discharge of pollutants into the waters of the United States.¹² Although the objectives, goals and policies of the CWA are national in scope, Congress envisioned that the responsibility for meeting these national ends would be shared by the federal government and the states, which would have the primary responsibility to "prevent, reduce, and eliminate pollution."¹³ Congress also recognized that government enforcement alone would not be sufficient to insure that the goals were met.

8. Frank J. Barry, *The Evolution of the Enforcement Provisions of the Federal Water Pollution Control Act: A Study of the Difficulty in Developing Effective Legislation*, 68 MICH. L. REV. 1103 (1970).

9. Act of June 30, 1948, ch. 758, 62 Stat. 1155 (codified as amended at 33 U.S.C. §§ 1251-1387 (1988 & Supp. V 1993)).

10. Act of Oct. 18, 1972, Pub. L. No. 92-500, § 2, 86 Stat. 896, provided, "[t]his Act may be cited as the 'Federal Water Pollution Control Act' (commonly referred to as the Clean Water Act)."

11. For ease of reference, the text of this Article will follow the practice of many courts, practitioners, and commentators of citing to CWA provisions by referring to the Act's section numbers and not the codified section numbers. The form used will be: CWA § _____. For example, instead of referring to the first section of the CWA as 33 U.S.C. § 1251, this section will be cited in the text as CWA § 101. However, the footnotes will refer to the codified section number.

12. CWA § 101(a), 33 U.S.C. § 1251(a). Section 101(a) provides:

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter—

(1) it is the national goal that the discharge of pollutants into navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983.

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited.

Id.

13. CWA § 101(b), 33 U.S.C. § 1251(b). Section 101(b) provides in pertinent part:

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter.

Id.

It therefore extended its allocation of enforcement responsibility directly to the citizens of the United States.¹⁴

To achieve its ambitious water quality goals, Congress abandoned the age-old water pollution control maxim that "the solution to pollution is dilution," and adopted a "command and control" pollution law. The new law was driven by mandatory minimum national technology-based standards for water quality, supplemented by more stringent state requirements, all of which were to be translated into specific effluent limitations at the end of the discharger's pipe.¹⁵ To make these limitations directly enforceable, the CWA prohibited any discharge of a pollutant into water from a point source¹⁶ without a permit that imposes specific effluent limitations and reporting requirements on the discharger.¹⁷

However, with over with over 1,000,000 miles of rivers and streams, 61,000 square miles of inland water bodies and 94,000 square miles of Great Lakes receiving billions of pounds of pollution annually¹⁸ from more than 70,000 direct dischargers¹⁹ and 27,000 industrial indirect dischargers,²⁰ regulated by the CWA, achievement of the

14. CWA § 101(e), 33 U.S.C. § 1251(e). Section 101(e) provides in pertinent part:

Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator [of the Environmental Protection Agency] or any State under [CWA] shall be provided for, encouraged, and assisted by the Administrator and the States.

Id.

15. For a concise summary of the changes made by the 1972 amendments, see John P.C. Fogarty, *A Short History of Federal Water Pollution Control Law*, in CLEAN WATER DESKBOOK 5-20 (Envl. L. Rep. ed., 1988).

16. "Point sources" are discernible, confined, discrete conveyances, such as pipes, from which pollutants are or may be discharged. CWA § 502(14), 33 U.S.C. § 1362(14). The CWA prohibitions do not apply to "nonpoint" sources of pollution such as sheet run-off from fields, farms and highways.

17. CWA § 301(2)(A), 33 U.S.C. § 1311(2)(A).

18. PROGRAM EVALUATION AND METHODOLOGY DIVISION, U.S. GENERAL ACCOUNTING OFFICE, GAO/PEMD-94-9, WATER POLLUTION: POOR QUALITY ASSURANCE AND LIMITED POLLUTANT COVERAGE UNDERMINE EPA'S CONTROL OF TOXIC SUBSTANCES 13 (1994) [hereinafter GAO, WATER POLLUTION].

19. *Senate Hearings*, *supra* note 1, at 688 (statement of John Martin).

20. SCIENCE APPLICATION INT'L CORP., STATISTICAL ASSESSMENT OF NATIONAL SIGNIFICANT INDUSTRIAL USER NONCOMPLIANCE (1992) [hereinafter STATISTICAL ASSESSMENT] (report submitted to Office of Water Enforcement and Compliance, EPA). Industrial indirect dischargers release effluent into municipal sewer systems. See CWA § 307(b), (c), 33 U.S.C. § 1317(b), (c) (stating that indirect dischargers must comply with pretreatment requirements imposed by EPA on various categories of industry, and with general prohibitions on the discharge of pollutants that either pass through the system untreated or interfere with the operation of the sewage treatment system).

CWA's goals depends on widespread voluntary compliance by the regulated community.

Generally, the tools available to motivate compliance fall into two categories, carrots—incentives and subsidies—and sticks—penalties, injunctions, and criminal sanctions. In the CWA, Congress created the paradigmatic command and control environmental statute—a statute that relies primarily on sticks to induce compliance with its standards. The CWA provides no financial rewards or market-based incentives for meeting or exceeding its standards. Those who do comply, however, suffer the stick of the expense of pollution control costs. Conversely, those who violate the CWA by using downstream waters for free waste disposal gain a competitive market advantage over those who internalize their waste disposal costs. As a result, voluntary compliance with the CWA's requirements will not occur unless the regulated community perceives the enforcement system as a credible threat that violating the law will be more painful than complying with it. To help make this threat credible, Congress designed the CWA for ease of enforcement: any discharge of a pollutant from a point source without a permit, or in violation of the permit, is a violation of the CWA, subjecting the violator to injunctive sanctions,²¹ civil penalties of up to \$25,000 per day per violation,²² and criminal sanctions.²³

But does this enforcement structure motivate a vast, ever expanding array of industrial, commercial, residential and governmental polluters to comply consistently with complex and ever more stringent pollution control regulation?²⁴ This is no small question. The economic pressures to avoid pollution control costs constantly gnaw at companies seeking to gain market share and to fend off competition. Unchecked by vigilant enforcement, these pressures will slowly, but inevitably, undermine our system of environmental laws.²⁵

21. CWA § 309(a), 33 U.S.C. § 1319(a).

22. CWA § 309(d), 33 U.S.C. § 1319(d).

23. CWA § 309(c), 33 U.S.C. § 1319(c).

24. As our population and economic activities grow, pollution regulations must become more stringent just to maintain existing environmental conditions, let alone improve deteriorating or deteriorated air and watersheds whose conditions jeopardize human health and the environment. For example,

New York City shows how population growth affects pollutant load. From 1880 to 1980, the metropolitan region's population grew by a factor of five, from roughly 3 million to roughly 15.2 million. Estimated waterborne discharges of organic carbon, nitrogen, and phosphorous from human waste rose in direct proportion to population growth.

WORLD RESOURCES INSTITUTE, *WORLD RESOURCES 1994-95* 34 (1994); *see also* THE WORLD BANK, *WORLD DEVELOPMENT REPORT 1992* 7-13 (1992).

25. According to James R. Elder, former Director, EPA Office of Water Enforcement and Permits, "We have found repeatedly that nothing is self-sustaining in the NPDES pro-

Similarly, as our nation's population grows,²⁶ new municipal sewage treatment plants must be added, and existing ones maintained, expanded, and upgraded simply to maintain current levels of treatment,²⁷ let alone meet demand for increasing residential, commercial, and industrial development. Local governments facing tight budgets inevitably will feel pressure to avoid expensive capital investment and operating expenditures if sending pollution downstream is cost-free.²⁸ Thus, compliance today, if it exists, does not assure compliance tomorrow. Without vigilant, widespread, voluntary compliance, our water and air pollution and hazardous waste control programs will erode, and possibly collapse, leaving future generations with the crushing expense of restoring the ecosystem, and the increased morbidity and mortality caused by the contamination.²⁹

Unfortunately, our system of public environmental enforcement is more fragile³⁰ and overwhelmed than most people realize.³¹ An-

gram. If a state's vigilance or EPA regional vigilance subsides, then noncompliance and point source contribution [pollution] increase." James R. Elder et al., *Regulation of Water Quality: Is EPA Meeting Its Obligations or Can the States Better Meet Water Quality Challenges?*, 22 *Envl. L. Rep. (Envl. L. Inst.)* 10,029, 10,037 (Jan. 1992).

26. The United States population, currently slightly over 250,000,000 persons, grows annually at the rate of 1.03%, which means that each year we must meet the needs of an additional 2,633,000 people. WORLD RESOURCES INSTITUTE, *supra* note 24, at 269.

27. In the face of growing population, the CWA has been successful to the extent that it has resulted in maintaining water quality across the nation, and even improving it in some places. Between 1972 and 1986, the CWA was in part responsible for a roughly 50% increase in the number of Americans being served by sewage treatment plants with secondary treatment technology, but many communities still do not meet this minimal level of treatment. WILLIAM R. LOWRY, *THE DIMENSIONS OF FEDERALISM* 66 (1992).

28. Lowry notes that it has long been true that "[p]ollution is wedded to political power. Wherever water is bad the industries and cities that made it that way are ready to use their influence and economic leverage on every level of government to stave off abatement." *Id.* at 57 (quoting DAVID ZWICK & MARCY BENSTOCK, *WATER WASTELAND* 168 (1971)).

29. The experience of the former Soviet Union illustrates this possibility. On paper, the Soviet Union had extensive, stringent environmental laws and regulations, but there was no enforcement of those laws. MURRAY FESHBACH & ALFRED FRIENDLY, JR., *ECOCIDE IN THE USSR: HEALTH AND NATURE UNDER SIEGE* 1-14 (1992). Without enforcement, there also has been no compliance with the environmental laws, which are now a sham, "a false front over grubby reality." *Id.* at 44. As a result, Russia suffers from widespread, severe, even catastrophic environmental contamination. *Id.* at 252. Some Soviet scholars calculated the annual economic costs of environmental damage at 15% to 17% of GNP, *id.* at 254, which may cost more than \$1.5 trillion to clean up. *Id.* at 258.

30. For instance, the enforcement system does not even protect our nation's massive investment in sewage treatment plants:

To protect the 75 billion dollar public investment over the past 18 years, federally-funded waste water plants are required to generate revenue to operate and maintain constructed facilities. This is done through user charges. We audited user charge systems in three EPA regions last year and found that 73% of the delegated States did not perform user charge system reviews as required. Of

nual enforcement accomplishment reports³² praise government's effectiveness in enforcing the law.³³ But, there is less than meets the eye to claims that the law is being effectively enforced.³⁴ Despite the many enforcement success stories reported by the government,³⁵ the

those that were performed, 61% identified deficiencies. Indications from a national survey of user charges are that 37% do not generate adequate revenues. The whole purpose of the user charge system is to prevent treatment facilities from deteriorating to a level of non-compliance with water standards.

Senate Hearings, supra note 1, at 688 (statement of John Martin). Senator Chafee responded, "All I can say is it is a terrible tragedy if we're not keeping these places up after all the money we have put into them." *Id.* at 698.

31. For instance, self-monitoring by the more than 70,000 direct dischargers is used to identify permit noncompliance. However, according to the EPA Inspector General, [o]nly non-compliance by the largest 10 percent of the facilities is reported in [EPA's] monitoring system, and of those facilities, only the ones judged to be in significant non-compliance for extended periods of time are counted against agency goals. Thus, the number of facilities recorded as being in significant non-compliance is vastly understated compared to the total universe of facilities that may not be meeting the terms of their permits.

Id. at 688 (statement of John Martin). Moreover, compliance monitoring information submitted by some states and EPA regions has been and continues to be inaccurate, federal oversight of this process is inadequate or totally absent, and the noncompliance criteria exclude many of the nation's chronic permanent violators. *Id.* at 693-94.

32. EPA's Office of Enforcement annually published an Enforcement Accomplishments Report.

33. *See, e.g.,* OFFICE OF ENFORCEMENT, U.S. ENVTL. PROTECTION AGENCY, EPA 230-R-93-001, EPA ENFORCEMENT ACCOMPLISHMENTS FY 1992 1-1 (1993) [hereinafter ENFORCEMENT ACCOMPLISHMENTS FY 1992] (stating "FY 1992 was a very successful year for . . . the Environmental Protection Agency . . .").

34. According to EPA's Inspector General,

[EPA's] complex reporting criteria, coupled with often inaccurate reporting from the field, and a lack of effective oversight at Regional and Headquarters levels exclude many of the nation's chronic violators from oversight. Reliance on compliance data obtained from EPA reports can give inflated impressions of accomplishments. Currently, no corrective actions for these reporting deficiencies have been taken.

Senate Hearings, supra note 1, at 789 (statement of John Martin).

Moreover, an EPA Chief of State under President Reagan explained:

Under most of our statutes EPA's enforcement role is residual, that is, allowing us to take the enforcement lead if and when states can not take effective action. To be blunt, I have concluded that EPA's reputation as a tough and effective enforcement agency over the past several years has been largely unearned. There has been little in the way of discernible enforcement strategy. Major polluters have gone untouched, and numerous cases have languished at the Department of Justice for want of adequate preparation. But we "fattened" our average by going after numerous small firms whose pollution problems were real but minor compared with those of the ones that eluded us.

John E. Daniel, *The Balance of Roles: EPA and the States Under the Reagan Administration*, in 12 *Envl. L. Rep.* (Envl. L. Inst.) 15,087, 15,088 (1982).

35. *See, e.g.,* ENFORCEMENT ACCOMPLISHMENTS FY 1992, *supra* note 33, app. National Penalty Report FY 1992, at 1 (stating the Office of Enforcement set a record in FY 1992 for penalties assessed); ENVIRONMENT AND NATURAL RESOURCES DIV., DEP'T OF JUSTICE DOJ STA-

number of violations overwhelm the enforcement capacity of both the federal and state governments.³⁶

Much has been written about citizen suits³⁷ and a little has been written about federal/state enforcement relationships,³⁸ but beyond the intuitive comments of present and former government enforcement lawyers,³⁹ no one has analyzed this three-part system as an integrated whole.⁴⁰ This Article will analyze why both federal and state governments are, for legal, policy, political, and institutional reasons, unable—and will forever be unable—to cope effectively with the constant flood of environmental law violations that inundate their offices. The analysis will conclude that despite the hostility of some courts and

TISTICAL REPORT FY 1993 5-13 (1994) [hereinafter DOJ STATISTICAL REPORT FY 1993] (detailing significant achievements and accomplishments).

36. William Cohen, Chief of the General Litigation Section of the Land and Natural Resources Division of the Department of Justice (DOJ) stated that “frankly” there are just too many enforcement cases “out there” for the federal and state governments to handle and that citizen suits should be applauded as a “natural adjunct” to government enforcement. William M. Cohen, Remarks at the ALI-ABA Environmental Law Course of Study (Feb. 19, 1994) [hereinafter Cohen Remarks].

37. See, e.g., Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 BUFF. L. REV. 833 (1985); David T. Buente, *Citizen Suits and the Clean Air Act Amendments of 1990: Closing the Enforcement Loop*, 21 ENVTL. L. 2234 (1991); Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 TUL. L. REV. 339 (1990); Jeffrey G. Miller, *Private Enforcement of Federal Pollution Control Laws, Part I*, 13 ENVTL. L. REP. (Envtl. L. Inst.) 10,309 (1983).

38. See, e.g., Hubert H. Humphrey III & LeRoy C. Paddock, *The Federal and State Roles in Environmental Enforcement: A Proposal for a More Effective and Efficient Relationship*, 14 HARV. ENVTL. L. REV. 7, 44 (1990) (“Today, faced with the task of assuring that a huge universe of regulated facilities is complying with environmental laws, neither federal nor state officials can afford the confusion, delay, disputes and duplicative enforcement efforts that result when the roles of various governmental entities are not clearly and consistently laid out.”); Marc Melnick & Elizabeth Willes, Comment, *Watching the Candy Store: EPA Overfiling of Local Air Pollution Variances*, 20 ECOLOGY L.Q. 207 (1993) (examining the relationship between EPA and air pollution control districts in California). The Humphrey and Paddock article proposes several federal/state enforcement allocation principles for Congress and EPA to adopt. Humphrey & Paddock, *supra*, at 44.

39. In his remarks to the Environmental Law Course, William Cohen stated that the collective action of citizen groups, EPA, DOJ, and state governments, working as partners, is necessary to advance environmental protection. Cohen Remarks, *supra* note 36; see also LeRoy C. Paddock, *Environmental Enforcement at the Turn of the Century*, 21 ENVTL. L. 1509 (1991) (Director of Environmental Policy, Minnesota Attorney General’s Office); Joel A. Mintz, *The Future of Environmental Enforcement: A Reply to Paddock*, 21 ENVTL. L. 1543 (1991) (formerly a senior attorney in EPA’s Office of Enforcement).

40. For instance, none of the 10 articles in a symposium evaluating EPA’s first 20 years addressed the structure of civil enforcement. Symposium, *Assessing the Environmental Protection Agency After Twenty Years: Law, Politics, and Economics*, 54 LAW & CONTEMP. PROBS., Autumn 1991. Nor did any of the 25 articles in Symposium, *Twenty-Five Years of Environmental Regulation*, 27 LOY. L.A. L. REV. 779 (1994).

commentators,⁴¹ only extensive use of citizen suits as private attorneys general can safeguard the enforcement system from collapse and prevent states from using lax environmental enforcement as an economic development tool.

This Article will examine critically the CWA's triangular structure of federal, state and citizen enforcement. First, the Article will review the evolution of the CWA into its current form. Then it will analyze the federal/state leg of the CWA's enforcement triangle, discussing the general strengths and weaknesses of federal versus state enforcement. The Article will identify the legal conflicts that emerge when enforcement authority and efforts overlap, examine how courts have resolved these conflicts, and analyze the extent to which these conflicts impair the effectiveness of CWA enforcement. In particular, the Article will focus on the intense interstate competitive pressures that result from unequal enforcement among the states, which create a cycle of diminished state enforcement. The Article will then outline the Environmental Protection Agency's (EPA) policy vision of the CWA federal/state enforcement partnership, followed by an analysis of the legal doctrines courts use to resolve conflicts arising from concurrent federal and state enforcement. As we shall see, courts have tended to limit federal enforcement power, restricting EPA's ability to level the playing field for state enforcement.

Having identified the legal and institutional problems in the federal/state CWA partnership, the Article will then examine whether the CWA is being effectively enforced in the field. The evidence dem-

41. Those courts and commentators view citizen suits as improper interlopers in the relationship between government and the regulated community. See, e.g., *Arkansas Wildlife Fed'n v. ICI Americas, Inc.*, 29 F.3d 376, 383 (8th Cir. 1994) (holding that diligent enforcement action by a state bars citizen suits); *North and S. Rivers Watershed Ass'n, Inc. v. Town of Scituate*, 949 F.2d 552, 558 (1st Cir. 1992) (stating that the preclusive effect of CWA § 309(g) bars all civil actions, not only civil penalty actions); Robert F. Blomquist, *Rethinking the Citizen Suit as Prosecutor Model of Environmental Enforcement Under the Clean Water Act: Some Overlooked Problems of Outcome-Dependent Values*, 22 GA. L. REV. 337 (1988) (arguing that private citizen suits do not promote the policy interests that they were intended to serve); Greve, *supra* note 37 (arguing that citizen suit enforcement is not supported by any plausible economic or environmental rationale); see also Harold J. Krent & Ethan G. Shenkman, *Of Citizen Suits and Citizen Sunstein*, 91 MICH. L. REV. 1793, 1808-14 (1993); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U.L. REV. 881, 884-88 (1983).

Some constitutional scholars begrudgingly have accepted the use of citizen suits. See, e.g., Cass R. Sunstein, *Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 222 (1992) ("[T]he citizen suit is probably best understood as a band-aid superimposed on a system that can meet with only mixed success. . . . We should not forget, however, that band-aids can do some good. The citizen suit may serve as an effective if partial alternative to massive regulatory overhaul.").

onstrates weak enforcement results and a failure to use civil penalties as a fundamental deterrent of violations. Based on this analysis, the Article demonstrates that federal enforcement alone is insufficiently comprehensive and forceful to level the state enforcement playing field. Federal enforcement cannot achieve this necessary parity among states without either a significant increase in resources and staff, a less-than-remote possibility, or the major supplemental support of citizens as private attorneys general.

Next, the Article will examine the federal/citizen and the state/citizen legs of the CWA enforcement triangle to see whether citizens as private attorneys general are, can be, or should be the substantial backstop to ineffective or insufficient government enforcement. At present, citizens are frequent participants in the CWA enforcement system, accounting for more judicial actions than does EPA, and almost as many judicial actions as all of the states combined. By bringing these cases in significant quantities and with high visibility, citizen suits materially minimize the effect of inconsistent enforcement among the states. However, recent judicial activism undermines the crucial role of private attorneys general by precluding citizen suits if even minimal state enforcement activities are underway. Unchecked, this judicial trend will have the effect of amending the CWA to its pre-1972 days, when enforcement was limited and water was viewed as an economically efficient waste disposal resource.

The last section of the Article will analyze the viability of citizen suits in the CWA enforcement system by first outlining the general legal principles and policy concerns that govern citizen suits. The Article then will examine the empirical data on the success of citizens suits and the significant barriers several hostile courts and states have raised to citizen enforcement. Finally, the Article will propose several legal solutions to improve the CWA enforcement system through enhanced use of citizen suits. Enhanced use will help significantly to level the enforcement playing field for the states, thereby freeing the many states genuinely concerned with environmental quality to enforce the law aggressively without worry that other states will use lax environmental enforcement to entice businesses out of state.

The Article will conclude that a triangulated federalist enforcement program can be successful only if citizens are unimpaired in their ability to fill the substantial gaps that exist in state and federal enforcement programs. Even in the most earnest federal and state enforcement programs, there are substantial institutional and political obstacles to adequate enforcement. Unfortunately, the present system does more to hinder citizen enforcement than to promote it.

If this trend continues, and as states continue to compete with each other for business development by relaxing enforcement activity, the regulated community will realize that it cannot justify voluntary compliance with permit requirements. Under the 1990 Clean Air Act Amendments,⁴² the CWA's enforcement system soon will be applied to the control of urban air quality, toxic air pollutants, and acid deposition. Thus, not only will the cleanliness of our water depend on the efficacy of the CWA's triangulated federalist enforcement system, but so will the nation's hopes for clean air.

I. THE EVOLUTION OF THE WATER POLLUTION ENFORCEMENT SYSTEM

Before the CWA was amended in 1972, states were primarily responsible for setting water quality standards and enforcing federal water quality goals,⁴³ which were general in nature, applied only to interstate water,⁴⁴ and were not widely implemented as state-based requirements.⁴⁵ Where water quality standards were not agreed upon by state and federal authorities, no federal enforcement was possible. As of 1972, only twenty-seven states had federally approved water quality standards.⁴⁶ Even in those states with approved standards, it was not possible to bring enforcement against individual dischargers on the basis of ambient water quality standards alone because the water quality goals did not identify what individual polluters may or may not discharge.⁴⁷

Even if the states and federal government had been able to assign specific ambient water quality-based effluent limitations to each discharger along interstate waters—an almost impossible task⁴⁸—en-

42. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (1990).

43. See FRANK P. GRAD, TREATISE ON ENVIRONMENTAL LAW § 3.03(1)(a), at 3-71 to -72 (1993).

44. 33 U.S.C. § 1160(a) (repealed 1972).

45. GRAD, *supra* note 43, at 3-73.

46. S. REP. NO. 414, 92d Cong., 1st Sess. 4 (1971).

47. *Id.* at 8.

48. The process first requires defining water quality criteria for each use designation; then identifying each source of pollutants, natural and human, discharged into the water; identifying the maximum total load of pollutants the water can assimilate before exceeding the criteria for the designated use; and finally, allocating among the regulated dischargers the exact amount of total load of pollutants they may discharge, which is incorporated into a document memorializing the allocation. CWA § 303(d), 33 U.S.C. § 1313(d). For scientific, economic and political reasons, making these determinations and allocations was almost impossible and was rarely done. See WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW: AIR AND WATER § 4.18(C), at 281-85 (1986) (discussing the difficulties of implementing water quality-based effluent limitations).

As of 1994, this task still daunts states. For instance, Pennsylvania has assessed less than half of its rivers and streams, about one-third of its lakes and none of its freshwater or

forcement of those limitations would have been impossible because the federal enforcement machinery was cumbersome and ineffective.⁴⁹ Essentially, enforcement was based on an elaborate, protracted conference procedure, which mandated extensive efforts to mediate disputes before any court action was possible.⁵⁰ As of 1971, only fifty informal conferences had been held nationwide, only four matters proceeded through the conference procedure to the administrative hearing stage, and only one case went to court.⁵¹ Thus, when Congress enacted the CWA in 1972, one of its central concerns was to create a readily enforceable system of regulation designed to bring water pollution under control.⁵²

To this end, the core provision of the CWA prohibits discharge of any pollutant from a point source into any waters of the United States without a permit⁵³ issued from the yet-to-be-created National Pollutant Discharge Elimination System (NPDES).⁵⁴ NPDES permits set specific limits on discharges against which compliance can be measured and enforced.⁵⁵ EPA designed these limitations so that there would be a 99% certainty that any discharge would be due to the pol-

tidal wetlands to determine if water quality standards are being met. Of the rivers and streams assessed, roughly 5000 miles, or 20% of the 25,000 miles assessed, do not meet water quality standards. CWA § 303(d)(1)(C) mandates that states establish "total maximum daily load" levels, maximum levels of pollution that water bodies can tolerate, to meet water quality standards with a margin of safety that takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality. 33 U.S.C. § 1313(d)(1)(C). However, in the 22 years since the CWA became effective, "neither Pennsylvania nor EPA have established the maximum assimilative load limitation for a single degraded water body in the entire State of Pennsylvania." Letter from James R. May, Widener University School of Law, Environmental Law Clinic, on behalf of the American Littoral Society, to Carol Browner, EPA Administrator (July 14, 1994) (on file with author).

49. See S. REP. NO. 414, *supra* note 46, at 5 (addressing the weakness of the permit system created in 1970 under the Refuse Act).

50. This excruciatingly cumbersome and slow conference enforcement system is described in *United States v. Bishop Processing Co.*, 423 F.2d 469, 470-73 (4th Cir. 1970). See also 33 U.S.C. § 1160(d), (3), (f) and (g) (1979). Prior to the 1990 Clean Air Act Amendments, 42 U.S.C. §§ 7401-7642, federal air pollution enforcement laws also followed a similar procedure, with similarly dismal results.

51. S. REP. NO. 414, *supra* note 46, at 5.

52. When Congress amended the Clean Air Act in 1990, it attempted to make Clean Air Act requirements more easily enforceable by repudiating the Act's ambient air-based enforcement system and adopting a comprehensive permit-based enforcement system in 42 U.S.C. § 7661a-d (Supp. V 1993) modeled on the CWA. See Timothy L. Williamson, *Fitting Title V into the Clean Air Act: Implementing the New Operating Permit Program*, 21 ENVTL. L. 2085, 2089 (1991).

53. CWA § 301(a), 33 U.S.C. § 1311(a).

54. CWA § 402, 33 U.S.C. § 1342.

55. See CWA § 402(a)(1), 33 U.S.C. § 1342(a)(1) (outlining the standards for compliance).

luter's actions rather than statistical error.⁵⁶ The permit-writing process anticipates that dischargers will design their systems with sufficient margin of safety for continuous compliance.⁵⁷ Under this "command and control"⁵⁸ approach, if the discharge violates the explicit terms of the permit, the discharger has violated the CWA, even if there is no scientifically identifiable adverse impact on the receiving water.⁵⁹

Underlying the CWA approach was the adoption of the principle that no one has the right to pollute the nation's waters.⁶⁰ This principle or ethic translated into the congressional mandate that any person who discharges without a NPDES permit, or in violation of an existing NPDES permit, is strictly liable under the CWA.⁶¹ This mandate

56. See *Natural Resources Defense Council, Inc. v. EPA*, 790 F.2d 289, 292 (3d Cir. 1986); see also *infra* note 128. This 99% confidence level is consistent with Congress's mandate that 100% compliance is required. *Natural Resources Defense Council v. Texaco*, 2 F.3d 493, 507 (3d Cir. 1994).

57. *Id.*

58. Command and control is used to describe "measures that require or proscribe specific conduct by regulated firms." Richard B. Stewart, *Regulation, Innovation, and Administrative Law: A Conceptual Framework*, 69 CAL. L. REV. 1256, 1264 (1981). Some commentators complain that such an inflexible system does not maximize economic efficiency and may result in over-control of pollution. See, e.g., Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law: The Democratic Case for Market Incentives*, 13 COLUM. J. ENVTL. L. 171 (1988) (urging abandoning command and control in favor of market-based incentive systems). Others reject "excessive preoccupation with theoretical efficiency" in favor of the pragmatic effectiveness of uniform standards that can be enforced to create a functioning pollution control system. See, e.g., Howard Latin, *Ideal Versus Real Regulatory Efficiency: Implementation of Uniform Standards and 'Fine Tuning' Regulatory Reforms*, 37 STAN. L. REV. 1267, 1270 (1985). This debate will not be resolved here. This Article focuses on the means to make enforcement effective irrespective of the policy orientation of the law. Even in market-based systems, such as the Clean Air Act's SO₂ allowance trading system, dischargers are issued permits and violations must be enforced. See CWA § 408, 42 U.S.C. § 7651g (Supp. V 1993).

59. See CWA § 301(a), 33 U.S.C. § 1311(a) ("except as in compliance with . . . sections . . . of this title, the discharge of any pollutant by any person shall be unlawful.").

60. The CWA's ethical approach can be traced to the long dormant § 13 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 407 (1988) (known as the Refuse Act), which barred discharges of refuse that impeded or obstructed the flow of navigable waters. *Id.* The U.S. Army Corps of Engineers revived the Refuse Act briefly in the 1960s, considering for the first time "pollution and other conservation and environmental factors in passing on applications under [§§ 401, 403]." Using this authority the Corps began issuing simple permits based on an absolute ban on discharges into navigable waters, because all discharges were deemed to interfere with navigation. Under this absolutist approach, no interference was reasonable. See *United States v. Pennsylvania Indus. Chem. Corp.*, 411 U.S. 655, 672-73 (1973).

61. See CWA § 301(a), 33 U.S.C. § 1311(a).

places the burden of pollution control on the individual polluter, who must internalize the cost of pollution reduction.⁶²

In comparison, the pre-1972 FWPCA approach can be characterized as economically-based enforcement. The Act allowed pollution as long as overall ambient water quality goals were met. Theoretically, under an ambient water quality approach, only those pollution reductions necessary to achieve overall water quality are necessary. Therefore, excess, or theoretically economically inefficient, pollution control was not necessary. From an historical perspective, the pre-1972 FWPCA, and its state water quality designations, reflected the common-law view of public resource use. Under common law, water could be used freely for waste disposal as long as the discharger did not impair downstream riparian rights by unreasonable use,⁶³ did not unreasonably interfere with the quiet use and enjoyment of downstream land (private nuisance),⁶⁴ or did not unreasonably interfere with rights common to the public in the water (public nuisance).⁶⁵ The pre-1972 FWPCA, oriented to this common law view, allowed externalized or free use of water for disposal until the enforcement authority proves that the discharger's pollution reaches the "point of unreasonableness."⁶⁶

The CWA rejected the economically based common-law view. In prohibiting any pollution without a permit and mandating national minimum standards of pollution control, even if the controls exceed what may be necessary to protect water quality, the CWA is driven more by a political or ethical view of environmental policy than an economic one.⁶⁷

Congress faced an analogous choice when it selected the enforcement philosophy that underlies the CWA. Just as all environmental

62. The system requires all firms "to exercise their best efforts to eliminate or reduce waste discharges." N. William Hines, *A Decade of Nondegradation Policy in Congress and the Courts: The Erratic Pursuit of Clean Air and Clean Water*, 62 IOWA L. REV. 643, 644 (1977).

63. See *Borough of Westville v. Whitney Home Builders*, 122 A.2d 233, 240-42 (N.J. 1956); *Snow v. Parsons*, 28 Vt. 459, 462 (1856).

64. See RESTATEMENT (SECOND) OF TORTS § 821D (1979). For a modern case stating that pollution of groundwater can constitute a private nuisance, see *Adkins v. Thomas Solvent Co.*, 487 N.W.2d 715, 720 (Mich. 1992).

65. See RESTATEMENT (SECOND) OF TORTS § 821B. See generally David R. Hodas, *Private Actions for Public Nuisance: Common Law Citizen Suits for Relief from Environmental Harm*, 16 ECOLOGY L.Q. 883 (1989).

66. See 2 RODGERS, *supra* note 48, § 4.1, at 13.

67. Although dilution of existing pollutants might be an economically efficient solution to pollution, "Congress explicitly recognized that reduction of the amount of effluents—not merely their dilution or dispersion—is the goal of the CWA." *Texas Mun. Power Auth. v. EPA*, 836 F.2d 1482, 1488 (5th Cir. 1988).

laws represent political choices between the benefits and harms of environmentally unregulated economic activity, all environmental enforcement systems face a constant tension between those who approach enforcement from a "sanctioning"⁶⁸ perspective and those preferring a "compliance"⁶⁹-oriented enforcement philosophy.⁷⁰ A sanctioning strategy tends to be adversarial, focusing on punishing prohibited conduct. Such a strategy views the imposition of sanctions that deter the violator and others from future violations as resolving the enforcement problem; remediation of existing violations is simply a part of the overall sanction process.⁷¹ A sanctioning enforcement strategy does not ask the enforcer to balance environmental harms with economic efficiency; rather, the regulator strikes that balance when it establishes the substantive rules and standards.

In contrast, enforcers following a compliance strategy tend to be conciliatory in style. These enforcers are concerned more with repairing a problem and with bringing the specific violator into compliance with the law than with either punishing violators or deterring future violations with civil penalties and other sanctions.⁷² Adherents to the compliance perspective tend to be adjudication averse, preferring ongoing working relationships with violators over adversarial interaction. They utilize private negotiations with violators that result in extended incremental advances that accommodate the economic interests of the regulated community. As a result, the tensions are minimized between the regulators and those that they must regulate.⁷³ Businesses, and the states that seek to accommodate them, prefer compliance-based enforcement for several reasons. Such a system enables the enforcers to ease the impact of federal regulations through extended compliance schedules, it results in enforcement only when the state discovers the problem, it allows violators to retain the economic benefit derived from their violations, and it does not actively deter future violations.

To discourage potentially inconsistent enforcement philosophies, Congress designed, and EPA has implemented, the CWA to be a sanctioning-oriented Act. The Act dictates strict liability for all CWA permit violations and provides that district courts *shall* assess civil

68. KEITH HAWKINS, ENVIRONMENT AND ENFORCEMENT: REGULATION AND THE SOCIAL DEFINITION OF POLLUTION 3 (1984).

69. *Id.* at 3.

70. *See id.* at 7-14 (discussing the roles of compliance and sanctioning in environmental enforcement).

71. *Id.* at 4.

72. *Id.*

73. *See id.* at 5.

penalties on violators to deter present and future violators.⁷⁴ However, as we shall see, many, if not most, states have rejected the CWA's federal sanction-based enforcement design in favor of a compliance-based enforcement philosophy to foster economic development.⁷⁵

Structurally, the CWA simplifies enforcement by requiring permits, self-monitoring, reporting of discharges, and strict liability for any civil violations. However, statutory power will induce compliance only to the extent that the regulated community believes that regulators will use the statute's enforcement power. Five elements must be present to create effective use of statutory enforcement power: (1) willingness to use discretionary enforcement power; (2) adequate resources and personnel to find and prosecute enforcement actions against violators; (3) easily accessible information on compliance status; (4) sanctions and remedies; and (5) fora with the power to enforce sanctions and mandate remedial action by violators. Because the CWA provides legal authority for information gathering,⁷⁶ sanctions and remedies,⁷⁷ and fora for enforcement,⁷⁸ successful use of its enforcement system turns on whether anyone is willing and able to enforce, and whether those to be regulated believe those elements are present. To provide this final element, Congress allocated enforcement power among the federal government, the states, and their citizens in a triangulated federalist system of overlapping authority.⁷⁹

Before analyzing the triangular enforcement relationships under the CWA, it is necessary to digress briefly to describe the structure of the CWA section 402 permit-granting process. The entry gate to the

74. See CWA § 309(d), 33 U.S.C. § 1319(d) ("In determining the amount of civil penalty the court *shall* consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator and such other matters as justice may require.") (emphasis added); cf. CWA § 309(g)(3), 33 U.S.C. § 1319(g)(3) (establishing similar criteria for the administrative assessment of civil penalties by EPA). "The general public interest in clean waterways will be served . . . by the deterrent effect of civil penalties." Public Interest Research Group of New Jersey v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 73 (3d Cir. 1990).

To deter the violator and others from not violating the law in the future, EPA's written policy seeks civil penalties to remove any significant economic benefit from the violator so the violator is placed in the same position as if it had complied on time, and also to impose a sufficiently large penalty to ensure that the violator is economically worse off than if it had complied with the law in a timely fashion. EPA, *Policy on Civil Penalties*, 17 *Env'tl. L. Rep.* (Env'tl. L. Inst.) 35,083 (1984).

75. See *infra* notes 112-116 and accompanying text.

76. See CWA § 308, 33 U.S.C. § 1318.

77. See CWA § 309, 33 U.S.C. § 1319.

78. See CWA §§ 309(a), (g), 402(b), 33 U.S.C. §§ 1319(a), (g), 1342(b).

79. See, e.g., *United States Steel Corp. v. Train*, 556 F.2d 822, 829-30 (7th Cir. 1977) (discussing the purpose and enforcement structure of the CWA).

CWA's regulatory system is the section 301(a) prohibition on the discharge of any pollutant without a NPDES permit.⁸⁰ A person discharges a pollutant when that person adds any pollutant from a point source⁸¹ into "the waters of the United States."⁸² Thus, section 402 requires a permit to discharge lawfully a pollutant from a point source into any body of water.⁸³ The permit imposes specific, end-of-the-pipe effluent limitations on the discharger that reflect the more stringent of either national technology-based minimum effluent standards or local water quality standards. Dischargers obtain NPDES permits from EPA, unless the discharge is located in a state to which EPA has delegated NPDES permit-writing authority.⁸⁴ Under section 402(b), any state desiring to administer its own permit program under the CWA may seek approval from EPA.⁸⁵ If EPA determines that the state program meets the requirements of the Act and EPA regulations, then EPA will suspend its issuance of NPDES permits in the state.⁸⁶ However, EPA retains the power and responsibility to oversee the approved state program, to veto state permits that do not meet CWA mandates, and to enforce the state permits. If an approved state fails to modify an NPDES permit to meet EPA objections, then permit-writing responsibility returns to EPA for that discharger.⁸⁷ When an approved state writes an NPDES permit, the state may include any state requirements more stringent than EPA limitations.⁸⁸ However, EPA may always veto the permit if the discharge would impair the water quality of a downstream state.⁸⁹ When EPA writes a permit in a non-approved state, or after vetoing a permit proposed by an EPA-approved state, it must incorporate any state water quality requirements, even if they are more stringent than EPA effluent limitations.⁹⁰

The legal relationships under the CWA are complex. Although the CWA is a federal law, the federal NPDES authority must defer to any state that has a permit program approved by EPA pursuant to sec-

80. 33 U.S.C. § 1311(a).

81. CWA § 502(12), 33 U.S.C. § 1362(12); *see supra* note 16.

82. CWA § 502(7), 33 U.S.C. § 1362(7); *see* *United States v. Riverside Bayview Homes*, 474 U.S. 121, 123 (1985) (discussing the scope of "navigable water" in the CWA).

83. 33 U.S.C. § 1342.

84. CWA § 402(c), 33 U.S.C. § 1342(c).

85. 33 U.S.C. § 1342(b).

86. CWA § 402(c)(1), 33 U.S.C. § 1342(c)(1).

87. *Champion Int'l Paper Co. v. EPA*, 850 F.2d 182, 187 (4th Cir. 1988).

88. CWA § 510, 33 U.S.C. § 1370.

89. *Arkansas v. Oklahoma*, 112 S. Ct. 1046, 1055 (1992).

90. CWA § 401, 33 U.S.C. § 1341.

tion 402(a)(5) and section 402(b).⁹¹ Once EPA approves a state law permit program, EPA must suspend its issuance of NPDES permits within that state.⁹² The approved state programs issue NPDES permits under state law. These programs use state agencies whose actions are reviewed by state courts enforcing state law that EPA has approved previously.⁹³ However, this allocation of responsibility is delicate because EPA retains its full enforcement authority despite the approved state's "capability of administering a permit program which will carry out the objectives of [the CWA]"⁹⁴ and its adequate authority to enforce compliance with NPDES.⁹⁵ The complexity has another level: whether EPA or an approved state administers the NPDES, Congress has created an enforcement triangle by granting citizens the right to bring an enforcement action against any person who is alleged to be in violation of a CWA effluent standard or limitation.⁹⁶ In sum, the federal government enforces violations of federally issued NPDES permits and violators of NPDES permits issued by EPA-approved states either in federal court, or within EPA by means of administrative procedures. EPA-approved states may concurrently enforce state permit violations under state law in their courts and environmental agencies. Citizens,⁹⁷ comprising the third leg of the enforcement triangle, may enforce violations of federal or EPA-approved state NPDES permits in federal court.⁹⁸

91. 33 U.S.C. § 1342(a)(5), (b). Most federal and state officials refer to this process as EPA "delegation" of NPDES authority to the states. However, federal power is not actually delegated to approved states; rather EPA suspends its own permit writing program in deference to an approved state's permit writing program. States are not required nor can they be forced to seek EPA approval; only states desiring to administer their own permit program need apply for approval.

92. CWA § 402(c), 33 U.S.C. § 1342(c). This suspension is subject to a state meeting the requirements of § 402(b), 33 U.S.C. § 1342(b), and to it conforming with guidelines issued under § 304(i)(2), 33 U.S.C. § 1314(i)(2).

93. CWA § 402(b) provides that EPA may only approve state programs if the state's attorney general has certified that "the laws of such State . . . provide adequate authority to carry out the described program." 33 U.S.C. § 1342(b). EPA may not approve a state program if EPA determines that "adequate legal authority does not exist: (1) [t]o issue permits . . . ; and (7) [t]o abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement." *Id.*

94. *See* CWA § 402(a)(5), 33 U.S.C. § 1342(a)(5).

95. *See* CWA § 402(b)(7), 33 U.S.C. § 1342(b)(7).

96. CWA § 505, 33 U.S.C. § 1365.

97. States are included within the definition of citizens and can bring citizen suits in federal court; *see also* U.S. Dep't of Energy v. Ohio, 503 U.S. 607, 615 (1991); CWA § 505(g), (h).

98. If citizen suits are authorized by the approved state's law, then citizens may also enforce violations of state permits under state law in state court.

This Article examines the ebb and flow of power that results from this shared responsibility to enforce compliance with the CWA. Simply stating that shared enforcement responsibility exists suggests the possibility of conflict when the enforcement activities and the perspectives of different participants overlap or collide. The conflicts fall within two major categories: (1) federalism tensions arising out of the ambiguous relationship between the federal government and the states in their shared enforcement of the CWA; and (2) tensions arising out of the relationship between citizens, as private attorneys general, and the federal and state agencies with CWA enforcement authority.

II. ENFORCEMENT IN A FEDERAL SYSTEM

A. *The Distribution of Enforcement Responsibility*

Although all the major environmental laws are federal,⁹⁹ the quantity, variety, and geographic dispersion of those regulated by these laws is so great that enforcement would be impossible if left solely to the federal government. As a result, essentially all the modern major environmental laws provide uniform, minimum national standards with the states "deputized," to a greater or lesser degree, to do the permitting and enforcing for the federal government.¹⁰⁰

Strong state enforcement programs are invaluable within a federal system. A strong state can respond more rapidly to local pollution problems than can the federal government. Additionally, compared to the federal government, state environmental agencies can better understand local environmental conditions, can be more flexible and innovative in their solutions, can avoid the weight of bureaucratically concentrated federal power, and can have more day-to-day interaction with the regulated community and the public. Moreover, law enforcement traditionally has been the responsibility of state and local police, prosecutors and courts.

A decentralized state-based system of environmental enforcement should perform several functions. It should inspect and monitor sources of water, air and land pollution, detect illegal activities in the

99. See, e.g., Endangered Species Act, 16 U.S.C. §§ 1531-1544 (1988 & Supp. V 1993); Clean Water Act, 33 U.S.C. §§ 1251-1387 (1988 & Supp. V 1993); Safe Drinking Water Act, 42 U.S.C.A. §§ 300f to 300j-26 (West 1991 & Supp. 1995); Clean Air Act, 42 U.S.C. §§ 7401-7671q (1988 & Supp. V 1993); Resource Conservation and Recovery Act, 42 U.S.C. §§ 6904-6992k (1988 & Supp. V 1993).

100. Panel Discussion, Symposium, *The New Federalism in Environmental Law: Taking Stock*, 12 *Env'tl. L. Rep.* (Env'tl. L. Inst.) 15,101, 15,101 (Dec. 1992) [hereinafter *Taking Stock*] (remarks of Frederick R. Anderson).

field, and bring violators into compliance through judicial or administrative prosecutions. This system would take advantage of the state agency's relatively easy access to the dischargers, its proximity to the affected water, land or air, and its knowledge of the dischargers' operations and local ecological conditions. Thus, it should not be surprising to learn that for the eight fiscal years (FY) between 1985 and 1992, ninety percent of all site inspections¹⁰¹ and over eighty percent of all air, water, pesticide, and hazardous waste governmental environmental enforcement actions were brought by the states.¹⁰²

Unfortunately, because of shrinking state government budgets and increasing interstate competitive pressures, state enforcement activity has dropped dramatically and federal enforcement has not filled the gap.¹⁰³ Enforcement of water pollution violations has declined even more than overall environmental enforcement activity. State administrative water enforcement has dropped seventeen percent from its peak in FY 1990 and state judicial enforcement has dropped seventy percent from its peak in FY 1988.¹⁰⁴ Federal administrative water enforcement dropped eight percent from its peak in FY 1989, and judicial enforcement dropped thirty-seven percent from its FY 1989 peak.¹⁰⁵ In comparison, by FY 1992, overall state administrative enforcement dropped from its peak in FY 1989 by twenty-eight percent, while state judicial enforcement had dropped over thirty-six percent from its peak in FY 1988.¹⁰⁶ Since 1983, however, citizen enforcement has greatly exceeded federal efforts, and has almost equaled overall state efforts in some years.¹⁰⁷ The historical data is contained in Table 1.

101. E. Donald Elliot, *Keynote Presentation: Making the Partnership Work*, in *FEDERAL VERSUS STATE ENVIRONMENTAL PROTECTION STANDARDS: CAN A NATIONAL POLICY BE IMPLEMENTED LOCALLY?* (1990) [hereinafter *FEDERAL VERSUS STATE ENVIRONMENTAL PROTECTION STANDARDS*] (proceedings of the 19th Annual ABA Conference on the Environment).

102. ENFORCEMENT ACCOMPLISHMENTS FY 1992, *supra* note 33, app. Historical Enforcement Data. For FY 1990, EPA no longer counted state pesticide warning letters as state enforcement actions, thereby reducing the apparent level of state activity. Still, even for that year, states accounted for over 76% of all enforcement actions. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* State administrative enforcement dropped 14% from its FY 1990 peak, when pesticide warnings no longer were counted as enforcement actions. *Id.*

107. *See infra* Table 1.

TABLE 1
CIVIL PENALTY CASES

Fiscal Year	EPA Referrals to DOJ ^{T1}	DOJ Filings (court) ^{T2}	EPA Admin. Penalty	State Judicial Referrals ^{T3}	Citizen 60-Day Notices
1993	57 ^{T4}	39	n/a	383	300 ^{T5}
1992	77	56	228 ^{T6}	204	189
1991	91	83	147 ^{T7}	297	177
1990	87	72		429	200 ^{T8}
1989	94	87		489	200
1988	123		164 ^{T9}	687	200
1987	92		40 ^{T10}	286	200
1986	119			221	205 ^{T11}
1985	93			137	135
1984	95				178
1983	56				110 ^{T12}
1982	45				17 ^{T13}
1981	37				6

Sources:

T1. ENFORCEMENT ACCOMPLISHMENTS FY 1992, *supra* note 33, app. Historical Enforcement Data.

T2. DOJ STATISTICAL REPORT FY 1993, *supra* note 35, at 47.

T3. OFFICE OF ENFORCEMENT, U.S. ENVTL. PROTECTION AGENCY, EPA 300-R-94-003, EPA ENFORCEMENT ACCOMPLISHMENTS FY 1993, app. Historical Enforcement Data (1994) [hereinafter ENFORCEMENT ACCOMPLISHMENTS FY 1993].

T4. According to its data, EPA referred 84 water cases to DOJ in FY 1993. *Id.*

T5. The data for 1991-1993 is taken from a printout of the EPA citizen suit log maintained by EPA's Office of Water Enforcement. The data are for calendar years, not U.S. government fiscal years.

T6. ENFORCEMENT ACCOMPLISHMENTS FY 1992, *supra* note 33, National Penalty Report FY 1992, at 6.

T7. OFFICE OF ENFORCEMENT, U.S. ENVTL. PROTECTION AGENCY, EPA 300-R-92-008, EPA ENFORCEMENT ACCOMPLISHMENTS FY 1991 app. National Penalty Report FY 1991 (1992) [hereinafter ENFORCEMENT ACCOMPLISHMENTS FY 1991].

T8. EPA does not have this data compiled; the 200 notices figure is based on the best estimate of Mary St. Peter, Attorney/Adviser, Office of Water Enforcement, EPA. St. Peter is currently responsible for maintaining this data at EPA.

T9. OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING, U.S. ENVTL. PROTECTION AGENCY, OVERVIEW OF EPA PENALTY PRACTICES FY 1989 (1990) [hereinafter OVERVIEW OF PENALTY PRACTICES].

T10. *Id.*

T11. Citizen 60-day notice letter data for 1981-1986 comes from Brief of Amicus Curiae Connecticut Business and Industry Association in Support of Petition for Certiorari, app. A, Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49 (1987) (No. 86-473). The data is based on calendar years, not fiscal years.

T12. The Environmental Law Institute reported 108 instances in its report. JEFFREY G. MILLER & ENVTL. L. INST., CITIZEN SUITS: PRIVATE ENFORCEMENT OF FEDERAL POLLUTION CONTROL LAWS 12 (1987).

T13. The Environmental Law Institute reported 19 instances. *Id.*

Heavy reliance on state enforcement is a double-edged sword. When we "deputize" the states to implement national environmental laws, we shift the government's discretionary enforcement power to state and local officials, who may not be interested in, or able to carry out, federal goals. For instance, state agencies may not have adequate budgets to carry out their delegated responsibilities,¹⁰⁸ or states may compete with each other for economic development by offering minimal environmental enforcement, particularly if the effects of pollution can be sent down-wind or down-stream to a neighboring state. For example, in Indiana, an EPA-approved state with weak enforcement, the few enforcement efforts the state agency was able to mount caused a powerful backlash from both the legislature and the regulated community.¹⁰⁹ These groups worked to further curb or eliminate the agency's enforcement capability on the grounds that reduced enforcement would improve Indiana's economic viability.¹¹⁰

Federal standards may be undermined by lax enforcement, affected through an array of subtle forms. For instance, state *A* could issue a strict permit, but be lenient in enforcement, while state *B* could write permits that ease up on effluent limitations or testing regimes¹¹¹ but enforce the liberal permits more regularly, although with only *de minimis* sanctions. In reality, state *A* might be more demanding of the regulated community than state *B*; although on paper the former would appear to be ineffective in enforcement, while the latter would display the false picture of a well-enforced program.

B. *The Unlevel Playing Field Problem*

When states evaluate their enforcement problems, one of their central concerns is the consistency of enforcement across the country. Without a level playing field, even the most conscientious state may be driven to compete for economic growth by undermining enforcement

108. See Rosemary G. Spalding, Deputy Commissioner for Legal Affairs, Indiana Department of Environmental Management (DEM), Remarks to Panel on Enforcement Proceedings and Citizens' Suits, at the ALI-ABA Environmental Law Course of Study (Feb. 19, 1994) [hereinafter Spalding Remarks] (noting that the Indiana DEM is so severely underfunded and understaffed that its compliance and enforcement program is viewed by many as largely ineffective) (on file with author).

109. *Id.*

110. *Id.* As a result of the Indiana DEM's lack of resources, the agency has begun the process of returning its CWA program back to EPA, which does not want it returned because of its own resource limitations. See also Robert F. Blomquist, "Turning Point": *The Foundering of Environmental Law and Policy in Indiana?*, 27 IND. L. REV. 1033 (1994) (analyzing Indiana's voluntary return of federally-delegated environmental regulatory powers).

111. The choice of either of these alternatives will have the same effect.

activity.¹¹² State officials seeking to keep existing industry and to lure new business into their state are acutely aware of the political danger of creating a hostile business atmosphere through vigorous enforcement of federal law.¹¹³ As a result, states with strong environmental programs feel intense local political pressure to slacken enforcement, while states with weak programs are loath to abandon the economic advantage that lax environmental enforcement provides.¹¹⁴ Although little evidence exists that industries relocate because of specific state environmental policies, state officials are "particularly sensitive" to economic competition among the states for business.¹¹⁵ No politician wants to open herself up to the charge of opposing, or not vigorously promoting, statewide business development.¹¹⁶

Thus, states view federal enforcement aimed at levelling the playing field as the political and economic prerequisite to maintaining a vigorous state enforcement effort. Theoretically, federal enforcers recognize the federal government's duty to promote vigorous state enforcement by removing the competitive advantage enjoyed by under-regulated entities in under-enforcing states.¹¹⁷ But, because of congressional reluctance to expanding the federal enforcement bureaucracy and because of resource limitations generally, the federal environmental enforcement effort, although valiant,¹¹⁸ is so sparse

112. See J. Langdon Marsh, Executive Deputy Commissioner, New York State Department of Environmental Conservation, Remarks to Panel on Enforcement Proceedings and Citizens' Suits, at the ALI-ABA Environmental Law Course of Study (Feb. 19, 1994) [hereinafter Marsh Remarks]. The same can be said for standard setting, where the presence of interstate competition makes it difficult for even the best states to exceed minimum federal standards and guidelines. Lowry, *supra* note 27, at 47, 79.

113. Lowry, *supra* note 27, at 13-14.

114. See *Senate Hearings*, *supra* note 1, at 699 (testimony of Sen. Joseph I. Lieberman) (stating that inconsistent enforcement places enforcing states at a competitive disadvantage in trying to attract and hold businesses); see also Spalding Remarks, *supra* note 108.

115. Lowry, *supra* note 27, at 13-14.

116. *But cf.* Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992) (arguing theoretically, on the basis of broad and empirically unconfirmed assumptions, that interstate competition for business development *should not* result in an environmental "race to the bottom" because total social welfare to states from increased business and decreased environmental quality *ought* to reach an equilibrium that mitigates the "race to the bottom"). Unfortunately, reality does not conform to Revesz's simple model. See generally Lowry, *supra* note 27.

117. Cohen Remarks, *supra* note 36.

118. DOJ environmental enforcement attorneys work very hard. In FY 1993 they logged an average of well over 50 hours of work per week, and spent, as a section, over 268,000 hours on enforcement cases, of which about 101,000 hours were spent on CWA enforcement (an average of 145.5 hours per CWA case in the year). DOJ STATISTICAL REPORT FY 1993, *supra* note 35, at 69-71, 81.

and varied from region to region that it cannot create the level playing field that the states need.¹¹⁹

Ironically, while the states look to vigorous federal enforcement to create a level playing field, the federal government believes that the bulk of enforcement is where it should be—in the states.¹²⁰ The result: uneven and steadily diminishing state CWA enforcement. Local, regional, and national environmental public interest groups have stepped into this gap as private attorneys general. Although they are relatively small in size, handicapped by limited resources, and viewed with hostility by courts, the regulated community and some embarrassed government officials, these groups can provide the states, through dedicated and persistent litigation, with the level playing field that the federal government cannot provide on its own. EPA is well aware of its own limitations and has publicly recognized the value of citizen enforcement:

[R]ecent history . . . shows a substantial increase in citizen suit enforcement particularly for Clean Water Act (CWA) violations and now also for violations of the Emergency Planning and Community-Right-To-Know Act (EPCRA). The Safe Drinking Water Act (SDWA), the Clean Air Act (CAA), the Toxic Substances Control Act (TSCA), the Ocean Dumping Act and the Solid Waste Disposal Act (RCRA) all have citizen suit authority. We can expect the trend towards increasing use of citizen suit authority will only accelerate in the future due to the ever heightening environmental consciousness of the public and the resource "squeeze" on government that precludes us from addressing every violation. To the extent that citizen groups successfully undertake enforcement, a positive result has been achieved; namely, the availability of citizen suit remedies has served to leverage our scarce enforcement resources. More to the point, Congress has leveraged the scarce federal enforcement resources. Moreover, to the extent that the regulated community views citizens enforcement as unpredictable, an even greater deterrent effect is achieved by the reality of active, broadly spread citizen suits enforcement as regulatees seek to achieve compliance to avoid not only federal and state prosecution but also to avoid independent citizen actions.¹²¹

119. *Id.* Federal enforcement efforts have been characterized as "small potatoes" compared to the states. Cohen Remarks, *supra* note 36.

120. Cohen Remarks, *supra* note 36.

121. OFFICE OF ENFORCEMENT, U.S. ENVTL. PROTECTION AGENCY, 22E-2000, ENFORCEMENT IN THE 1990'S PROJECT: RECOMMENDATIONS OF THE ANALYTICAL WORKGROUPS 5-47 to 5-48 (1991) [hereinafter ENFORCEMENT IN THE 1990'S].

Citizen suits represent far more than an expedient congressional solution to an enforcement resource problem. In a fundamental sense, they are the necessary capstone to the public participatory process which the CWA so paradigmatically represents. In our complex, representative democratic society, we have come to understand that open public participation and comment are integral to the process of sound decision-making.¹²² In the context of the CWA, the public participated in the decision-making process when Congress enacted and amended the Act. After the legislation became law, the public participated in the drafting of EPA's implementing regulations by offering comments on proposed rules and seeking judicial review of regulations thought to be inconsistent with Congress's mandate.¹²³ When the CWA regulations are implemented by NPDES permits, each permit is subject to public comment, possible hearing, and judicial review.¹²⁴ If EPA or an approved state agency simply ignores violations after this extensive public process is completed, then that entity will render prior public participation a meaningless exercise. Thus, the CWA represents a pact with the public. The NPDES permit is the final product of a long public process, and if the permit is to be changed, the change must be done publicly, following the same process.¹²⁵

The CWA's pact with the public is that the government may only issue a permit via a public process, and the Act may not be de facto amended by the secret, nonpublic means of simply not enforcing it. As part of this pact, citizens have been given the power to act as private attorneys general.¹²⁶ This power insures that the publicly developed CWA, including its regulations and permits, are publicly enforced. Under the CWA, Congress writes the statute, EPA promul-

122. See Richard Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975) (analyzing the transformation of administrative law into a surrogate political process to ensure fair representation of a range of affected interests); see also Administrative Procedure Act, 5 U.S.C. § 553(b) (1988) (mandating publication of general notice of proposed agency rule-making in the Federal Register); *id.* § 553(c) (requiring an agency to give interested persons an opportunity to participate in the rule-making through submission of written comments).

123. See, e.g., *Chemical Mfrs. Ass'n v. EPA*, 870 F.2d 177 (5th Cir. 1989) (reviewing reasonableness of EPA regulations limiting discharge of waterborne pollutants); *American Paper Inst. v. EPA*, 660 F.2d 954, 961 (4th Cir. 1981) (setting aside EPA regulations which were contrary to plain meaning of statute).

124. See 40 C.F.R. § 123.27(d) (1987); see also *Natural Resources Defense Council, Inc. v. EPA*, 859 F.2d 156, 175-77 (D.C. Cir. 1988); *Citizens for a Better Env't v. EPA*, 596 F.2d 720, 723 (7th Cir. 1979).

125. See *Manasota-88, Inc. v. Thomas*, 799 F.2d 687 (11th Cir. 1986) (reviewing public participation process in NPDES permit modification); *Natural Resources Defense Council v. Outboard Marine Corp.*, 692 F. Supp. 801 (N.D. Ill. 1988).

126. See CWA § 505, 33 U.S.C. § 1365.

gates the regulations, and EPA and EPA-approved states issue the permits. Citizen enforcement does not redraft the CWA, EPA's CWA regulations or any NPDES permits, it merely swiftly and directly enforces¹²⁷ the specific limitations established in the permit¹²⁸ with which the discharger must comply.¹²⁹

III. THE FEDERAL/STATE LEG OF THE ENFORCEMENT TRIANGLE

A. *Organizational Structure*

Congress designed the CWA for governmental enforcement responsibility shared by the states and federal government. As the Act has evolved, states with approved programs have assumed primary enforcement responsibility, with EPA retaining concurrent enforcement authority and responsibility for program oversight in approved states. Under this system, the states conduct the vast majority of compliance inspections and bring the great majority of enforcement actions.¹³⁰ Whether or not a state is approved, CWA enforcement is a decentralized activity, as it is under virtually all other environmental laws. The primary enforcing authority is either the approved state or the EPA

127. *Corn Refiners Ass'n v. Costle*, 594 F.2d 1223, 1226 (8th Cir. 1970).

It is axiomatic that Congress intended enforcement of the Act to be "swift and direct." A Legislative History of the Water Pollution Control Act Amendments of 1972, Senate Committee on Public Works, 93d Cong., 1st Sess. at 1483 (1973). Enforcement is "swift and direct" when the case turns on the sharply defined question whether the plant discharged more pollutant than allowed under the simple numeric standards contained in the effluent discharge regulations.

Id.

128. *See Natural Resources Defense Council, Inc. v. EPA*, 790 F.2d 289, 293, 299 (3d Cir. 1982). The court stated:

The [permit] limits applicable to direct dischargers are based on empirical studies of the amount and consistency of removal that can be achieved by a well-designed and operated plant. These limits require consistency of removal in two important respects. First, they are set so that a discharger can be in compliance virtually all the time. *See, e.g., General Pretreatment Regulations*, 43 Fed. Reg. 27743 (1978). "Guidelines are generally calculated with a 99% confidence level. Therefore, if a discharger exceeds the effluent limitations established by the guideline regulation, there is a 99% certainty that it was caused by discharger error rather than statistical variation." *National Pollutant Discharge Elimination System Permit Regulations*, 49 Fed. Reg. 38019 (1984). Second, the limits fix precise daily maxima as well as monthly averages, neither of which may be exceeded by the direct discharger.

Id.

129. *See Natural Resources Defense Council, Inc. v. EPA*, 859 F.2d 156, 177 (D.C. Cir. 1988) (stating that citizen groups are to be treated as "welcome participants in the vindication of environmental interests") (citations omitted).

130. ENFORCEMENT ACCOMPLISHMENTS FY 92, *supra* note 33, app. Historical Enforcement Data.

regional office for that state.¹³¹ If either's vigilance subsides, then noncompliance and point source pollution will increase.¹³²

EPA sets national policy and technology-based effluent standards through its headquarters in Washington, D.C. The various regional offices essentially conduct all inspection and enforcement at the regional level, where the states and regulated community have their day-to-day contact with EPA. However, unlike EPA headquarters, which employs a primarily national policy perspective, the regional offices are "more apt to reflect the different political cultures and varying demands for environmental regulation across the country."¹³³ As a result, the extent of regional enforcement can vary significantly from weak to stringent.¹³⁴

EPA's national control over the states, which flows through the regions, is even more diffuse than its control over the regions. However, it is a daunting challenge for EPA vigorously to oversee state enforcement programs, especially because of the wide range in quality of state programs and in state attitudes towards environmental regulations. These attitudes tend to divide into four categories, which define the unlevel playing field states create.¹³⁵ One observer has divided the states as follows:

1. *The Progressives*—states with a high commitment to environmental protection coupled with strong institutional capability;
2. *The Strugglers*—states with a strong commitment to environmental protection, but with limited institutional capability because of limited allocation of resources;
3. *The Delayers*—states with strong institutional capacity but with limited commitment to environmental protection; these states move very slowly in implementing federal legislation; and
4. *The Regressives*—states with weak institutional capacity and weak commitment to environmental protection. These states fail to

131. See CWA § 309, 33 U.S.C. § 1319.

132. Elder et al., *supra* note 25, at 10,037.

133. EVAN J. RINGQUIST, ENVIRONMENTAL PROTECTION AT THE STATE LEVEL: POLITICS AND PROGRESS IN CONTROLLING POLLUTION 37 (1993). This regional variation runs as deeply as the inspection capability of the regions. For instance, the number of water inspectors in each region widely varies, ranging from a low of 4 in Region X to a high of 75 in Region IV. ENFORCEMENT IN THE 1990's, *supra* note 121, at 4-129. However, EPA inspectors do little inspection; more than three-fourths of the inspectors spend less than 20% of their time inspecting. *Id.* at 4-126.

134. RINGQUIST, *supra* note 133, at 38 (citing Susan Hunter & Richard W. Waterman, *Determining an Agency's Regulatory Style: How Does the EPA Water Office Enforce the Law?*, 45 W. POL. Q. 403 (1992)).

135. James P. Lester, *A New Federalism? Environmental Policy in the States*, in ENVIRONMENTAL POLICY IN THE 1990s 73-75 (Norman J. Vig & Michael E. Kraft eds., 1990).

adequately implement federal programs, are unwilling to take independent action, and actively promote economic development at the expense of the environment due to their "obsessive optimism"¹³⁶ that economic growth will not degrade or impair the environment, and therefore, their economic policy need not be impeded by environmental precaution.¹³⁷

In reality, the states are relatively free from federal control,¹³⁸ and possess such a wide variation in basic policy orientations and agency organization that effective management oversight by EPA is difficult, even though EPA funds and retains oversight responsibility for approved state programs.¹³⁹ EPA oversight is further complicated because, for nonapproved states, EPA headquarters has oversight responsibility for EPA regional administration of the NPDES program. Thus, EPA faces the management challenge of overseeing forty different approved-state programs,¹⁴⁰ while retaining sole responsibility for eleven states,¹⁴¹ Puerto Rico, the Trust Territories and the District of Columbia.¹⁴² Eventually, EPA would like every state to have an approved NPDES program so that the Agency will no longer have primary responsibility for enforcement in any state.¹⁴³

However, if every state program is approved, the variety of state environmental agencies will increase, further complicating EPA's oversight role. Currently, states divide into four broad categories of organizational structure.¹⁴⁴ Some states house environmental protection programs in public health agencies; others create variations on mini-EPAs; a third group of states has environmental superagencies;

136. *Id.* at 75.

137. *See id.* at 74.

138. RINGQUIST, *supra* note 133, at 38

139. *See id.*; *see also* ENFORCEMENT IN THE 1990's, *supra* note 121, at 2-1 to 2-13.

140. EPA, Office of Water, State NPDES Program Status (Dec. 30, 1993).

141. *Id.* These states include Alaska, Arizona, Idaho, Louisiana, Maine, Massachusetts, New Hampshire, New Mexico, Oklahoma, and Texas.

142. EPA Region II, located in New York, administers the Puerto Rico NPDES program and oversees the Virgin Islands. Region IX, in San Francisco, administers the NPDES program in the Trust Territories.

143. Reagan era federalism theory strongly encouraged this trend, although more as a means to deregulate than to allocate resources more efficiently. *See Taking Stock, supra* note 100, at 15,101 (remarks of Frederick R. Anderson). According to Anderson:

What we have today is not a state/federal program at all, but a purely through-and-through federal program. We deputized the states to do unpleasant or routine work for our federal government. What the [Reagan] Administration is really talking about is not so much the creative return of power to the states, but an attempt to shrink the size of the entire budget and to dismantle the environmental effort.

Id.

144. *See* RINGQUIST, *supra* note 133, at 38-39.

and finally, some states, such as Texas and California, have no central agency focus, but rely on separate boards and commissions.¹⁴⁵ As economic competition among states intensifies, the Progressives and Strugglers face powerful economic and political pressures to relax enforcement to enhance their competitive position.

B. *Tensions in the Federal/State Leg of the Enforcement Triangle*

Tensions between the federal and state governments arise when EPA defers to state-approved programs for the issuance and enforcement of NPDES permits, while retaining full federal enforcement authority under CWA section 309.¹⁴⁶ These tensions raise several questions: (1) When should EPA enforce the CWA directly against a polluter in an approved state? (2) If EPA decides to enforce directly when a state is acting concurrently, although independently, against the same or similar violations, which jurisdiction's enforcement authority, if either, controls? and (3) How effective has this federalist allocation of authority been? The answers to these questions will emerge from EPA's policy, relevant judicial decisions, and empirical analysis.

C. *When Should EPA Enforce the CWA: Statutory Directives and EPA Policy*

1. *Statutory Structure.*—Even when EPA relinquishes the NPDES program to the states, section 402(i)¹⁴⁷ provides that EPA retains its enforcement authority under section 309.¹⁴⁸ If a person is discharging pollutants in violation of any conditions contained in a state-issued permit, section 309 states that EPA may issue a compliance order,¹⁴⁹ bring a civil action in a United States District Court,¹⁵⁰ assess civil pen-

145. These structures have various advantages and disadvantages. Environmental programs housed in public health agencies must compete for resources with other health concerns. *Id.* States that create mini-EPAs centralize and improve the visibility and professional quality of the state environmental programs, but limit the agency's ability to deal with cross-media environmental problems. *Id.* State superagencies combine pollution control, natural resources, fish and wildlife management, and related functions. These agencies may be able to approach environmental problems broadly, if they are not too compartmentalized, but they may de-emphasize environmental protection in favor of other goals. *Id.* The states that employ separate boards and commissions to handle environmental issues, in effect, create an additional level of administration for federal regulators to oversee. *Id.*

146. See *infra* notes 147-159 and accompanying text.

147. 33 U.S.C. § 1342(i).

148. *Id.* § 1319.

149. CWA § 309(a)(3), 33 U.S.C. § 1319(a)(3).

150. CWA § 309(a)(3), (b), 33 U.S.C. § 1319(a)(3), (b).

alties administratively;¹⁵¹ or notify the polluter and the state of the violation, wait thirty days, and if the state fails to enforce within the thirty days, order compliance or bring an enforcement action in district court.¹⁵²

In states without approved programs, EPA is the sole governmental enforcer of the CWA. Otherwise, EPA has the authority to enforce violations of either federal NPDES permits or EPA-approved state permits even if a state has instituted or concluded its own enforcement. This statutory structure confers on EPA the power to monitor CWA enforcement in approved states, and the authority, but not necessarily the resources and staff, to assure that the CWA will be enforced adequately. However, although section 309 empowers EPA to enforce directly and even to usurp the state enforcement program in its entirety, it simultaneously encourages EPA to defer to state enforcement.¹⁵³ The CWA encourages deference by requiring, in section 309(a)(4), that a copy of any compliance order be sent to the state in which the violation occurred and to other affected states.¹⁵⁴ Section 309(b) further requires that EPA send notice of the filing of a judicial enforcement action to the appropriate state.¹⁵⁵ Under section 309(a)(2), if CWA violations are so widespread that it appears the approved state effectively has failed to enforce its program, then, after ninety days notice,¹⁵⁶ EPA can assume enforcement of the state's permit program. But the threat of federally assumed enforcement is more theoretical

151. CWA § 309(g), 33 U.S.C. § 1319(g). Class I penalties, which may not exceed \$10,000 per violation and \$25,000 per assessment for all violations, may be assessed by EPA after an informal hearing at which the violator will be provided a reasonable opportunity to be heard and present evidence. *Id.* § 309(g)(2)(A), 33 U.S.C. § 1319(g)(2)(A). Class II penalties, which may not exceed \$10,000 per day for each day during which the violation continues and \$125,000 overall, may only be assessed after notice and an opportunity for a hearing on the record in accordance with § 554 of the Administrative Procedure Act, 5 U.S.C. § 554 (1988 & Supp. V 1993). CWA § 309(g)(2)(B), 33 U.S.C. § 1319(g)(2)(B). The assessment of Class II penalties is governed by EPA's Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, 40 C.F.R. pt. 22 (1993).

152. CWA § 309(a)(1), 33 U.S.C. § 1319(a)(1).

153. 33 U.S.C. § 1319.

154. 33 U.S.C. § 1319(a)(4). The standards and procedures EPA is to use when faced with a water quality dispute between upstream and downstream states were thoroughly reviewed in *Arkansas v. Oklahoma*, 503 U.S. 91 (1992).

155. 33 U.S.C. § 1319(b).

156. *Id.* § 1319(a)(2). However, notice to the state is not a condition precedent to federal enforcement of a particular permit violation. *United States v. City of Colorado Springs*, 455 F. Supp. 1364, 1366 (D. Colo. 1978).

than real, for EPA does not have the resources to take over state enforcement programs.¹⁵⁷

A similar ambivalence exists in the relationship between EPA and EPA-approved states when EPA chooses to enforce CWA violations with its administrative enforcement power. Pursuant to section 309(g), EPA has the power to assess administrative penalties for violations of a state-issued permit.¹⁵⁸ However, if a state is diligently prosecuting an administrative penalty assessment or the state has issued a final administrative order and the violator has paid the penalty, then EPA may not seek civil penalties in court for the CWA violations.¹⁵⁹ The preclusive effect of section 309(g)(6) only flows in one direction: an EPA assessment of an administrative penalty does not restrict a state's authority to seek civil penalties in court or administratively. This asymmetrical structure can lead to uneven enforcement results. If a state agency collects minimal penalties for a serious violation, then EPA may not seek civil penalties in federal court, but stringent federal enforcement will not preclude any state enforcement efforts.

2. *EPA's "Policy Framework for EPA/State Enforcement Agreements."*— Within this federal/state enforcement partnership, EPA must decide

157. Letter to Sen. John Glenn, Chairman, U.S. Committee on Government Affairs, from Richard D. Morgehstern, Acting Assistant Administrator, Office of Policy, Planning and Evaluation, U.S. EPA, at 6 (Oct. 9, 1991) [hereinafter Morgehstern Letter] (on file with author).

158. 33 U.S.C. § 1319(g). Prior to the 1987 amendments to the CWA, Pub. L. No. 100-4, 101 Stat. 7 (1987), EPA did not have the power to assess penalties administratively for CWA violations; only federal courts could assess civil penalties. CWA § 309(d), 33 U.S.C. § 1319(d) (1982), *amended by* 33 U.S.C. § 1319(g) (1988 & Supp. V 1993). In the 1987 CWA amendments, Congress expanded EPA's power by authorizing it under § 309(g) to assess penalties of up to \$125,000 for a Class II penalty under EPA's administrative law process. 33 U.S.C. § 1319(g); *see also* 40 C.F.R. § 22.38 (1994) (containing supplemental rules of practice governing Class II penalties).

Before the new power from § 309(g), the assessment of civil penalties depended on DOJ agreeing to prosecute a violator in federal court. Institutionally, it was difficult for EPA to insist that DOJ prosecute a matter that a state was handling already. Because Congress was aware that this administrative power would greatly ease EPA's burden in seeking penalties, some feared that EPA might too often seek penalties in cases where states had already obtained them. Section 309(g)(6) thus represents a compromise: Congress gave EPA expanded authority and the ease of administrative enforcement, but EPA could not use this power to take a second bite at the violator if an approved state was diligently prosecuting, or had already prosecuted, the matter under state law comparable to the CWA.

159. CWA § 309(g)(6), 33 U.S.C. § 1319(g)(6). In states without an EPA-approved program, EPA has exclusive authority and responsibility for issuing NPDES permits and enforcing the CWA. CWA § 402(a), 33 U.S.C. § 1342(a). Any state water pollution laws in nonapproved states are independent of the CWA and have no effect on EPA's power to bring an enforcement action. *See* CWA § 309(a), 33 U.S.C. § 1319(a).

how and when to use its retained CWA enforcement power. Although EPA has not issued any written guidance specific to this question, it has developed a "Policy Framework for EPA/State Enforcement Agreements."¹⁶⁰ EPA views states with approved programs as having primary responsibility for enforcement within the state, but sees itself as responsible for achieving the goals of "fair and effective enforcement of federal requirements, and a credible national deterrence to non-compliance."¹⁶¹ Because neither state nor federal enforcement resources alone are adequate to address the majority of CWA violations, EPA cannot meet its enforcement goals without the combined strength of an effective partnership with the states. The Policy Framework attempts to minimize the differences between EPA and state enforcement perspectives that can drive the parties apart and weaken the partnership.¹⁶²

The Policy Framework's title is deceptive because the word "agreement" is not used in its formal sense. The Policy Framework does not require the production of a written document called "Federal/State Agreement on Enforcement," or anything of the sort.¹⁶³ Rather, the Policy Framework envisions only that EPA regions and their approved states will discuss EPA oversight procedures, criteria for direct enforcement by EPA, procedures for advanced notification and consultation, and state reporting requirements.¹⁶⁴ None of these discussions need to be reduced to writing if the topics discussed are covered elsewhere.¹⁶⁵ Furthermore, the oversight procedures, EPA criteria for direct EPA enforcement, and the state reporting requirements described in the Policy Framework apply, unless otherwise specified in the discussions or other EPA documents.¹⁶⁶

According to Edward E. Reich, then EPA's Deputy Assistant Administrator for Civil Enforcement, each environmental program formalizes its own federal/state enforcement relationship in an annual Regional/State Enforcement Agreement that sets forth mutual responsibilities and criteria to assess performance and also attempts to

160. Alvin Alm, EPA Memorandum on State/Federal Enforcement "Agreements" (June 26, 1984); *see also* U.S. Env'tl. Protection Agency, *Implementing the State/Federal Partnership in Enforcement: State/Federal Enforcement Agreements*, (Aug. 25, 1986) (available from Env'tl. L. Rep. (Env'tl. L. Inst.) Document Service) [hereinafter Policy Framework].

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at 3052.

avoid surprises.¹⁶⁷ Reich states that the “agreements” are intended to define the criteria to measure good enforcement performance. Such criteria include: specific enforcement priorities, “high or improving” compliance rates, “timely and appropriate” enforcement, “accurate” record-keeping practices, “sound” program management practices,¹⁶⁸ oversight procedures, standards for direct federal enforcement,¹⁶⁹ exchange of enforcement information, and state reporting requirements.¹⁷⁰

Defining performance expectations in advance is a sound management practice, but it does not address the central federalism issue: When should EPA wield its enforcement power in a state with an EPA-approved program? Section 309(a)(2) provides the easy answer—when a state program has failed.¹⁷¹ EPA has interpreted failure to mean that the state is “unwilling or unable” to take “timely and appropriate” enforcement action.¹⁷² But, EPA assumption of a state enforcement program is the enforcement equivalent of a nuclear deterrent. It is useless except to the extent that it prevents catastrophic collapse of state programs. Because EPA relies on the state-approved program to assume primary enforcement responsibility, EPA’s budget does not provide the resources to take over the enforcement role in the states.¹⁷³ For example, in most states EPA receives DMRs only for major dischargers;¹⁷⁴ DMRs for nonmajors, which comprise the bulk of state-approved NPDES permits, are never sent to EPA. To assume the enforcement role in the states, EPA would have to expand significantly its enforcement staff for those states.¹⁷⁵ To accomplish this, Congress would either have to increase EPA’s budget,

167. Edward E. Reich, *EPA/State Enforcement Relationship*, in ALI/ABA ENVIRONMENTAL LAW COURSE OF STUDY MATERIALS 477, 479 (Feb. 16-18, 1989).

168. *Id.*

169. Direct federal enforcement may be appropriate where a state requests EPA action, state enforcement is inadequate, there is a possibility of national precedents, and where an EPA order has been violated. *Id.* at 480-81.

170. *Id.*

171. See 33 U.S.C. § 1319(a)(2) (requiring EPA enforcement if the Administrator finds “a failure of the State to enforce . . . permit conditions or limitations effectively”).

172. Policy Framework, *supra* note 160.

173. Morgehstern Letter, *supra* note 157, at 6.

174. However, in some states, such as New York, EPA no longer receives DMRs even for major dischargers, although much but not all of the data is placed into an EPA computer data base; also most states put some DMR data for some minor discharges into the EPA database. Letter from Jim Hecker, Trial Lawyers for Public Justice to author (Nov. 16, 1994) (on file with author).

175. Among other changes, EPA would be required to monitor all nonmajor dischargers; develop extensive information handling systems; and hire inspectors, engineers, and attorneys.

a difficult thing to do, or permit EPA to shift resources from existing programs. According to EPA, "even if only a small number of delegated states returned their programs to EPA, [EPA's] enforcement program would not be able to cope with the new responsibilities. Ultimately, there would be less enforcement, not more."¹⁷⁶

Thus, it is hardly surprising that EPA has never taken back the primary enforcement role from an approved state.¹⁷⁷ When the state program has not collapsed, EPA must define its role in state enforcement against the backdrop of an "effective" approved program possessing primary enforcement responsibility. As a result, EPA must limit enforcement resources for that state. Given these constraints on EPA enforcement, it is hard to imagine EPA developing or implementing its own active enforcement program in a state with an approved program.

Despite these policy and resource constraints, EPA's articulated criteria for direct enforcement create the impression that EPA will play a significant enforcement role in an approved state if necessary. The Policy Framework requires EPA to consider three broad categories when deciding whether to take direct enforcement action: (1) the type of case; (2) the timeliness and appropriateness of the state enforcement action; and (3) the adequacy of the penalty imposed at the state level.¹⁷⁸

EPA will take direct enforcement action depending upon the "type of case" only if at least one of the following factors is present:

- a) violation of an EPA order or consent order;
- b) state request for EPA action;
- c) the case is specifically designated as nationally significant, such as significant noncompliance or explicit national or regional priorities;
- d) legal precedent;
- e) interstate issue;
- f) significant environmental or public health risk involved;

176. Morgehstern Letter, *supra* note 157, at 6.

177. However, EPA is currently considering the petition of the Chesapeake Bay Foundation requesting that EPA withdraw Virginia's enforcement and permit-writing approved status because Virginia allegedly has failed to enforce the CWA, has failed to provide adequate public participation in its NPDES program, has allowed the issuance of illegal permits, and is using water quality rules never promulgated by EPA. See Petition for Corrective Action, An Order Commencing Withdrawal Proceedings, and Other Interim Relief with Respect to Virginia's Water Pollution Control Program (Nov. 5, 1993) (submitted by Chesapeake Bay Foundation to EPA Region III). About a dozen similar petitions are pending before EPA in other regions. Hecker Letter, *supra* note 174.

178. Policy Framework, *supra* note 160.

- g) significant economic benefit gained by the violation;
- h) repeat violators; and
- i) areas where state authority may be inadequate.¹⁷⁹

Because EPA resources are so limited, the Policy Framework provides that the Agency generally will not act if the state has taken, or can take, timely and appropriate action.¹⁸⁰ This policy holds true even in cases involving national priorities, interstate issues, significant environmental harm or health risk, or significant economic benefit to the polluter. Only when enforcement of an EPA order, a consent decree, or a legal precedent is at stake will EPA permit itself to consider the effectiveness of the state program. However, only if EPA had already instituted enforcement will an order or consent decree be at stake. Thus, only in the limited situation where a legal precedent is at stake does EPA allow itself to commence an action in the presence of approved state enforcement activity.¹⁸¹ Yet, even in this circumstance, if EPA fails to act quickly enough or to coordinate its enforcement with the states, prior state enforcement could render EPA's efforts unconstructive or ineffective.¹⁸²

According to the Policy Framework, EPA will not take action based upon the adequacy of the state penalty unless clear national guidance on penalties covers the violation and the EPA regions consistently follow the national guidance.¹⁸³ Even if such penalty guidance existed, EPA's lack of enforcement resources prevents it from bringing a direct action every time a state penalty is inadequate. Furthermore, if the penalty was the result of a state administrative action, section 309(g)(6) would bar an EPA judicial action.¹⁸⁴ Because the vast majority of state enforcement actions are administrative, the number of state judicial cases, which EPA could second guess in court, is extremely limited.¹⁸⁵ Ironically, state judicial actions inevitably in-

179. *Id.*

180. *Id.*

181. *Id.*; see also U.S. GENERAL ACCOUNTING OFFICE, GAO/RCED-91-166, ENVIRONMENTAL ENFORCEMENT: PENALTIES MAY NOT RECOVER ECONOMIC BENEFITS GAINED BY VIOLATORS 2-3 (1991) [hereinafter GAO, ENVIRONMENTAL ENFORCEMENT]. However, as will be discussed *infra* notes 552-557 and accompanying text, almost all of the legal precedents involving CWA enforcement issues have been established in citizen suit litigation, and not in EPA enforcement actions.

182. See *United States v. Cargill*, 508 F. Supp. 734 (D. Del. 1981).

183. Policy Framework, *supra* note 160, at 3048. EPA has issued no such guidance document. See CLEAN WATER ACT CIVIL PENALTY POLICY (Feb. 11, 1986); Revised Interim Clean Water Act Settlement Penalty Policy (Feb. 28, 1995), Env't Rep. (BNA) 21:0911 (July 7, 1995).

184. 33 U.S.C. § 309(g)(6).

185. See *supra* notes 103-105 and accompanying text.

volve the most serious cases and penalties. Not surprisingly, EPA's policy, which has not been modified since 1984, limits its direct action to those instances when a state's penalty is grossly deficient considering the facts, the national concern and the state's own penalty authority and policy.¹⁸⁶

But EPA action because of an inadequate state penalty is essentially nonexistent. The Agency will look for the assessment of any civil penalty and turn a blind eye to the amount.¹⁸⁷ EPA officially maintains that penalties are a crucial tool in deterring violators, and its general policy requires collection of the economic benefit of noncompliance as a minimum penalty.¹⁸⁸ However, EPA does not condition approval of a state program on whether the state has a penalty policy comparable to EPA's.¹⁸⁹ As a result, some states still view penalties as counterproductive and tend not to impose them.¹⁹⁰ Furthermore, despite its claim that penalties are an important compliance tool, EPA does not require approved states to assess specific penalties in specific circumstances. Moreover, no effective check exists for states that assess little or no penalties on CWA violators. EPA's heralded policy of threatening direct action if a state has not assessed a penalty or if the

186. *Id.* A grossly deficient penalty is one which has a *de minimis* effect.

187. *Id.*

188. U.S. Envtl. Protection Agency, *Policy on Civil Penalties*, 17 Envtl. L. Rep. (Envtl. L. Inst.) 35,083, 35,083 (Feb. 16, 1984). EPA states:

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

If a penalty is to achieve deterrence, both the violator and the general public must be convinced that the penalty places the violator in a worse position than those who have complied in a timely fashion. Neither the violator nor the general public is likely to believe this if the violator is able to retain an overall advantage from noncompliance. Moreover, allowing a violator to benefit from noncompliance punishes those who have complied by placing them at a competitive disadvantage. This creates a disincentive for compliance. For these reasons, it is Agency policy that penalties generally should, *at a minimum*, remove any significant economic benefits resulting from failure to comply with the law.

Id.

189. Morgehstern Letter, *supra* note 157.

190. Reich, *supra* note 167, at 483.

penalty assessed is grossly deficient¹⁹¹ has never been used successfully.¹⁹²

Instead, EPA merely encourages those states that do not have administrative penalty authority¹⁹³ to enact legislation giving their state agencies this power.¹⁹⁴ If states adopt administrative penalty authority comparable to EPA's, then section 309(g) protects them from EPA interference. Under section 309(g), a state's diligent prosecution¹⁹⁵ or a state's assessment and collection of a penalty would bar EPA from seeking judicial penalties even if EPA believed that the state penalty was grossly deficient.¹⁹⁶ This EPA policy presents a potential irony: States which do not believe in using penalties to achieve compliance can assess a *de minimis* administrative penalty and bar an EPA civil judicial penalty action. Although the state action would only preclude a subsequent EPA judicial penalty action, EPA is unlikely to bring an administrative action for penalties if the pollution has been abated as a result of the state proceeding.¹⁹⁷

Two interpretations of the Policy Framework's deference to state enforcement are possible. One could interpret the deference as an example of Reagan-era federalism that sought to diminish federal involvement in environmental protection and have the states assume "ownership" of programs administered by EPA and become "principally responsible for the day-to-day management of environmental programs."¹⁹⁸ Alternatively, one could infer from the Policy Framework's emphasis on the interstate nature of water pollution and the need for uniformly strong state enforcement programs that EPA's approach to inadequate penalties is more influenced by the Agency's limited resources than by a states' rights federalism philosophy. EPA's desire to support strong state programs bolsters the limited resource interpretation.¹⁹⁹ For instance, instead of taking direct action itself, EPA suggests that its regions take joint state/federal action when a

191. *Id.*

192. It is rare for EPA to take direct action because of an inadequate state penalty. In the only reported decision involving EPA overfiling, *United States v. Cargill*, 508 F. Supp. 734 (D. Del. 1981), the federal action was stayed in favor of the state proceeding.

193. About half of all states do not have administrative penalty authority.

194. GAO, ENVIRONMENTAL ENFORCEMENT, *supra* note 181, at 13.

195. 33 U.S.C. § 1319(g)(6)(A)(ii).

196. *Id.* § 1319(g)(6)(A)(iii).

197. The question of whether a *de minimis* state administrative penalty can preempt federal action is effectively moot because EPA has circumscribed so severely the occasions on which it will respond to inadequate state penalties that its power is more theoretical than real.

198. Daniel, *supra* note 34, at 15,087.

199. Policy Framework, *supra* note 160, at 3048.

state is moving responsibly to correct a violation but lacks the appropriate resources, legal authority, or national or interstate perspective.²⁰⁰ Similarly, EPA attempts to use enforcement tools such as state inspection, data collection and witnesses, and enforcement penalties (in whole or in part) to further state goals to the extent legally possible.²⁰¹ EPA also supports strong state programs by attempting to enhance the credibility of the states in the public's eye as the primary CWA enforcers. To accomplish this, EPA involves states in creative settlements, issues joint press releases that share credit with the states, ensures that it does not actively compete with the states, and attempts to avoid creating an impression of weakness or failure of state programs.²⁰² Finally, the Policy Framework admonishes EPA to avoid conflicts, to keep states apprised of events and the reasons for EPA action, and generally to build a common understanding of state-EPA perspectives.²⁰³ Regardless of EPA's reasons for supporting state programs to this extent, the Policy Framework supports the conclusion that EPA rarely intends to take direct enforcement action in states with approved programs.

D. Problems of Concurrent Federal and State Enforcement

1. *Preemption.*—Our federal system is built on the constitutional principle, grounded in the Supremacy Clause,²⁰⁴ that in any conflict between federal and state law, federal law prevails. The doctrine of federal preemption has evolved out of this constitutional idea. A federal law will preempt state law if (a) the federal statute explicitly preempts the state law, (b) the federal legislation is sufficiently comprehensive to make reasonable the inference that Congress "left no room" for supplemental state regulation, or (c) state law actually conflicts with a federal statute, in which case federal law will preempt state law only to the extent of the actual conflict.²⁰⁵ Such a conflict exists "where compliance with both federal and state regulations is a physi-

200. *Id.*

201. These pronouncements are particularly ironic because it is the EPA resources in an approved state that are so weak.

202. *Id.*

203. *Id.*

204. U.S. CONST. art. VI, § 2 provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

205. *International Paper Co. v. Ouellette*, 479 U.S. 481, 491 (1987).

cal impossibility."²⁰⁶ A conflict also exists "where [a] state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,"²⁰⁷ such as where the state law interferes with the methods by which the federal statute was designed to reach its goal.²⁰⁸

In the CWA, Congress turned this doctrine on its head. Although the federal statute and EPA regulations comprehensively regulate the discharge of pollutants into the water,²⁰⁹ Congress explicitly intended that the states have the primary responsibility for administering and enforcing the CWA.²¹⁰ Congress gave the states the power to administer and enforce the Act,²¹¹ as well as the power to enact more stringent regulations than those promulgated by EPA.²¹² Consequently, even federally-issued permits, such as hydroelectric dam licenses²¹³ that normally preempt all state regulation, must yield to more stringent state water quality requirements.²¹⁴

Congress intended that states, under EPA-approved state law, would be the primary enforcers of the CWA. As a check on this power, Congress granted EPA concurrent enforcement authority.²¹⁵ What is unusual is that this concurrent federal/state enforcement authority²¹⁶ exists without the presence of the preemption doctrine to resolve conflicts between the federal and state governments. In the absence of an overriding constitutional rule or statutory guidelines to resolve federalism enforcement conflicts, courts have turned to traditional common-law and equitable doctrines to ease these tensions. As

206. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).

207. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1977) (citations omitted).

208. *Id.*

209. *See City of Milwaukee v. Illinois*, 451 U.S. 304 (1981); *Illinois v. City of Milwaukee*, 599 F.2d 151, 162 (7th Cir. 1978), *vacated by City of Milwaukee v. Illinois*, 451 U.S. 304 (1981).

210. CWA § 101(b), 33 U.S.C. § 1251(b).

211. CWA § 402(b), (c), 33 U.S.C. § 1342(b), (c).

212. CWA § 510, 33 U.S.C. § 1370.

213. The Federal Energy Regulatory Commission (FERC) issues such permits. *See, e.g., California v. FERC*, 495 U.S. 490 (1990).

214. *See PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 114 S. Ct. 1900 (1994) (noting that under § 401(d) a state shall impose any limitations necessary to assure compliance with § 303).

215. CWA § 402(i), 33 U.S.C. § 1342(i). Section 402(i) provides: "Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 1319 of this title." *Id.*

216. The state NPDES permit is to be issued under state law no less stringent than the CWA, and is enforceable in federal court under the CWA and in state court under state law. *Chesapeake Bay Found., Inc. v. Virginia State Water Control Bd.*, 453 F. Supp. 122, 126-27 (E.D. Va. 1978).

we will see, when these doctrines are used to resolve CWA conflicts, state enforcement usually prevails over federal enforcement.

2. *Res Judicata and Collateral Estoppel*.—One of the doctrines that courts use to resolve federalism conflicts where constitutional preemption principles would otherwise apply is *res judicata*. Courts ask whether a judgment in a state enforcement action under an EPA-approved NPDES program can preclude a subsequent EPA enforcement action under the authority reserved to it by CWA section 402(i). The CWA does not, by its terms, bar an EPA enforcement action after a state judicial enforcement action is complete; rather, it preserves EPA's enforcement power despite the presence of an approved state NPDES program.²¹⁷ However, the plain language of the CWA does not abrogate the application of the principles of *res judicata*²¹⁸ or collateral estoppel²¹⁹ to the federal/state relationship.²²⁰ Courts also will ask whether the relationship between EPA and a state environmental agency is sufficiently close so that EPA could be collaterally estopped from relitigating an issue which a state enforcement action previously decided.²²¹ If a state action can estop subsequent EPA enforcement, then that would appear to negate the reserved statutory power of EPA to enforce in an approved state.²²²

217. See CWA § 309, 33 U.S.C. § 1319. However, in 1987 Congress barred EPA from seeking judicial penalties if the state has sought or obtained administrative penalties under comparable state law. CWA § 309(g)(6), 33 U.S.C. § 1319(g)(6); see *supra* notes 158-159 and accompanying text.

218. The *res judicata* rule requires that "a final judgment on the merits bars further claims by parties or their privies based on the same cause of action." *Montana v. United States*, 440 U.S. 147, 153 (1979).

219. "Collateral estoppel, like the related doctrine of *res judicata*, has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979). This doctrine differs from *res judicata*, which bars a second proceeding involving the same cause of action and the same parties or their privies. *Id.* at 326 n.5. With collateral estoppel, the second suit is based upon a different cause of action from the first, but the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action. *Id.*

220. These doctrines are "central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions. This policy protects parties from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana*, 440 U.S. at 153.

221. See *United States v. ITT Rayonier, Inc.*, 627 F.2d 996, 1000 (9th Cir. 1980) (deciding whether "the statutory language and history of the [CWA] . . . creates a 'special circumstance' warranting an exception to the normal rules of preclusion").

222. *But see* CWA § 402(i), 33 U.S.C. § 1342(i) ("Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 1319 of this title.").

However, the delicate partnership between state and federal enforcement agencies does not negate *res judicata* principles, and congressional approval of concurrent enforcement does not “preclude the operation of collateral estoppel after one action reaches finality.”²²³ In *United States v. ITT Rayonier, Inc.*,²²⁴ a CWA enforcement case turned on a dispute between the United States and a discharger over the meaning of a footnote pertaining to discharge standards in the state NPDES permit, which EPA could have vetoed,²²⁵ but did not.²²⁶ The court reasoned first that the federal/state relationship under the CWA was sufficiently close to conclude that Congress did not manifest an intent to abrogate collateral estoppel or *res judicata*.²²⁷ The court reached this conclusion despite its determination that the state did not act as EPA’s “agent” in issuing the state permit.²²⁸

The second step in the analysis conducted by the *ITT Rayonier* court involved a determination whether EPA could be deemed a party or privy to the state action.²²⁹ According to the court, a nonparty may be bound by prior litigation if a prior party is so closely aligned with the nonparty’s interests “as to be its ‘virtual representative.’”²³⁰ This contemplates “an express or implied legal relationship by which parties to the first suit are accountable to non-parties who file a subsequent suit with identical issues.”²³¹ The *ITT Rayonier* court found the

223. *ITT Rayonier*, 627 F.2d at 1001.

224. *Id.* at 996.

225. See CWA § 402(d), 33 U.S.C. § 1342(d) (stating “[n]o permit shall issue (A) if the Administrator . . . objects in writing to the issuance of such permits”).

226. *ITT Rayonier*, 627 F.2d at 999.

227. *Id.* at 1002. The court stated:

Congress has stated FWPCA does not involve a “delegation” of federal authority. Although the NPDES state program is established under state law and functions “in lieu” of federal authority, the source of the federal/state “partnership” can be traced to a single act of Congress (FWPCA). Regardless whether the state’s enforcement positions can be accurately described as a “delegee” of powers, its authority vis à vis NPDES permits is derived from FWPCA and is revocable by the EPA.

Id. (citations omitted). If EPA revoked program approval, the state could still use its water pollution laws, even if more stringent than the CWA, to regulate dischargers within its borders. However, only EPA would issue NPDES permits in the state. Even though the state permits could be identical in requirements after the program revocation and even though the EPA-issued NPDES permit would incorporate all state water quality standards, see CWA § 401, 33 U.S.C. § 1341, the federal/state partnership would no longer exist, thus collateral estoppel should no longer apply.

228. *ITT Rayonier*, 627 F.2d at 1002.

229. *Id.* EPA contended it was neither. *Id.*

230. *Id.* at 1003 (citing *Aerojet-Gen. Corp. v. Askew*, 511 F.2d 710, 719 (5th Cir.), *cert. denied*, 423 U.S. 908 (1975)).

231. *Id.*

interests of EPA and the state to be sufficiently similar because "they share more than an abstract interest in enforcement."²³² The state filed its action after EPA warned that it would bring an enforcement action if the state did not.²³³

The *ITT Rayonier* court deemed the relationship to be sufficiently close to preclude relitigation, even though the state was not acting as EPA's agent and EPA was not bound by the state's action.²³⁴ The failure of EPA to object to or veto²³⁵ a state-issued permit is not subject to appeal.²³⁶ If EPA vetoes a state permit, that EPA action is not subject to judicial review²³⁷ until EPA issues its own NPDES permit.²³⁸ Even if EPA allegedly coerces a state to write a permit that satisfies EPA's concerns, the state agency actions are not transformed into federal actions reviewable in federal court.²³⁹ Nevertheless, the *ITT Rayonier* court reasoned that, because EPA could assert collateral estoppel offensively against the polluter if the polluter had lost its state-law challenge to the permit terms, EPA should be subject to defensive application of the doctrine by the alleged polluter.²⁴⁰

Pursuant to *ITT Rayonier*, courts will preclude federal actions questioning state enforcements when the same permit terms and conditions are at issue.²⁴¹ To the extent EPA assists, closely supports, or actively oversees state enforcement actions, it may become bound to the results in the state action by collateral estoppel. Conversely, where EPA involvement is minimal, such as the review of the adequacy of state penalties, EPA could most strongly avoid the preclusive effects of

232. *Id.*

233. *Id.*

234. *Id.*; *cf.* *Washington v. EPA*, 573 F.2d 583, 586 (9th Cir. 1978) ("Nor does anything in § 402 . . . suggest the existence of an Agency relationship between the Administrator and a state so that the latter's actions in issuing or denying a permit could be deemed action of the Administrator.").

235. EPA may veto any approved state permits that do not adequately protect water quality of downstream states, or that are outside the guidelines and requirements of the CWA. CWA § 402(d)(2), 33 U.S.C. § 1342(d)(2).

236. *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193, 197 n.9 (1980).

237. CWA § 509(b)(1)(F), 33 U.S.C. § 1369(b)(1)(F) grants jurisdiction to the United States Courts of Appeals to review the issuance or denial of an NPDES permit by EPA.

238. *See Champion Int'l Corp. v. EPA*, 850 F.2d 182, 190 (4th Cir. 1988) (finding that EPA objections to state-issued permits can only be examined on judicial review after EPA grants or denies a permit).

239. *Shell Oil Co. v. Train*, 585 F.2d 408, 414 (9th Cir. 1978).

240. *United States v. ITT Rayonier*, 627 F.2d 996, 1002-03 (9th Cir. 1980).

241. However, courts do not consider consent decrees between a discharger and a state to be a determinative finding as to the meaning of a permit for collateral estoppel purposes, so that if the violation persists despite the agreement, EPA's subsequent enforcement action will not be barred by *ITT Rayonier*. *See United States v. Lowell*, 637 F. Supp. 254, 257 (N.D. Ind. 1985).

collateral estoppel. However, it is in this area that EPA seems least interested and has most limited its action.

An opposite question to that presented in *ITT Rayonier* is whether a prior federal enforcement action against a violator of an approved state permit bars state enforcement of the same violation. Violation of an approved-state permit is a violation of federal law subject to federal enforcement.²⁴² It is also a violation of the underlying state law. Thus, pursuant to section 510, unless the state discharge requirements are less stringent than the federal requirements, federal enforcement shall not “preclude or deny the right of any State . . . to adopt or enforce any standard of limitation respecting discharges of pollutants.”²⁴³ In light of this mandate, it is not surprising that there are no reported cases in which a state has been collaterally estopped from enforcement on the basis of a prior federal action. This result is consistent with Congress’s view of federalism under the CWA that federal law could be bound by state enforcement, whereas state law, which may be more stringent in substance and enforcement than the CWA, should not be so bound.

3. *Abstention.*—*ITT Rayonier* is arguably limited by its facts to EPA challenges to state permit terms to which EPA could have objected.²⁴⁴ Although the terms of a permit are crucial to standard setting and pollution control, Congress requires EPA to suspend its permit writing authority in approved states.²⁴⁵ This leaves EPA with only the power to veto individual permits that impair downstream states’ water quality or otherwise do not meet CWA standards.²⁴⁶ In the typical enforcement case, however, permit terms are not in dis-

242. CWA § 301(a), 33 U.S.C. § 1311(a).

243. 33 U.S.C. § 1370.

244. Under the permit-writing process in section 402, if EPA had not already waived its power to object, it could have made timely objection to the permit. CWA § 402(e), 33 U.S.C. § 1342(e). In *Montana v. United States*, 440 U.S. 147, 155 (1979), the Court held that if the United States, although not a party, had “sufficient ‘laboring oar’ in the conduct of the state-court litigation,” collateral estoppel could be triggered. *Montana*, 440 U.S. at 155. Thus, to the extent the state enforcement action was prompted, supported, or directed by EPA officials, as may well be the case under EPA enforcement institutions and ongoing EPA/state cooperative enforcement agreements, collateral estoppel or *res judicata* might preclude EPA action.

245. CWA § 402(c) provides: “[T]he Administrator shall suspend the issuance of permits [in approved states] unless he determines that the [submitted] State permit program does not meet the requirements of [§ 402(b)] or does not conform to the guidelines issued under [this Act].” 33 U.S.C. § 1342(c).

246. *Arkansas v. Oklahoma*, 503 U.S. 91 (1992) (explaining that great deference must be given to the policies designed by EPA and it is not the role of the courts to decide which policy choice is the best).

pute, nor may they be disputed.²⁴⁷ Thus, in these cases, the *ITT Rayonier* doctrine does not limit EPA power.

Because EPA's enforcement capability is limited in an approved state,²⁴⁸ these states inevitably take the enforcement lead. If EPA subsequently wants to challenge a state permit term it will be estopped under *ITT Rayonier*. But what if EPA brings an enforcement action entirely independent of one brought by an approved state? This situation presents several possible problems. Does section 402(i) allow EPA to seek more stringent or alternate abatement remedies? Must a federal court adjudicate the EPA actions and grant the relief EPA seeks, even if incompatible with state actions? How can a court determine which enforcement authority should prevail or what remedy is preferable? Constitutional preemption principles are not available to resolve these federalism conflicts, nor are the principles of res judicata and collateral estoppel. What neutral principles then may courts use to resolve these conflicts between federal and state governments? A federal court has two possible choices: decline to hear the case or enter the thicket of concurrent enforcement. However, if the federal court were to decline to act in a case in which it has subject matter jurisdiction, it is not clear where that authority would come from.

One principle that addresses this problem involves the doctrine of abstention. In most cases, a federal court is obligated to hear and decide a case over which it has jurisdiction of both the subject matter and the parties.²⁴⁹ However, the abstention doctrine provides three narrow exceptions to the court's duty to decide cases and controversies: *Pullman* abstention,²⁵⁰ *Burford* abstention,²⁵¹ and *Younger* abstention.²⁵²

Pullman abstention applies where a federal constitutional issue might be mooted or modified by a state court determination of unsettled state law.²⁵³ A party properly invokes *Pullman* abstention when it establishes with particularity the following circumstances: a serious

247. See *Natural Resources Defense Council, Inc. v. Outboard Marine Corp.*, 692 F. Supp. 801 (N.D. Ill. 1988) (stating that permit requirements can be interpreted as a matter of law).

248. But permit-writing does not exist in a vacuum. State permit writers need discharge data, inspection authority, CWA § 402(b)(2)(B), 33 U.S.C. § 1342(b)(2)(B), and the authority to enforce violations of the permit. CWA § 402(b)(9), 33 U.S.C. § 1342(b)(9). Approved programs employ inspectors, attorneys, permit writers, and other enforcement officials.

249. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976).

250. *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941).

251. *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

252. *Younger v. Harris*, 401 U.S. 37 (1971).

253. *Pullman*, 312 U.S. at 501.

constitutional claim;²⁵⁴ an unsettled question of state law;²⁵⁵ and the susceptibility of a state law to a limiting construction that could avoid or modify the constitutional question.²⁵⁶

Except in unusual circumstances, federal CWA enforcement cases do not raise constitutional issues; the same is true for the application and interpretation of state water law and regulations.²⁵⁷ However, cases involving these issues do arise. In *Berman Enterprises, Inc. v. Jorling*,²⁵⁸ a barge owner brought a § 1983 civil rights action in federal court after the state environmental agency imposed summary abatement orders which revoked the plaintiff's state license, thereby prohibiting plaintiff's operations.²⁵⁹ The court determined that dismissal based upon *Pullman* and *Burford* abstention was appropriate because interpretation of the applicable state statutes and regulations would decide the controversy²⁶⁰ and because the federal interpretation of the complex state regulatory scheme might disrupt state efforts to develop a unified, coherent set of rules.²⁶¹ Similarly, where a state law implementing the CWA is arguably invalid under that state's constitution, a federal court will abstain from deciding a dispute concerning the federal constitutionality of the law because the state court ruling could render the federal matter moot.²⁶² But when the underlying claim in the district court is a federal question, the court is not required to abstain from deciding a state tort law counterclaim involving no difficult issues of state law or matters of substantial concern.²⁶³

Burford abstention applies where federal adjudication would interfere substantially with a state's efforts to enforce a coherent system of purely state regulation bearing on matters of significant impor-

254. *Id.*

255. *Id.*

256. *Zwickler v. Koota*, 389 U.S. 241, 249 (1967) (interpreting *Pullman*).

257. *See United States v. Cargill, Inc.*, 508 F. Supp. 734, 746 (D. Del. 1981) ("Baldly stat[ing] that an interpretation of relatively straightforward state laws and regulations might avoid a constitutional decision without specifying what interpretation of what specific law or regulations would do so and, in regards to the constitutional issue, only vaguely referring to due process and equal protection concerns [does not establish the special circumstances necessary to invoke *Pullman* abstentions].").

258. *Berman Enters., Inc. v. Jorling*, 3 F.3d 602 (2d Cir. 1993).

259. *Id.* at 606.

260. *Id.* at 608.

261. *Id.* at 606.

262. *See Metropolitan St. Louis Sewer Dist. v. Ruckelshaus*, 590 F. Supp. 385, 387 (E.D. Mo. 1984).

263. *See, e.g., United States v. Montrose Chem. Corp.*, 788 F. Supp. 1485, 1496 (C.D. Cal. 1992) (holding that defendants are entitled to bring counterclaims based on both tort law and CERCLA).

tance to the state.²⁶⁴ *Burford* abstention makes little sense in the CWA context.²⁶⁵ In *Burford* itself, the federal court was asked to enjoin a state administrative order regulating oil well operations under a complex state oil and gas conservation law—an area that Congress had left explicitly to the states.²⁶⁶ The Court stated that abstention was necessary because “sound respect for the independence of state action requires the federal equity court to stay its hand.”²⁶⁷ The relationship between federal and state laws under the CWA differs from the relationship between federal energy law and state oil and gas laws, which regulate different phases of energy production.²⁶⁸ The CWA explicitly contemplates a federal/state partnership in which state law is crucial to the implementation of the federal CWA. EPA only approves state water laws if they meet minimum federal requirements,²⁶⁹ and EPA has the authority to revoke approval and to assume purely federal administration of a state NPDES program.²⁷⁰ States do not have exclusive control or expertise over any aspects of the CWA, and states have no authority to define minimum national standards required under the CWA.²⁷¹ Thus, state courts have no greater competence in applying the CWA than do federal courts.²⁷² For these reasons, a fed-

264. *Burford v. Sun Oil Co.*, 319 U.S. 315, 323 (1943).

265. See, e.g., *Student Pub. Interest Research Group, Inc. v. P.D. Oil & Chem. Storage, Inc.*, 627 F. Supp. 1074, 1085 (D.N.J. 1986) (summarily rejecting argument that court should apply abstention doctrine to citizen suit because Congress clearly intended citizen suits to supplement state governmental actions); *Brewer v. City of Bristol*, 577 F. Supp. 519 (E.D. Tenn. 1983) (declining to abstain in a citizen enforcement action contemporaneous with a state action because the CWA demonstrated a comprehensive scheme approving multiple litigation, federal issues were at stake, the state court proceedings might inadequately protect plaintiffs and the state action was not being diligently prosecuted). In fact, the *Cargill* court held that *Burford* abstention considerations “simply do not apply” to CWA enforcement. *United States v. Cargill, Inc.*, 508 F. Supp. 734, 747 (D. Del. 1981).

266. See, e.g., *Northwest Cent. Pipeline Corp. v. State Corp. Comm’n*, 489 U.S. 493 (1989) (stating that states have the traditional power to regulate production as a means of conserving natural resources and protecting correlative rights of producers).

267. *Burford*, 319 U.S. at 334.

268. Federal energy laws regulate interstate transportation and wholesales of natural gas, while state oil and gas laws regulate well placement and pumping practices. See, e.g., *Northwest Cent. Pipeline*, 489 U.S. at 510.

269. CWA § 402(a)(2), 33 U.S.C. § 1342(a)(2).

270. Section 402(c)(3) states:

Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with the requirements of this section, he shall notify the State and, if applicable corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program.

33 U.S.C. § 1342(c)(3). EPA may also assume administration of NPDES enforcement alone. See CWA § 309(a)(2), 33 U.S.C. § 1319(a)(2).

271. States may impose state requirements more stringent than the CWA mandates.

272. *United States v. Cargill, Inc.*, 508 F. Supp. 734, 747 (D. Del. 1981).

eral court will not abstain in a CWA enforcement action on the grounds that a pending state administrative action might ease permit terms so that the discharger would no longer be in violation.²⁷³

Younger abstention generally applies where a federal court is asked to restrain state criminal actions or civil proceedings closely akin to criminal actions.²⁷⁴ *Younger* abstention has no place in resolving CWA concurrent enforcement disputes because it only prohibits federal courts from hearing cases seeking to enjoin or directly interfere with state criminal prosecutions, and quasi-criminal state actions in which First Amendment rights are at stake.²⁷⁵

4. *Discretionary Stay of Enforcement.*—As we have seen, the doctrines of preemption, res judicata, collateral estoppel, and abstention provide little or no guidance to a court faced with the task of easing the tensions of concurrent enforcement. Certainly, when both state and federal actions are pending, and they seek incompatible or inconsistent relief, existing doctrines provide no rule of decision to help a defendant determine which of its master's commands must be obeyed.

Although CWA section 404(i) grants EPA the power to enforce any violation of a permit issued by an approved state,²⁷⁶ that power may disappear when a court exercises its inherent discretionary power to manage litigation through the use of a stay.²⁷⁷ Concurrent federal and state enforcement actions seeking potentially inconsistent or counterproductive pollution controls are ripe for the exercise of judicial power to stay an enforcement action. Although the stay is an important judicial lubricant for lessening federalism frictions, it is an extraordinary remedy that courts use only under "exceptional circumstances" or in a "clear case of hardship or inequity."²⁷⁸ Nevertheless, a

273. *Natural Resources Defense Council, Inc. v. Outboard Marine Corp.*, 692 F. Supp. 801, 811 (N.D. Ill. 1988); see also *Wiconisco Creek Watershed Ass'n v. Kocher Coal Co.*, 646 F. Supp. 177, 178 (M.D. Pa. 1986) (stating that *Burford* abstention is also inappropriate where a state agreement to build a mine runoff treatment facility is sufficiently separate from the defendant's CWA obligations not to pollute).

274. *Younger v. Harris*, 410 U.S. 37, 53-54 (1971).

275. See *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 602 (1975).

276. 33 U.S.C. § 1344(i).

277. See, e.g., *United States v. Cargill, Inc.*, 508 F. Supp. 734 (D. Del. 1981) (holding that a stay was appropriate to allow Cargill the opportunity to complete construction of its pollution control facilities).

278. *Id.* at 748. The court stated that only in these circumstances "will the existence of concurrent state proceedings warrant the abdication of 'the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them.'" *Id.* (citations omitted).

stay can be a powerful defensive tool with which a polluter can fend off federal CWA enforcement.

A court generally will consider several factors when deciding to grant a stay or dismissal, the most extreme form of stay of the federal action. These factors include (1) the inconvenience of the federal forum, (2) the desirability of avoiding piecemeal litigation, (3) the order in which jurisdiction was obtained by the concurrent forums, (4) whether any federal policy exists militating for or against a stay, (5) the identity of the issues in the two forums, and (6) the existence of any countervailing federal interest, which federal courts might be more likely to respect or enforce than state courts.²⁷⁹ If a stay is justified, it must be crafted as narrowly as possible to restrain only those aspects of the federal case that give rise to the adverse effects that justify the stay.²⁸⁰

In *United States v. Cargill*, the court presented the following factors favoring a stay of federal CWA proceedings: (1) the avoidance of federal/state friction, (2) greater state familiarity with the facts, (3) the state's interest in enforcing its pollution laws, (4) the existence of parallel state litigation adequate to protect the public interest, (5) the conservation of judicial resources, (6) congressional intent that states have primary enforcement responsibility over the NPDES program, and (7) practical considerations concerning the effects of inconsistent concurrent enforcement actions.²⁸¹ Although the court did enter a stay, it noted the following factors weighing against a stay: (1) a court's obligation to exercise its jurisdiction, (2) the practical similarities of federal/state injunctive relief, (3) lack of enforceable requirements for the polluter to upgrade its equipment, (4) Congress's intent to create concurrent enforcement authority, (5) the existence of EPA enforcement discretion, (6) EPA's interest in insuring national uniformity of enforcement, including adequate and uniform penalties, and (7) EPA's nonparty status in the state action.²⁸²

Because a stay is a quasi-equitable doctrine, a court's decision to stay a case will depend on the particular facts involved. Generally, courts are inclined to stay federal actions to the extent that federally

279. *Id.* at 749 (citations omitted).

280. *Id.*

281. *Id.*

282. *Id.* at 750.

sought relief conflicts with prior state-based abatement strategies;²⁸³ however, courts will tend to allow EPA to pursue civil penalties.²⁸⁴

As a policy matter, if each sovereign knows that incompatible enforcement actions are subject to stays, then they will be encouraged to coordinate their efforts to minimize the incompatibility of relief. The federal government must be particularly mindful of coordination because its lack of resources and the approach dictated by the Policy Framework often result in federal actions commencing long after state actions are underway. Courts will insist then that EPA justify its late and incompatible action.²⁸⁵

As a practical matter, a stay of the federal action can cause more than a temporary delay in federal prosecution—it can put an end to EPA's abatement efforts. To the extent that a settlement of an earlier state action mandates installation of one type of pollution control equipment, EPA may be precluded from insisting on the installation of different pollution control equipment, thus putting an end to EPA's abatement efforts. Thus, under the discretionary stay doctrine EPA may be relegated to pursuing civil penalties, a course in which EPA has almost no interest.

A discretionary stay can help resolve federalism conflicts. But if the conflict is caused by an incompatible concurrent federal administrative enforcement action, can a federal court enjoin, temporarily or permanently, a federal administrative action in favor of a pending state judicial or administrative action? And, if so, may the court en-

283. If federal injunctive relief would require the discharger's approved state permit to be amended, then the state would be a necessary party to the action under Federal Rule of Civil Procedure 19(a)(2)(ii) because failure to join the state would make the discharger subject to "a substantial risk of incurring double, multiple or otherwise inconsistent obligations." *Hudson Riverkeeper Fund, Inc. v. Orange & Rockland Utils., Inc.*, 835 F. Supp. 160, 167 (S.D.N.Y. 1993). *But cf. Wiconisco Creek Watershed Ass'n v. Kocher Coal Co.*, 646 F. Supp. 177, 178 (M.D. Pa. 1986) (holding that a state agency was not an indispensable party to a citizen suit CWA action, despite the state's agreement to build a facility to treat the defendant's discharge).

284. For example, in *Cargill*, the court stayed the incompatible federal injunctive claim but permitted the United States to seek civil penalties for past violations. *Cargill*, 508 F. Supp. at 751.

285. The Policy Framework anticipates that EPA will receive its information about state activities in after-the-fact reports and informal communications. EPA's lack of real-time data means that EPA is rarely able to take the enforcement lead in an approved state. Moreover, because of EPA's general inability to move quickly, the "timely and appropriate" enforcement action guidelines do not apply to EPA consideration of whether to take direct enforcement action. Those guidelines only apply to EPA when a direct enforcement action actually begins. Thus, in addition to lack of resources and delayed receipt of information, the longer EPA delays bringing an enforcement action, the longer it can avoid being bound to the time guidelines it imposes on the states. Under these circumstances, it is hard to imagine EPA ever instituting an action in advance of an approved state.

join the federal action on the grounds that the federal relief is incompatible or inconsistent with the prior state relief? Under section 309(g), a state administrative action will bar EPA from seeking judicial civil penalties,²⁸⁶ but it is unclear whether federal courts have the equitable power to enjoin federal administrative actions seeking injunctive relief or abatement. Because EPA orders are not self-executing, EPA must go to federal court for injunctive relief enforcing their orders. At this point, a court could stay the EPA action. No cases discuss a court's powers vis-à-vis EPA on this point. However, in the citizen suit context, courts have extended the section 309(g)(6) ban beyond EPA claims for penalties to also bar citizen claims for equitable relief, despite its specific reference to only penalties and despite EPA's objections as *amicus curiae*.²⁸⁷

If a federal court can bar a federal enforcement action on the basis of collateral estoppel or stay the action by using its inherent power to control litigation before it, it would seem to also have the power in its equitable discretion to enjoin the administrative proceeding under the same kind of exceptional circumstances in which it exercised its discretionary stay power.²⁸⁸ But unlike collateral estoppel and discretionary stays, which allow a federal court to preserve the integrity of its own process, conserve judicial resources, and monitor its own docket, an injunction against an administrative action would be an assertion of power over a co-equal branch of government. That assertion of equitable power could be guided by administrative law principles such as ripeness, primary jurisdiction, and exhaustion of remedies. However, these principles should not limit the equitable discretion of federal courts because of the importance of the proper resolution of difficult federalism conflicts. Just such a conflict arises when state and subsequent federal administrative actions are incompatible and exceptional circumstances exist, so that the failure of a federal court to enjoin the federal administrative action could deny the discharger due process of law.²⁸⁹

286. 33 U.S.C. § 1319(g)(6)(A)(ii).

287. See *North & S. Rivers Watershed Ass'n, Inc. v. Town of Scituate*, 949 F.2d 552 (1st Cir. 1992) (discussed extensively *infra* notes 451-505 and accompanying text). But see *Washington Pub. Interest Research Group v. Pendleton Woolen Mills*, 11 F.3d 883, 886 (9th Cir. 1993) (finding *Scituate* unpersuasive, and holding that under § 309(g)(6) citizen suits are only barred by prior federal administrative penalty actions, not by compliance actions).

288. The Supreme Court comprehensively analyzed the scope of a federal court's equitable discretion in *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982).

289. Cf. *Wagner Seed Co. v. Daggett*, 800 F.2d 310 (2d Cir. 1986) (finding that the opportunity for judicial review of any administrative order and the presence of judicial discretion in enforcing any penalties may be sufficient due process protection).

In reality, EPA-approved states have more than primary enforcement responsibility; they have nearly exclusive governmental responsibility for CWA enforcement.²⁹⁰ Without concurrent federal enforcement, enforcement conflicts are rare. As EPA has all but abandoned its direct enforcement role in approved states, the CWA has lost its character as a federally enforced law. Instead, it has become largely a state permitted and state enforced law, granting states unfettered enforcement discretion to establish the level of compliance they expect from their permitted dischargers. Thus, policy, legal, and resource obstacles to federal enforcement have converted the CWA from a national law designed to achieve national goals into state law enforced to achieve state goals. Under these circumstances, is there effective enforcement of the CWA? The next section of this Article will examine this question.

IV. FEDERAL AND STATE ENFORCEMENT EFFECTIVENESS

A. *The Erratic Enforcement Record*

Compliance is essential to the success of any environmental regulatory program because it

is critical to realizing the benefits envisioned by environmental policy, statutes, regulations, standards, and permits. The vast regulatory apparatus we have put in place to protect public health and the environment amounts to empty words and deeds without compliance. It is the regulatory bottom line. All of the cost-benefit or cost-effectiveness studies that go into assessing the best regulatory route become meaningless if the costs and benefits do not play out as predicted, usually with assumptions of full compliance.²⁹¹

290. For example, EPA anticipates that its federal/state enforcement partnership will result in a sharing of the inspection burden at the information gathering stage of enforcement so that each of the 7500 major NPDES facilities will be inspected once a year. Elder et al., *supra* note 25, at 10,031. Theoretically, in approved states, EPA would perform about 10% of the inspections and the state would perform the balance. *Id.* The reality in approved states is that the inspection function of enforcement is almost exclusively a state activity. In nonapproved states, EPA tends to do more; however, that increase is balanced by EPA's practice in some approved states of performing no inspections at all. *Id.* For the rest of the NPDES permits, some 53,000 dischargers, EPA performs no inspections, and does not even receive the dischargers' own self-monitoring reports. Although EPA has authority to require that discharge monitoring reports be sent to it, CWA § 308(b), 33 U.S.C. § 1318(b), Congress has allowed it to waive that power. CWA § 402(d), (e), 33 U.S.C. § 1342(d), (e). In fact, EPA waives its power to review most nonmajor NPDES permits written by approved states, and does not receive nonmajor discharge monitoring reports.

291. Cheryl E. Wasserman, *Federal Enforcement: Theory and Practice*, in *INNOVATION IN ENVIRONMENTAL POLICY* 21, 22 (T.H. Tietenberg ed., 1992).

To achieve compliance, an effective enforcement system must exist. Enforcement is the use of legal tools, formal and informal, to compel compliance by imposing legal sanctions or penalties.²⁹² Effective enforcement is based on the theory of deterrence, which holds that a strong enforcement program deters the regulated community from violating in the first place, deters specific violators from further violations, and deters the public from violating other laws.²⁹³ Effective enforcement accomplishes these goals by providing "visible examples to encourage others in the regulated population to maintain desired behavior to avoid a similar fate."²⁹⁴ Although there is little empirical data or economic literature on how best to achieve widespread compliance with environmental laws,²⁹⁵ it is generally accepted that effective deterrence requires four elements: (1) significant likelihood that a violation will be detected; (2) swift and sure enforcement response; (3) appropriately severe sanctions; and (4) that each of these factors will be perceived as real.²⁹⁶

Unfortunately, government enforcement programs do not have, and never will have, sufficient resources to meet these requirements. Studies of government enforcement consistently indicate that violations of environmental law are widespread. Even under the CWA, designed by Congress to be easily enforceable, enforcement remains problematic. The United States General Accounting Office (GAO) has reported:

[E]xperience with EPA's water quality programs suggests that strong enforcement by EPA and the states is fundamental to their success. Effective enforcement serves as a deterrent to violations and, when violations do occur, helps to ensure that appropriate corrective action is taken in a timely manner.

Specifically, our work clearly indicates that:

— Enforcement of our nation's water quality laws continues to be weak and sporadic. Despite serious and long-standing violations, most enforcement actions are mild, informal "slaps on the wrist" rather than formal actions such as administrative orders or fines and penalties. Further, even in the relatively few cases where penalties have been assessed,

292. *Id.* at 23. Enforcement systems must monitor the regulated community and act to force a change in violators' behavior. Clifford Russell, *Monitoring and Enforcement, in PUBLIC POLICIES FOR ENVIRONMENTAL PROTECTION* 243 (Paul Portney ed., 1990).

293. Wasserman, *supra* note 291, at 23.

294. Russell, *supra* note 292, at 243.

295. Wasserman, *supra* note 291, at 21.

296. *Id.* at 23.

they are often significantly reduced or dropped without adequate documentation.

. . . .
. . . EPA still has a long way to go before enforcement serves as an effective deterrent against violations of the Clean Water Act. Until then, violators will continue to enjoy competitive advantages over those complying with the Act, and the Act will not realize its full potential in protecting the nation's waters.²⁹⁷

Private studies of federal environmental enforcement have been similarly critical. One study of federal environmental enforcement reported systematic enforcement failures such as:

1. heavy reliance on self monitoring;
2. infrequent auditing of the self-reporting sources;
3. a lack of rigorous enforcement designed to catch ongoing violations of those audits that do occur;
4. ad hoc invention of the definition of violation to a level less stringent than the permits, even though the permits are designed to be complied with 100% of the time;²⁹⁸
5. infrequent and reluctant use of self-monitoring records as the basis for notices of violation, even though the records show that significant violations have been occurring; and
6. when violations are found and federal enforcement actions taken, the penalties assessed appear to be so small as to be insignificant in a violator's income statement.²⁹⁹

Based on these findings the investigator concluded: "Efforts to monitor regulated behavior appear to have been inadequate to the task—a very difficult task in many instances—and typical enforcement policies appear to have been insufficiently rigorous. Together these inadequacies seem to have encouraged widespread violations of environmental regulations."³⁰⁰

Federal CWA enforcement remains limited. For instance, an audit of EPA's toxic water pollution program for direct dischargers found that in five of the seven core EPA toxic standard-setting and compliance-identification activities, EPA's data either does not exist or

297. U.S. GENERAL ACCOUNTING OFFICE, GAO/T-RCED-91-53, GAO TESTIMONY: OBSERVATIONS ON EPA AND STATE ENFORCEMENT UNDER THE CLEAN WATER ACT 1-2 (1991) (statement of Richard L. Hembra, Director, Environmental Protection Issues, before the House Subcommittee on Water Resources, Committee on Public Works and Transportation).

298. See *Natural Resources Defense Council v. EPA*, 683 F.2d 752 (3d Cir. 1986).

299. Russell, *supra* note 292, at 243.

300. *Id.*

fails to meet a significant number of EPA data quality criteria.³⁰¹ In 77 percent of the 1217 cases sampled by the audit, the NPDES permit did not regulate toxic pollutants emitted by the facilities.³⁰² Furthermore, for eighty-five percent of the facilities studied, the majority of the toxic pollutants discharged were not controlled through the permit process.³⁰³ The study also found that the pollutant category with the greatest number of toxic dischargers was also the least controlled,³⁰⁴ even though many of these pollutants are "bioaccumulative chemicals of concern."³⁰⁵

A series of audits of enforcement by the EPA Inspector General concluded that

enforcement actions taken by EPA and the States were frequently ineffective in returning major municipal and industrial violators to compliance. . . .

. . . .

. . . In reviewing enforcement actions taken by the delegated States, we found a pronounced preference for informal action such as telephone calls and notices of violation. These informal actions are not inappropriate, but when the same facility remains in violation of its permit year after year, stronger enforcement actions are indicated. In many of the cases we reviewed, the States continued to use informal means to bring violators back into compliance with little success.

In addition to EPA and States not taking increasingly stringent enforcement actions to encourage compliance, they did not follow the general enforcement guidance for penalty assessment. . . . Violators must be convinced that an assessed penalty places them in a worse economic position than those who comply.

In our audits we found that in 46 of the 69 cases we evaluated, the penalty assessments were not sufficient to recover the economic benefit gained by non-compliance. Frequently, preliminary calculations were reduced down to only a small fraction of their calculated amount with little or no documentation to support the reductions. When penalties are reduced to below what it would cost to comply with environmental laws, they encourage rather than deter non-com-

301. GAO, WATER POLLUTION, *supra* note 18, at 44.

302. *Id.* at 53.

303. *Id.*

304. *Id.* at 54.

305. *Id.* at 67. The GAO study notes that EPA has placed some of these pollutants in higher risk categories in recent proposals. *Id.*

pliance. Small fines and lengthy time limits to achieve compliance promote a "pay to pollute" mentality.³⁰⁶

An EPA funded study of the compliance rates in the indirect discharger program reveals similarly dismal performance.³⁰⁷ That study found that fifty-four percent of significant industrial dischargers into sewer systems were in "significant noncompliance"³⁰⁸ with discharge standards and self-monitoring and reporting requirements or both.³⁰⁹ Additionally, eighty-one percent of the significant industrial user permits violated at least one pre-treatment requirement.³¹⁰

Even the regulated community does not believe that regulators adequately enforce environmental laws. In a poll of corporate environmental managers throughout the country, forty-nine percent believed that the federal government's enforcement of environmental laws was inadequate.³¹¹ Even those managers who believed that the level of enforcement was either adequate (twenty-six percent) or excessive (twenty percent) agreed that enforcement was inconsistent and unfair.³¹² One respondent complained, "We comply, and then see so many other [companies] that do not and never get penalized."³¹³ Another respondent indicated that EPA "would be more effective if [it] were better staffed. Small companies, some major polluters, may never see an EPA inspector."³¹⁴ Another manager agreed, stating that because of a shortage of personnel, EPA staff "do all their enforcement by mail."³¹⁵

In fact, EPA only conducts about ten percent of the inspections of major NPDES dischargers, and none of the inspections of nonmajor dischargers, leaving the balance of inspections to the states.³¹⁶ Even in states without approved programs, where EPA is the sole governmental enforcer of the CWA, EPA activities are minimal.

306. *Senate Hearings, supra* note 1, at 687 (statement of John Martin).

307. STATISTICAL ASSESSMENT, *supra* note 20, Executive Summary, at v-vi.

308. The report employed EPA's definition of significant noncompliance. *Id.* at 2-1.

309. *Id.* The report was based on a statistical analysis of available data. The authors reported 90% confidence that the value was between 32% and 75%. *Id.*

310. *Id.* at 2-2. There was 90% confidence that the value was between 57% and 100%.

311. BNA Special Report, *Government Has Too Many Rules, Too Little Enforcement, Not Enough Prevention, Environmental Managers Report in BNA Survey*, 22 *Env't Rep.* (BNA) 2386, 2386 (Feb. 14, 1992).

312. *Id.* at 2388. This includes those managers who blamed the results on inadequate enforcement staff. *Id.*

313. *Id.* at 2386.

314. *Id.* at 2388.

315. *Id.*

316. Elder et al., *supra* note 25, at 10,021. At the time of his publication, Mr. Elder was Director of the Office of Water Enforcement and Permits, EPA.

For instance, in Texas, which does not have an approved program, EPA has contracted with the Texas Water Commission to perform 62% of the inspections at the approximately 900 major dischargers in the state.³¹⁷ Although EPA performs the balance of the Texas inspections, it relies primarily on self-reported discharge monitoring reports mailed to EPA by the permittees.³¹⁸ Prior to 1985, Texas's enforcement record was poor, although it has improved somewhat since then. According to the Chair of the Texas Water Commission, Texas has "initiated 727 enforcement actions and issued 539 orders since 1985, for a seventy-four percent completion rate. Over the same period of time . . . EPA initiated sixty-four enforcement actions and issued thirty-eight orders for a fifty-nine percent completion rate."³¹⁹

In the early 1980s, EPA enforcement collapsed because of political decisions made by the Reagan administration and EPA Administrator Gorsuch that limited EPA's enforcement efforts.³²⁰ In response to public outcry and the embarrassment of widespread citizen suit

317. *Id.* at 10,033 (remarks of B.J. Wynne, III): At the time, Mr. Wynne was Chair of the Texas Water Commission. The Texas Water Commission has 15 district offices, about 300 field employees, and a budget the size of EPA Region VI, which is solely responsible for the CWA in Texas, Louisiana, Oklahoma, and New Mexico (none of which have EPA-approved NPDES programs) and oversight of Arkansas's approved program. *Id.*

318. *Id.*

319. *Id.* Wynne cautioned, however, that "making a direct comparison is impossible because of the many other intangible factors involved." *Id.*

320. *See Boyer & Meidinger, supra* note 37, at 870-72. Boyer and Meidinger explain that the wave of citizen suits in the 1980s was motivated, in part, by the perception that "the first Reagan Administration was rapidly undermining compliance with environmental laws." *Id.* at 870. This perception was fed by managerial turmoil at EPA, scandals forcing high-level EPA officials to resign, and by reductions in the numerical indicators used to measure compliance and enforcement. *Id.* Case referrals from EPA to the Department of Justice dropped dramatically, and investment in new pollution control equipment declined as well. *Id.* at 870-71. Boyer and Meidinger do note, however, that other forces played a part in the private enforcement movement, such as the leadership of the citizen suit movement and changes in beliefs relating to compliance and enforcement. *Id.* at 872. EPA critics at the time concluded that this lack of enforcement would result in a collapse in compliance and that

[i]n the long run the massive loss of voluntary compliance is the most harmful effect of this failure to implement the law in the 1980s. Once firms lose confidence that their competitors are complying, they too will stop. Regaining the confidence of hundreds of thousands of business operators is an enormously difficult, very expensive, and painfully slow undertaking. The nation's small force of environmental safety officers, armed with the key fairness argument that everyone should do their share, could deal effectively with a handful of noncompliers. Asking them to deal with almost everyone, especially with the fairness argument turned against them, is to ask the impossible and thereby insure failure.

Id. at 871 n.95.

prosecution of major polluters,³²¹ EPA strengthened its civil enforcement efforts, which rose to a peak in 1990, but have since declined.³²² This inadequacy in enforcement is not due to lack of a good faith effort, but because of significant resource limitations, which never will go away. In contrast, citizen suit activity has not diminished since its increase in the early 1980s, and now accounts annually for almost five times the number of judicial actions as the federal government, and is almost equal to the total of all state judicial actions combined.³²³

B. Civil Penalties, Economic Benefit, and Deterrence

1. *EPA and Civil Penalties: Theory vs. Practice.*—Because EPA and state enforcement resources are so limited, regulators must get the maximum deterrent impact from each enforcement action in order to motivate widespread voluntary compliance. To accomplish this, each action must reliably result in civil penalties that (1) deprive the violator of all economic benefits derived from the violations and (2) place the violator in a significantly worse position than it would have been if it had complied.³²⁴ Unfortunately, EPA resolves ninety percent of all CWA compliance actions by settlement. Settlement is the quickest and easiest method of meeting EPA case load volume performance criteria, but often results in penalties so low that the violators economically benefit from their violations.³²⁵ A review of EPA and state penalty practices between 1988 and 1990 by the GAO documented numerous cases in which EPA regional offices and states had not followed the Agency's penalty policy and had assessed low penalties, or

321. Miller, *supra* note 37, at 10,314. In late 1982 or early 1983, the Natural Resources Defense Council (NRDC) began a national CWA enforcement effort in response to the lack of EPA enforcement during the Gorsuch era. NRDC hoped to create new law, to show local groups that citizen suits could be brought on a sustained basis, and to embarrass EPA because of its terrible enforcement record. Interview with James Simon, Esq., then Director of the Enforcement Project of the Natural Resources Defense Council (Mar. 21, 1989). NRDC hoped that EPA might take steps to improve its record, and stop perceived deals between industry and EPA-approved states. *Id.* NRDC's approach was to pick a state, screen through the DMRs to find the most serious CWA violators, send out a 60-day notice of suit letter, attempt to negotiate settlements and then sue if necessary.

322. In FY 1989, EPA's peak year, EPA administrative actions and referrals to the Department of Justice under all environmental laws totaled 4500; in FY 1990, 4179; in FY 1991, 4318; FY 1992, 4028; and FY 1993, 4141. By comparison, in FY 1982, the figure was 976. Criminal enforcement has steadily risen from 20 referrals to DOJ in FY 1982 to 140 in FY 1993. ENFORCEMENT ACCOMPLISHMENTS FY 1993, *supra* note T-2 of Table 1, app. Historical Enforcement Data.

323. See *supra* Table 1, Civil Penalty Cases.

324. See *supra* notes 292-296.

325. Energy and Environment Study Institute, *EPA Enforcement Policies Reviewed*, ENERGY AND ENV'T STUDY INST. WKLY. BULL., June 17, 1991, at B11.

none at all, for significant violations.³²⁶ Although total penalties assessed by the Agency increased in FY 1990, the amounts, for the most part, still show little relationship to the economic benefit of the violation.³²⁷

For instance, in 65% of the 685 cases evaluated, EPA did not know the amount of the violator's economic benefit.³²⁸ This problem is even more pronounced when judicial cases are compared with administrative actions. Eighty percent of judicial cases documented the violator's economic benefit, while only twenty-five percent of the administrative cases, which comprise ninety percent of all EPA enforcement actions, had economic benefit information in the file.³²⁹ The Agency cannot collect the economic benefit derived if it does not know the amount. Significantly, in eighty-five percent of the cases in which the economic benefit calculations were documented, EPA's final penalty assessments were greater than or equal to the economic benefit enjoyed by the violator.³³⁰

Benefit recovery performance in the states is considerably worse than EPA's. The states, which are responsible for seventy percent of all government enforcement actions, regularly do not recover economic benefits through penalties.³³¹ GAO's review of some 1100 state enforcement actions in 1988 and 1989 revealed that over 50% of the violators paid no penalty at all, and those penalties which were assessed were far below the economic benefit enjoyed by the violator.³³² For example, a violator which exceeded its permit limits for over six years, ultimately was assessed a penalty of \$15,000 even though EPA calculated the economic benefit alone to be \$231,000.³³³ Two months later the facility again was violating its permit limits.³³⁴

When an administrative action results in a compliance order with no civil penalties, violators will often continue their pollution un-

326. GAO, ENVIRONMENTAL ENFORCEMENT, *supra* note 181, at 4. The reviews covered NPDES, pretreatment, oil pollution, Clean Air Act, and Resource Conservation and Recovery Act (hazardous waste) programs, covering 10 EPA regions, 22 states, 685 EPA cases, and 1100 state actions. *Id.* at 4-6.

327. *Id.* at 5. These results hold true for penalties assessed by EPA and, according to available data, for state penalties as well. *Id.*

328. *Id.*

329. *Id.* at 6.

330. *Id.*

331. *Id.* at 1. States fail to do so even though in the absence of adequate penalties violators repeat their violations. *Id.*

332. *Id.* at 6.

333. *Id.* at 6-7. EPA did not intervene in the case on the grounds of inadequate penalty. See discussion *supra* Part III.C.3.

334. *Id.* at 7.

abated, causing serious environmental contamination, and economic hardship to the public and competitors. A prominent example is Avtex, a company in serious violation of several environmental laws for over nine years, with almost 2400 documented violations and several state administrative orders against it.³³⁵ The state did not revoke the facility's permit until it discovered that the facility was discharging a toxic substance, PCBs, into the local water.³³⁶ The company is now bankrupt, the site is on EPA's National Priority List under CERCLA, and the clean up costs will be extremely expensive.³³⁷ These public damages were compounded by the market distortion caused by inadequate enforcement. One competitor complained that it had spent over \$30 million on pollution control equipment, but Avtex did not and thereby was able to underprice the law-abiding competitor in the rayon market.³³⁸

The GAO report noted that, in interviews, EPA staff supported a strong penalty policy that could serve as a deterrent to violations and a leveler of the economic playing field. At the same time, however, the GAO found, for a variety of reasons, a poor prognosis for improvements in penalty assessment and EPA oversight of state penalties.³³⁹ First, EPA has limited civil enforcement resources, which are likely to decrease in the foreseeable future.³⁴⁰ Second, EPA standards for mea-

335. *Id.*

336. *Id.*

337. *Id.*

338. *Id.*

339. *Id.* at 4, 14.

340. *Id.* at 10. The only recent increase in enforcement resources has been in criminal investigation and prosecutions, where EPA is best able to leverage enforcement activity into public warnings that increase deterrence. The Federal Sentencing Guidelines make it probable that defendants will receive significant terms of imprisonment. As the one penalty that owners and operators of violating facilities cannot pass on to customers, imprisonment deters egregious violations. *See, e.g.,* United States v. Ferrin, 994 F.2d 658 (9th Cir. 1993); United States v. Rutana, 932 F.2d 1155 (6th Cir. 1991); United States v. Bogas, 920 F.2d 363 (6th Cir. 1990). However, criminal prosecution for relatively "minor" violations may be a nuclear deterrent: too big a weapon to motivate widespread voluntary compliance. Arbitrary, scattered use of criminal enforcement powers may be viewed as an abuse of the moral authority behind environmental laws which may create a backlash of resistance to the appropriateness of the substantive environmental laws. Pollution harms human health and the environment, but its regulation is perceived as burdening productive economic behavior. The result is moral ambiguity in environmental laws which declare almost all civil violations to be criminal, (*e.g.,* CWA § 309(b)) but which do not clearly distinguish in the statute between bad or morally offensive conduct (criminal) and civil violations. This wide criminal net may prevent "bad" violators from avoiding government prosecution on a technicality, but in preventing loopholes the law expands the universe of "criminal" conduct to include almost all civil violations. To the extent the government overuses criminal tools by prosecuting activity that is beyond public agreement on what is morally offensive or deviant behavior worthy of criminal prosecution, it may lose public

sureing state performance create enormous pressure to settle cases quickly through routine compliance orders and penalties small enough to avoid challenge by the violator because of the premium placed on the numbers of cases resolved.³⁴¹

To assess an appropriate penalty takes considerable time and effort. The economic benefit calculation is information intensive, requiring extensive documentation from the violator as well as expert evaluation of the acquisition, operation, and management costs of the proper equipment for compliance and pollution reduction.³⁴² Then the gravity penalty factors must be considered. This analysis is time consuming and labor intensive for the litigants and for the judicial or administrative decision-maker.³⁴³ Because EPA's resource allocation to the states is determined by EPA's "timely and appropriate" action criteria, states are reluctant to delay settlements merely to obtain higher penalties.³⁴⁴ Moreover, as states make higher penalty assessments, the stakes to the discharger rise proportionately, motivating the discharger to litigate both its liability and the penalty more vigor-

support. Hawkins suggests that "the formal processes of the law . . . be employed only where a regulatory agency can be sure they rest upon the secure foundation of a perceived moral consensus." HAWKINS, *supra* note 68, at 207; see also HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 249-59, 356-63 (1968) (questioning the wisdom of using criminal sanctions to enforce economic regulation by making regulated business practices "immoral" that were previously accepted as routine); Richard J. Lazarus, *Assimilating Environmental Protection into Legal Rules and the Problem with Environmental Crime*, 27 *LOY. L.A. L. REV.* 867, 879-91 (1994) (concluding that environmental law has assimilated so poorly into criminal law because policy makers have done a poor job of considering the values, purposes and limitations of criminal law; instead, they have "criminalized virtually all environmental violations" and, in addition, prosecutors have shown a lack of expertise in both environmental law and criminal enforcement).

341. Marsh Remarks, *supra* note 112.

342. This evaluation includes review of corporate environmental management practices generally, so that equipment is not merely installed, but properly operated and maintained over time.

343. Merely mastering EPA's extensive penalty policies and guidance documents is a major undertaking. For examples of judicial efforts in assessing penalties that suggest the amount of work involved, see *Natural Resources Defense Council, Inc. v. Texaco Ref. & Mktg., Inc.*, 800 F. Supp. 1 (D. Del. 1992), *aff'd in part, rev'd in part*, 2 F.3d 493 (3d Cir. 1993); *Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc.*, 720 F. Supp. 1158 (D.N.J. 1989), *aff'd in part, rev'd in part*, 913 F.2d 63 (3d Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991); *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 611 F. Supp. 1542 (E.D. Va. 1985), *aff'd*, 791 F.2d 304 (4th Cir. 1986), *vacated*, 484 U.S. 49 (1987).

344. Marsh Remarks, *supra* note 112. State agencies also wish to avoid being accused of funding their operations with civil penalties; such accusations are possible even if the penalties go into the general fund. See Gerald Esposito, Director of Water, Delaware Department of Natural Resources and Environmental Conservation, Lecture on State Perspectives on Enforcement of Environmental Law at Widener University School of Law (Nov. 25, 1992) [hereinafter Esposito Lecture]; Spalding Remarks, *supra* note 108.

ously. This more intensive litigation absorbs precious enforcement resources, thereby reducing the volume of cases the state can pursue.³⁴⁵

The same pressures created by litigation exist in each of EPA's regions, which results in widely divergent penalty practices across the regions.³⁴⁶ For instance, in Fiscal Year 1991, the mean judicial penalty nationally was \$100,000 but the mean administrative penalty nationally was only \$12,000. Moreover, the disparity of median civil penalties by region was enormous, ranging, for judicial penalties, from a low of \$5000 to a high of \$450,000, and for administrative penalties, from a low of \$6433 to a high of \$57,000.³⁴⁷

The pressures created by the costs of litigation apply to an even greater extent when an agency is deciding whether to pursue a case judicially or administratively. By its very nature, judicial litigation is much more time consuming and labor intensive than administrative litigation. Also, to get to court, EPA must refer cases to DOJ, which means convincing another agency to pursue the case, a time consuming and unpleasant process that is only successful an average of seventy-eight percent of the time.³⁴⁸ Additionally, because the median 1992 judicially assessed penalty was 37.5 times larger than the median

345. Additionally, as the stakes rise for future violations, astute dischargers may fight stringent permit terms more vigorously to minimize compliance thresholds and thereby reduce violations and exposure to enforcement sanctions.

346. COMPLIANCE POLICY AND PLANNING BRANCH, U.S. ENVTL. PROTECTION AGENCY, MANAGEMENT REPORT ON EPA FEDERAL PENALTY PRACTICES FY 1991 26 (1992).

347. *Id.*

<u>Median Judicial Penalties</u>		<u>Median Administrative Penalties</u>	
Region 7	\$5,000	Region 4	\$6,433
Region 10	5,000	Region 10	7,000
Region 6	25,000	Region 9	9,000
Region 8	70,000	Region 2	12,000
Region 2	100,000	Region 8	12,750
Region 3	105,000	Region 6	15,000
Region 1	106,000	Region 1	18,000
Region 5	115,000	Region 7	30,808
Region 4	124,944	Region 5	50,000
Region 9	450,000	Region 3	57,500

348. ENFORCEMENT ACCOMPLISHMENTS FY 1992, *supra* note 33. DOJ data reports a success rate of 83%. DOJ STATISTICAL REPORT FY 1993, *supra* note 35, at 47. Neither EPA nor DOJ report how many case referrals DOJ declines to prosecute. However, a comparison of EPA referral statistics with DOJ case filing statistics shows that DOJ files fewer cases in federal court than EPA refers to it:

administrative penalty,³⁴⁹ violators are much more likely to resist litigation forcefully. However, only judicially assessed penalties have a deterrent effect. The public nature of the large penalty assessments leads to their rapid dissemination to environmental lawyers and their clients, which immediately deters violations by others who wish to avoid the expense and public humiliation of judicially assessed penalties. In contrast, administratively assessed penalties are both too small and too private to motivate voluntary compliance.

For all practical purposes, administrative enforcement activity is not subject to public scrutiny;³⁵⁰ thus there is no independent public check on state and federal enforcement practices. In comparison, the judicial actions are open to the public. The DOJ policy to settle CWA cases only by consent orders signed by a district court judge enhances the public nature of judicial enforcement. Moreover, DOJ will not even submit the consent order to the court until it has given the public notice of the proposed settlement in the Federal Register and an opportunity to comment, a process which may cause DOJ or the court

<u>Fiscal Year</u>	<u>EPA Referrals</u>	<u>DOJ Case Filings</u>	<u>% of EPA Cases Filed</u>
1993	84 (DOJ reports only 57 referrals)	39	46.4% (68.4% using DOJ data)
1992	77	56	72.7%
1991	91	83	91.2%
1990	87	72	82.7%
1989	94	87	92.5%

349. ENFORCEMENT ACCOMPLISHMENTS FY 1992, *supra* note 33, app. National Penalty Report FY 1992, at 10.

<u>Fiscal Year</u>	<u>Judicial Median Penalty</u>	<u>Administrative Median Penalty</u>	<u>Difference</u>
1992	\$225,000	\$6,000	37.5 times
1991	\$100,000	\$12,000	8.3
1990	\$63,000	\$10,650	6
1989	\$55,000	\$10,000	5.5

Id.; ENFORCEMENT ACCOMPLISHMENTS FY 1991, *supra* note T-7 of Table 1, app. National Penalty Report FY 1991, at 11; OVERVIEW OF PENALTY PRACTICES, *supra* note T-9 of Table 1. EPA's FY 1993 enforcement report does not include this data for 1993.

350. For instance, the Freedom of Information Act (FOIA) specifically exempts from disclosure most records and information compiled for law enforcement purposes. 5 U.S.C. § 552(b)(7) (1988). Although CWA § 309(g)(4), 33 U.S.C. § 1319(g)(4) mandates public notice and opportunity to comment on contested administrative penalty actions, the same is not true of many state programs. Moreover, for EPA and the states, administrative compliance orders are negotiated, drafted and executed outside of the public's eye. See, e.g., *Brant Constr. Co. v. EPA*, 778 F.2d 1258 (7th Cir. 1985).

to rethink the settlement terms.³⁵¹ Additionally, the district court judge may sign the consent order only if it is in the public interest.³⁵²

2. *States and Civil Penalties: The Unsupervised "Race to the Bottom."*—Not only are state administrative penalty matters essentially hidden from public view, but many states simply do not believe in using civil penalties for past noncompliance. Rather, they believe public policy is better served when they work with violators to obtain compliance.³⁵³ A typical example is Delaware, where the environmental agency is less interested in assessing penalties than in protecting natural resources, and as a matter of policy, is willing to forego or reduce civil penalties to obtain compliance schedule agreements.³⁵⁴ This philosophy is particularly understandable in a state where about twenty-five percent of the NPDES permittees are municipalities with limited staffs and budgets and political leaders that have strong political influence in the state.³⁵⁵ Even if such a state agency could force municipalities to comply with their permits, assessing significant civil penalties, which get passed on to voters, is difficult politically.³⁵⁶

A significant number of states are reluctant to impose civil penalties for fear of creating a bad business climate.³⁵⁷ These states view civil penalties as causing present businesses to leave while dissuading other businesses from moving into the state. Businesses may perceive stringent state enforcement, such as large visible civil penalties, as creating a bad business environment, particularly if other states use lax enforcement as a lure for business relocation. These competitive fears even drive environmental enforcement behavior at the local government level, where publicly owned treatment works (POTW), the CWA

351. See, e.g., *United States v. Telluride Co.*, 849 F. Supp. 1400, 1404 (D. Colo. 1994) (noting EPA reaction to public comments on a proposed consent order); 28 C.F.R. § 50.7 (1994).

352. *Id.* at 1401-02; see also *Utah v. Kennecott Corp.*, 801 F. Supp. 553, 567 (D. Utah 1992), *appeal dismissed*, 14 F.3d 1489 (10th Cir. 1994).

353. GAO, ENVIRONMENTAL ENFORCEMENT, *supra* note 181, at 2.

354. Esposito Lecture, *supra* note 344.

355. Gerald Esposito, Director of Water, Delaware Department of Natural Resources and Environment, Address to Environmental Law Section, Delaware State Bar Association (Oct. 10, 1992). These political leaders typically try to resist complying with orders agreed to by prior administrations. *Id.*

356. See, e.g., *Proffitt v. Lower Bucks County Mun. Auth.*, No. Civ. A. 86-7220, 1988 WL 48552 (E.D. Pa. 1988), *rev'd*, 877 F.2d 57 (3d Cir. 1989); *United States v. Puerto Rico Aqueduct and Sewer Auth.*, 25 *Env'tl. Rep. Cas.* (BNA) 1921 (D.P.R. 1987).

357. GAO, ENVIRONMENTAL ENFORCEMENT, *supra* note 181, at 8. One North Carolina official told GAO that assessing economic benefit-based civil penalties against a violator might put the facility at a competitive disadvantage with businesses in states without an economic benefit penalty policy. See also Marsh Remarks, *supra* note 112; Spalding Remarks, *supra* note 108.

euphemism for public sewage treatment plants, are often reluctant to assess penalties on industrial dischargers that violate federal, state, or POTW-established pretreatment standards and indirect discharger limitations.³⁵⁸ These dischargers are often significant employers in the community and are necessary sources of the POTW's user fees, neither of which a municipality wishes to jeopardize. Because municipalities know that states are unlikely, for obvious and powerful political reasons, to enforce diligently violations by a POTW of its NPDES permit or of its indirect discharger program, the municipality has little motivation to enforce stringently against its economically and politically important users. If the POTW's pollution is sent downstream, the community derives no local benefit from enforcement. It is thus not surprising that most of the significant industrial users of POTWs are in violation of some federal requirements.³⁵⁹

This local ambivalence towards enforcement is mirrored in the similarly ambivalent relationship between EPA and the states regarding economic benefit penalty policies. Although we may now have uniform, federal, technology-based, minimum standards for water pollution from point sources, states retain almost unbridled enforcement discretion. EPA merely encourages, but does not require, states to adopt a penalty policy that recovers the economic benefit of noncompliance. Not surprisingly, less than half of the approved state programs have adopted such penalty policies, and the remaining approved states are unlikely to do so.³⁶⁰

Even within EPA, views on penalties differ. Some regions strongly endorse the EPA penalty policy, while others de-emphasize penalties in favor of working with violators to obtain compliance, ostensibly in the belief that this approach will bring a larger number of facilities into compliance.³⁶¹ Unfortunately, this latter approach often signals to the regulated community that it need not comply until enforce-

358. Industries that send their water pollution to POTWs for treatment are regulated by the CWA's indirect discharger program. See CWA § 307(b)-(e), 33 U.S.C. § 1317(b)-(e).

359. STATISTICAL ASSESSMENT, *supra* note 20, at 2-2. Of the more than 15,000 POTWs in the United States only about 1500, the major plants which receive an estimated 82% of the industrial wastewater sent to POTWs, are required to implement pretreatment programs. The remaining 18% of the industrial indirect discharges escape all pretreatment requirements. According to Professor Houck, "[v]irtually every review of the pretreatment program has rated it a failure." Oliver A. Houck, *Ending the War: A Strategy to Save America's Coastal Zone*, 47 MD. L. REV. 358, 386 (1988). He concludes, "Even the most vigorous defender of federalism has to blush at a program that turns the responsibility for regulating nearly half the toxic pollution discharged in this county over to 15,000 disparate, local POTWs." *Id.* at 387-88.

360. GAO, ENVIRONMENTAL ENFORCEMENT, *supra* note 181, at 2.

361. *Id.*

ment begins. As the regulated community recognizes that EPA and the states are unlikely to take them to court or even to an administrative hearing, violators will be less willing to settle on terms favorable to the government, thus further undermining the economic incentive to comply voluntarily. This failure to settle in turn increases the work load on already overworked agency enforcement staff. Moreover, the numerical program targets, such as the number of enforcement matters handled in a year, that are the performance measurement criteria for individual staff members and for the agency as a whole, motivate quick settlements with low penalties in lieu of extended litigation.

Finally, from an information-management perspective, it is unlikely that EPA oversight of regional or state penalty practices will or can improve significantly because EPA headquarters has insufficient information with which to oversee regional practices, let alone the state practices. Audits and reviews of penalty practices are labor intensive and time consuming. Economic benefit or gravity penalty analysis documentation often does not exist, particularly in administrative cases. Penalty reviews are so infrequent and so individually detailed, that the reviews cannot discover overall patterns and trends in programs, regions, or states.³⁶² Moreover, EPA does not collect gravity penalty component analyses or explanations as to why the penalty in the final settlement was reduced from the minimum economic benefit and gravity based penalty.³⁶³ Finally, EPA oversight of trends in the states is virtually non-existent. EPA does not collect data on state penalty practices, and the information is not easily available, if at all, from the state agencies themselves.³⁶⁴

V. THE ROLE OF CITIZEN ENFORCEMENT IN THE TRIANGULAR FEDERAL SYSTEM

In addition to the allocation of responsibility between federal and state governments, the CWA also allocates enforcement power among the public and private sectors by giving private citizens authority to enforce under CWA section 505.³⁶⁵ This section of the Article will examine the federal/citizen and the state/citizen legs of the CWA enforcement triangle to determine whether citizens, as private attorneys general, are fortifiers of the national enforcement of a national law to achieve national goals, or whether they are secondary enforcers sub-

362. *Id.* at 9.

363. *Id.* This data would be collected in EPA's regional case data on minimum economic benefit calculations. *Id.*

364. *Id.* at 30.

365. 33 U.S.C. § 1365.

servient to state enforcement policies—policies that define the CWA as a state-oriented law whose enforcement is suppressed by economic competition among states. In conducting this analysis, this part of the Article will first outline citizen suit authority under section 505. The Article next will discuss the evolving role of citizen suits as the nation's CWA enforcement safety net, including an empirical comparison of government and citizen suit activity and an analysis of the policy issues surrounding citizen enforcement. Then the Article will discuss the major legal obstacles to citizen suits created when government and citizen enforcement efforts overlap. Finally, the Article will suggest changes in the law that will best promote the continued, healthy participation of citizens in the enforcement system as a valuable, necessary partner with federal and state governments.

A. *Citizen Suits in the CWA Enforcement Structure*

Since 1972, the CWA has authorized citizens to act as private attorneys general to enforce CWA violations that EPA or the states were unwilling or unable to prosecute.³⁶⁶ Congress included the citizen suit power so 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."³⁶⁷ This power remained largely dormant until EPA slashed its CWA enforcement efforts in the early 1980s.³⁶⁸

Public interest environmental groups such as Natural Resources Defense Council, Sierra Club Legal Defense Fund, New Jersey Public Interest Research Group, and others responded by actively using CWA citizen suits as an enforcement tool³⁶⁹—exactly as Congress had in-

366. *Id.*

367. S. REP. NO. 414, 92d Cong., 2d Sess. 64 (1972), *reprinted in* 1972 U.S.C.A.N. 3668, 3730 (emphasis added).

368. In late 1983, GAO reported a significant decline in federal enforcement, U.S. GENERAL ACCOUNTING OFFICE, GAO/RCED-84-53, WASTEWATER DISCHARGERS ARE NOT COMPLYING WITH EPA POLLUTION CONTROL PERMITS (1983), a fact EPA publicly acknowledged a few months later:

[R]egardless of how one measures, regardless of how one counts, regardless of whether you look at the permittees in a particular category over 3 months, 12 months or 18 months, the trend is, in fact, the same: We continue to see a significant degree of noncompliance by permittees and we continue to see EPA and the States falling behind in their workload.

Hearings on Implementation of the Federal Clean Water Act Before the Subcomm. on Investigation and Oversight of the House Comm. on Public Works and Transportation, 98th Cong., 2d Sess. 51 (1984) (testimony of Jack E. Ravan, Assistant Administrator for Water, EPA).

369. Prior to this, citizen suits were primarily "agency-forcing," in that they were brought against EPA under CWA § 505(a)(2) for its failure to perform a nondiscretionary duty, such as the timely promulgation of congressionally mandated regulations. 33 U.S.C.

tended: "Citizen suits are a proven enforcement tool. They operate as Congress intended—to both spur and [as a] supplement to government enforcement actions. They have deterred violators and achieved significant compliance gains."³⁷⁰

The burst of citizen suit activity in the early 1980s did spur EPA's enforcement. EPA judicial enforcement efforts rose dramatically, from 37 referrals to DOJ in FY 1981, to a high of 123 in FY 1988, but has dropped steadily since then to 57 referrals in FY 1993.³⁷¹ Given EPA's limited CWA enforcement resources, the Agency's current efforts are at peak capacity, and it is unrealistic to expect its CWA enforcement resources or its level of activity to increase in the future.³⁷² State judicial enforcement activity has followed a pattern similar to the experience at EPA. In 1985, the first year for which data is available, states brought 137 judicial actions, rising to a high of 687 in FY 1988, and dropping steadily thereafter to 204 in FY 1992 although rising to 383 actions in FY 1993.³⁷³ These state enforcement statistics are aggregated numbers; in fact, some states, particularly many in the South and Southwest, bring few enforcement actions against CWA violators.³⁷⁴ In comparison, citizen suit activity in FY 1981 generated only six 60-day notices, which rose to 178 in FY 1984, and since the late 1980s, citizen activity has generated between 200 and 300 notices per year.³⁷⁵ Given the limited resources of most states, weak programs in many states facing increased unfunded federal mandates, and the funding and political pressures in states with strong programs, state enforcement activity certainly will not increase, and may in fact decrease, particularly if a race-to-the-bottom begins in earnest. More-

§ 1365(a)(2). See, e.g., *Sierra Club v. Thomas*, 828 F.2d 783 (D.C. Cir. 1987) (attempting to require EPA to place strip mines on list of pollutant sources); *Natural Resources Defense Council, Inc. v. Train*, 545 F.2d 320 (2d Cir. 1976) (requiring EPA to place lead on its list of air pollutants); *Sierra Club v. Ruckelshaus*, 602 F. Supp. 892 (N.D. Cal. 1984) (compelling promulgation of regulations covering radionuclide emission standards).

370. S. REP. NO. 50, 99th Cong., 1st Sess. 28 (1985).

371. ENFORCEMENT ACCOMPLISHMENTS FY 1993, *supra* note T-2 of Table 1, app. Historical Enforcement Data; DOJ STATISTICAL REPORT FY 1993, *supra* note 35, at 47. DOJ reports that EPA referred 57 CWA civil cases in FY 1993, but EPA's report indicates that it referred 84 civil water cases. No explanation is given for this difference, but it may be explained by EPA's inclusion of cases arising under the Safe Drinking Water Act and other non-CWA matters in its water referral statistics.

372. Telephone Interview with Mary St. Peter, Attorney/Adviser, Office of Enforcement for Water, EPA (Mar. 28, 1994) [hereinafter St. Peter Interview].

373. ENFORCEMENT ACCOMPLISHMENTS FY 1993, *supra* note T-2 of Table 1, app. Historical Data. Although state and federal water-related judicial referrals increased in FY 1993, the increase may have been at the expense of Clean Air Act judicial enforcement, which dropped about 33% in the states and over 45% at the federal level. *Id.*

374. St. Peter Interview, *supra* note 372.

375. *Id.*

over, for obvious budgetary reasons, EPA oversight of state programs is not likely to increase. At present, EPA rarely overfiles when an approved state has taken some action; if the state has obtained a consent order with a compliance schedule, EPA is unlikely to act simply because no or low civil penalties are assessed.³⁷⁶

Amazingly, as of 1993, citizen suit judicial enforcement nearly equalled all CWA judicial enforcement efforts brought throughout the nation by all the states and the federal government combined.³⁷⁷ Because of the realities of enforcement at the federal level, EPA and DOJ have become openly supportive of citizen suits, which significantly augment federal government enforcement efforts.³⁷⁸ However, because EPA efforts are insufficient to level the national enforcement playing field, states trying to create or maintain favorable business climates do not welcome the supplemental efforts of citizen suits, and in fact, these states are openly hostile to citizen efforts to challenge *de minimis* state enforcement.

Studies of state enforcement have documented the serious inadequacies of their enforcement efforts—even in states considered to be committed to environmental protection.³⁷⁹ A review of these studies reveals that:

- a) discharge violations, even if chronic, are routinely ignored;
- b) reporting violations, particularly omissions of pollution discharge data, are treated by government regulators as unimportant and are largely unenforced;
- c) noncompliance levels are high;
- d) enforcement actions are usually limited to telephone calls or notice of violation letters; and
- e) citizens use the CWA citizen suit provisions to bring violators into compliance when state and federal agencies have failed to do so.³⁸⁰

376. *Id.*

377. *See supra* Table 1.

378. ENFORCEMENT IN THE 1990s, *supra* note 121, at 5-5.

379. For a list of studies, see sources *infra* note 380.

380. *Reauthorization of the Federal Water Pollution Control Act: Hearings Before the Subcomm. on Water Resources of the House Comm. on Public Works and Transportation*, 102d Cong., 1st Sess. 1716-27 (1991) [hereinafter *House Hearings*] (testimony of Robert Stuart, Program Director, New Jersey Public Interest Research Group). The written statement accompanying the testimony noted that it was based on the following reports:

CALIFORNIA PUBLIC INTEREST RESEARCH GROUP, DUMPING ON THE CLEAN WATER ACT: A CALIFORNIA PUBLICLY OWNED TREATMENT WORKS SURVEY (1988); ILLINOIS PUBLIC INTEREST RESEARCH GROUP, AN INVESTIGATION OF CLEAN WATER ENFORCEMENT IN ILLINOIS (1988); INFORM, INC., TRACING A RIVER'S TOXIC POLLUTION: A CASE STUDY OF THE HUDSON (1985); NEW JERSEY PUBLIC INTEREST RESEARCH GROUP (NJPIRG), POLLUTERS PLAYGROUND: AN IN-

One of the important lessons citizen suits have taught is that "private industry, left to its own initiative, will procrastinate indefinitely, even at the expense of the environment, [and] the government agencies empowered with protecting the environment are far from diligent in that regard."³⁸¹ Only from the impetus of citizen suits do government agencies take meaningful enforcement action.

Unfortunately, when the government takes an enforcement action, it does not mean necessarily that CWA violations actually end. Typical federal and state enforcement consists of administratively issued consent orders comprised of extended compliance schedules and *de minimis* civil penalties, under which pollution can remain unabated for years.³⁸² Violations of the compliance schedules in the orders are often met with wrist slaps and further lengthy extensions.³⁸³ Because EPA records consider a discharger subject to a compliance order as being in compliance, despite unabated pollution during the life of the order, compliance schedules can also lead to government

VESTIGATION OF WATER POLLUTION VIOLATIONS IN NEW JERSEY (1988); NJPIRG, ENFORCEMENT UNDER THE FEDERAL WATER POLLUTION CONTROL ACT BY THE U.S. ENVIRONMENTAL PROTECTION AGENCY REGION II, 1975-1980 (1981); PROJECT ENVIRONMENT FOUNDATION, ENVIRONMENTAL AUDIT: A REPORT ON THE WATER QUALITY DIVISION OF THE MINNESOTA POLLUTION CONTROL AGENCY (1990); SAVE THE BAY, INC., ZERO TOLERANCE: REDUCING TOXIC POLLUTION IN NARRAGANSETT BAY (1989); SAVE THE BAY, INC., DOWN THE DRAIN: TOXIC POLLUTION AND THE STATUS OF PRETREATMENT IN RHODE ISLAND (1986); and WATERSHED ASSOCIATION OF THE DELAWARE RIVER, PROJECT OUTFALL: AN INVESTIGATION OF MUNICIPAL SEWAGE TREATMENT PLANTS IN THE DELAWARE RIVER WATERSHED (1990).

381. Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc., 720 F. Supp. 1158, 1163-64 (D.N.J. 1988), *aff'd in part, rev'd in part*, 913 F.2d 64 (3d Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991). In this citizen suit, which resulted in a civil penalty payable to the United States of \$4.2 million, *id.* at 1160, and injunctive relief, *id.* at 1159, the violator consented in 1977 to an EPA order to upgrade its water treatment plant and to pay a \$10,000 civil penalty for past violations. *Id.* at 1164. When seven years later the violator had not upgraded its plant and was still regularly violating the CWA, the citizens filed suit. *Id.* at 1165. Three years later, as a result of the citizen suit, and fully 10 years after EPA's consent order, the violator finally began to install its treatment plant upgrades. *Id.* at 1162.

382. *See id.* at 1159-60.

383. *See, e.g., id.*; *see also* Arkansas Wildlife Fed'n v. ICI Americas, Inc., 29 F.3d 376 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1095 (1995). In this case, a state agency sent the violator notices of discharge violations from 1988 to 1991, *id.* at 377, and entered into an Administrative Consent Order in 1991 calling for compliance and a \$1,000 civil penalty. *Id.* at 378. The agency amended the order several times, extending the compliance date to late 1993, eliminating the effluent limitation for zinc (the toxic pollutant of concern in the case), and imposing a *de minimis* \$500 civil penalty for each extension. *Id.* These penalties were to cover all violations of both the CWA and the consent order for the previous 5 years. *Id.* Because the *de minimis* penalties were consistent with standard state practice, the court held that they reflected diligent prosecution of an enforcement action by the state agency. *Id.* at 380.

reports overstating the levels of compliance across the country.³⁸⁴ If one were to include these dischargers on current lists of significant noncompliers, then the reported level of noncompliance would jump dramatically. Such a calculation for major municipal dischargers revealed large increases in rates in Pennsylvania, Texas, Maryland, Hawaii, and in virtually all other states reviewed.³⁸⁵

Most troubling is that the compliance orders, which enable violators to delay compliance and to avoid civil penalties for present and past violations, are often prompted by the state's and polluter's desire to preempt citizen suits after the polluter receives a 60-day letter. Many states routinely preempt citizen suits by entering into mild enforcement consent orders after the citizen group sends 60-day notices to a violator who had not been previously subject to state enforcement attention.³⁸⁶ Because states know that EPA resources are so thin that EPA will not overfile or interfere,³⁸⁷ they can easily keep enforcement lax while simultaneously preempting citizen suits, particularly in light of several recent court decisions hostile to citizen enforcement.³⁸⁸ The result is growing demoralization among public interest groups, diminished deterrence of violators, corrosion of the nation's enforcement system, and marked increase in EPA reliance on criminal enforcement to optimize the deterrent effect of limited EPA enforcement resources.³⁸⁹ To the extent the law permits weak consent orders to preempt citizen enforcement, the danger exists that the

384. EPA Inspector General John Martin has testified that:

Another peculiarity of the [EPA non-compliance] reporting system is that once a violating facility agrees to take corrective action to bring it back into compliance, it is taken off the list of violators. This occurs even though the facility may be discharging the same level of pollutants as when it was on the list of [significant] non-compliers. The violating facility is not reported on the list of significant non-compliers as long as it is meeting an agreed upon schedule, although final corrective action may be years away.

Senate Hearings, supra note 1, at 688 (testimony of John Martin).

385. *House Hearings, supra* note 380, at 1719-20 (testimony of Robert Stuart). In Hawaii, the rates rose from 0% to 36%, in Maryland from 2% to 31%, in Pennsylvania from 7% to 36%, and in Texas from 7% to 15%. *Id.*

386. *See, e.g., Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 1995 WL 311983 (D.S.C. Apr. 7, 1995) (where a polluter's attempt to preempt a citizen suit by drafting a complaint, filing it in court, and paying the filing fee for the state's judicial action against the polluter).

387. Even if EPA desired to overfile, its efforts might be precluded by *res judicata* or by CWA § 309(g)(6), 33 U.S.C. § 1319(g)(6), or impaired by a district court's discretionary stay of the action. *See* discussion *supra* Parts III.D.2, D.4.

388. *See infra* Part V.D.1.

389. *See* ENFORCEMENT ACCOMPLISHMENTS FY 1992, *supra* note 33, app. Historical Enforcement Data (showing increase in EPA criminal referrals from 20 in FY 1982 to 107 in 1992).

power of citizen suits to spur enforcement and supplement government efforts will be lost.

On the other hand, some commentators worry that citizen suits, which enforce formally established, legally binding permit terms, may discourage innovation by interfering with nonpublic, informal understandings between EPA and the regulated community. As a result, they speculate that a mechanism under which industry may be willing to try new pollution control technology may be lost.³⁹⁰ However, these fears are unfounded because permits and even consent orders can be written to allow innovation, and when done properly—following the public processes of notice and opportunity to comment—will shield the dischargers from any citizen suits.

Other critics complain that CWA citizen suits brought by the “environmentalist enforcement cartel” are economically inefficient.³⁹¹ This “overenforcement” then begets pollution control expenditures whose costs exceed the marginal benefits to society from the reduced pollution, and thus diminishes the power of governmental discretion to achieve economic efficiency by selectively not enforcing CWA violations.³⁹² However, when Congress amended the pre-1972 FWPCA by enacting the CWA, it specifically abandoned the prior water quality based system, which placed judgments about the economically efficient use of the nation’s waters in the hands of waste discharges and government enforcers and which was utterly unenforceable.³⁹³ Instead, Congress designed the CWA to require EPA to consider economic efficiency of effluent limitations on an industry-wide basis. This consideration is made at the regulatory stage after public notice and opportunity for comment, when EPA promulgates regulations establishing national uniform minimum requirements to be imposed on every discharger in that industrial category.³⁹⁴

390. See, e.g., Greve, *supra* note 37, at 380 n.175 (“Pollution control equipment is often installed on the basis of informal understandings between EPA and regulated firms. Such understandings provide a means of advancing complicated technology. . . . The threat of private enforcement proceedings may thwart such agreements . . .”). Blomquist, *supra* note 41, at 404 (discussing arguments that “highlight the detrimental impact that citizen suits can have on the informal administrative process of give and take, where sound regulatory standards require time, judgment, and efficient adjustment based on a number of bargained-for practical considerations”).

391. Greve, *supra* note 37, at 344-46.

392. *Id.*; see also Krent & Shenkman, *supra* note 41, at 1808-14.

393. See *supra* notes 3-11 and accompanying text.

394. See *EPA v. National Crushed Stone Ass'n*, 449 U.S. 64, 73-78 (1980) (holding that EPA is not required by the CWA to consider economic capability in granting variances from its uniform standards); *E.I. duPont de Nemours & Co. v. Train*, 430 U.S. 112, 136 (1977) (holding that EPA has the authority under the CWA to issue industry-wide regulations limiting discharges by existing chemical manufacturing plants); *Weyerhaeuser v.*

Thus, the argument that the CWA should be made economically efficient through the use of selective, discretionary government enforcement, shifts the power to establish legislative guidelines from Congress to prosecutors.³⁹⁵ Even if government prosecutors were charged with the responsibility to make the CWA economically efficient, it would be just as hard to provide the necessary level of incentives and criteria to enforcers to undertake an economically optimal level of enforcement as it would be to draft environmental regulations that are neither economically over-controlling nor under-controlling.³⁹⁶ Additionally, in empowering citizens as private attorneys general to enforce CWA permit violations, Congress intended to limit the ability of those in the regulated community to "capture" their regulating agencies.³⁹⁷ Congress did not want the regulated community to use enforcement fora to debate, litigate or even raise economic efficiency issues that EPA had resolved in its regulations.

Those who see the CWA as comprised of underinclusive rules and negligible enforcement dismiss the economic efficiency criticism of citizen suits: "Where economists (and to some extent, representatives of the regulated industries) see the regulatory system caught up in rigid rules and inefficient enforcement policies, observers who are more sympathetic to the regulatory mission of the EPA instead see laxity, indecision and drift."³⁹⁸ Others find citizen enforcers merely to

Costle, 590 F.2d 1011, 1019-20 (D.C. Cir. 1978) (holding that if the cost/benefit relationship of regulations is consistent throughout an industry, then EPA may impose uniform regulations on an operator without regard to whether the operator can absorb the added costs); see also Sanford E. Gaines, *Decisionmaking Procedures at the Environmental Protection Agency*, 62 IOWA L. REV. 839, 842-64 (1977) (reviewing EPA's rule-making process under the CWA as illustrated by the development of effluent guidelines for the corn wet milling industry).

Economic efficiency is not a factor in the subsequent drafting or enforcement of NPDES permits. Rather, NPDES permits simply incorporate EPA's national standards and any more stringent water quality requirements by defining explicit, numerical effluent limitations. Violations of such permits result in strict liability and are easily enforced.

395. Similarly, Justice Stevens has expressed concern over whether federal courts could decline to use their discretionary equitable powers to enjoin undisputed violations of the CWA. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 330-31 (1982) (Stevens, J., dissenting).

396. Boyer & Meidinger, *supra* note 37, at 880-84.

397. According to capture theory, an agency is

co-opted by those it seeks to regulate, incorporating and reflecting their concerns into its decision making in the interests of stability and self-preservation. The shift is a subtle one in which the 'mores, attitudes, and thinking of those regulated come to prevail in the approach and thinking' of many regulatory officials.

HAWKINS, *supra* note 68, at 3 (citations omitted).

398. Boyer & Meidinger, *supra* note 37, at 884-89. The authors report that these observations of leniency have been corroborated by EPA officials. *Id.* at 386-89.

be additional actors in a behavioral model of enforcement that acknowledges that the actors in regulatory enforcement settings are rational persons who analyze possible outcomes and respond to potential financial incentives and punishments "within complex social and political structures which serve to create and distort incentives in their own right."³⁹⁹

B. Statutory Authority for Citizen Suits

The citizen suit provisions of the CWA contained in section 505 provide that any citizen may commence a civil action in federal district court for injunctive relief and civil penalties against any person⁴⁰⁰ who is alleged to be in violation of an effluent standard or limitation under the CWA or in violation of an order issued by EPA or a state "with respect to such a standard or limitation."⁴⁰¹ The Supreme Court has interpreted this language as limiting citizen enforcement to actions only against persons who are alleged to be either currently, intermittently or sporadically in violation of an effluent standard or

399. *Id.* at 889-95.

400. Under the CWA, "person" includes "(i) the United States, and (ii) any other government instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution." CWA § 505(a)(1), 33 U.S.C. § 1365(a)(1).

401. CWA § 505(f) broadly defines "effluent standard and limitation" to include any unlawful act under CWA § 301, 33 U.S.C. § 1311, which would include the discharge of a pollutant without a permit. 33 U.S.C. § 1365(f).

limitation.⁴⁰² Only EPA, and not citizens, may obtain civil penalties for wholly past violations of the CWA.⁴⁰³

Congress envisioned that EPA and the states would be the primary enforcers of the CWA, and that citizens would fill any gaps in government enforcement.⁴⁰⁴ To accomplish this, Congress made citizen suits secondary to government enforcement by allowing timely government actions to preempt citizen enforcement.

Under section 505(b)(1)(A), a citizen suit may not be commenced without giving the violator, the state, and EPA sixty days prior

402. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 64 (1987). The Court held that the § 505(a) "alleged to be in violation" language establishes the good faith allegation of continuous or intermittent violation by the alleged polluter as a jurisdictional prerequisite to a citizen suit. *Id.* at 64-65. Underlying facts that support the allegation must be established for a citizen suit to survive a motion for summary judgment and for the citizen to prevail at trial. *Id.* On remand, the court of appeals held that a citizen may establish that the defendant is in violation "either (1) by proving violations that continue on or after the date the complaint is filed, or (2) by adducing evidence from which a reasonable trier of fact could find a continuing likelihood of a recurrence in intermittent or sporadic violations." *Chesapeake Bay Found., Inc. v. Gwaltney*, 844 F.2d 170, 171-72 (4th Cir. 1988). This jurisdictional limitation on citizen suits has resulted in substantially increased litigation as defendants increasingly raise this issue as a defense. *See, e.g., Connecticut Coastal Fishermen Ass'n v. Remington Arms Co.*, 989 F.2d 1305 (2d Cir. 1993) (holding that citizen plaintiff's belief that gun club might discharge lead shot and clay targets into the Long Island Sound was not sufficient to meet continuing violations requirement where gun club had ceased operations); *Atlantic States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128 (11th Cir. 1989) (holding that citizen plaintiff may request injunctive relief and civil penalties where defendant poultry processing plant continued violating the CWA after the filing date); *Public Interest Research Group of New Jersey, Inc. v. Hercules, Inc.*, 830 F. Supp. 1525, 1538-40 (D.N.J. 1993), *aff'd in part, rev'd in part*, 50 F.3d 1239 (3d Cir. 1995) (holding that citizen plaintiffs were not barred from seeking penalties in addition to fines imposed by the state where the state fined the company for discharge violations after the plaintiffs sent 60-day notice but before plaintiffs filed complaint); *Natural Resources Defense Council, Inc. v. Texaco Ref. & Mktg., Inc.*, 719 F. Supp. 281 (D. Del. 1989) (holding that refinery's post-complaint discharge permit violations were conclusive to determine that pre-complaint violations were either continuous or intermittent), *order vacated in part* by 906 F.2d 934 (3d Cir. 1990).

403. *Gwaltney*, 484 U.S. at 63. Compare CWA § 309(d), 33 U.S.C. § 1319(d) with CWA § 505(a), 33 U.S.C. § 1365(a). If the law of an EPA-approved state so provides, states may seek civil penalties for wholly past violations of the EPA-approved state program NPDES permit. Additionally, states may authorize citizens to enforce wholly past violations of state NPDES permits in state courts; however, EPA-approved states need not authorize any state law citizen suits under the state program.

404. S. REP. No. 414, 92d Cong., 2d Sess. 64 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3730:

[T]he Committee concluded that the enforcement presence of the Federal government should be concurrent with the enforcement powers of the States. The Committee does not intend this jurisdiction of the Federal government to supplant state enforcement. Rather the Committee intends that the enforcement power of the Federal government be available in cases where States . . . are not acting expeditiously and vigorously to enforce control requirements.

Id.

notice of the alleged violation.⁴⁰⁵ Nor may a citizen suit be commenced if EPA or the state has commenced, and is diligently prosecuting, a civil or criminal action in a court to secure compliance with a CWA standard, limitation, or order.⁴⁰⁶ Similarly, a citizen may not seek civil penalties if EPA or the state has collected an administrative penalty or has commenced, and is diligently prosecuting, an administrative penalty assessment, unless the citizen suit was commenced prior to the commencement of the administrative action or within 120 days of the 60-day notice if the 60-day notice was sent prior to the administrative action.⁴⁰⁷ Once the citizen suit is commenced properly, a consent order cannot be entered without both EPA and the United States Attorney General receiving forty-five days notice.⁴⁰⁸ Thus, in each case there are two opportunities for government and citizen interest to conflict: at the beginning, when diligent government prosecution can bar citizen enforcement, and at the end, when the United States can oppose the entry of a consent decree settling the case between the citizen and the polluter.

C. *Legal Issues at the Government/Citizen Interface: The "Diligent Prosecution" Bar*

1. *What is a "Court"?*—A citizen suit is barred under CWA section 505(b)(1)(B) if EPA or a "state has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or a state."⁴⁰⁹ The simple language "in a court" has created a split of authority over whether an administrative enforcement action is an action in a court.

a. *The "Functional Equivalence" Rule.*—One line of cases has developed out of the Third Circuit's decisions in *Baughman v. Bradford Coal Co.*⁴¹⁰ and *Student Public Interest Research Group of New Jersey, Inc. v.*

405. 33 U.S.C. § 1365(b)(1)(A). Strict compliance with the 60-day notice requirement is a jurisdictional prerequisite to the citizen suit. See *Hallstrom v. Tillamook County*, 493 U.S. 20, 25-26 (1989) (interpreting the 60-day notice requirement in § 7002(b)(2) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6972(b)(2) (1988), which contains language virtually identical to the 60-day notice requirement in CWA § 505(b)). Congress intended this delay to allow EPA or the state to take action on violations that they might have overlooked. S. REP. NO. 414, 92d Cong., 2d Sess. 79-80 (1972), *reprinted in* 1972 U.S.C.A.N. 3668, 3745.

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

407. CWA § 309(g)(6)(A), (B), 33 U.S.C. § 1319(g)(6)(A), (B).

408. CWA § 505(c)(3), 33 U.S.C. § 1365(c)(3).

409. 33 U.S.C. § 1365(b)(1)(B).

410. 592 F.2d 215 (3d Cir.), *cert. denied*, 441 U.S. 961 (1979). *Baughman* involved the Clean Air Act, 42 U.S.C. §§ 7401-7642 (1988 & Supp. V 1993). The citizen suit provisions of the Clean Air Act were the model for those of the CWA. See *Proffitt v. Rohm & Haas*,

*Fritzsche, Dodge & Olcott, Inc.*⁴¹¹ These cases hold that any prior diligently prosecuted action in a forum that is the "functional equivalent" of a court would bar a citizen suit.⁴¹² The functional equivalence rule requires that a tribunal have (1) the self-enforcing power to accord relief that is the substantial equivalent to that available in federal courts, including the power to issue injunctive orders and to assess penalties;⁴¹³ and (2) procedural features comparable to federal court, including the power of citizens to intervene as a matter of right,⁴¹⁴ an independent judge, witnesses, hearings, transcripts, and formal records of decision.⁴¹⁵ Applying its version of this test, *Baughman* held that the Pennsylvania Environmental Hearing Board was not a "court" because it had limited penalty power, could not enjoin violations, and did not permit intervention as a matter of right.⁴¹⁶ For similar reasons, the *Fritzsche* court held that, under the pre-1987 CWA, EPA administrative proceedings did not meet the functional equivalence test.⁴¹⁷

Under the functional equivalence doctrine, a state⁴¹⁸ enforcement agency must possess the full remedial power inherent in traditional courts, including the power to enforce civil penalty assessments and compliance orders without obtaining a court judgement.⁴¹⁹

850 F.2d 1007, 1011 (3d Cir. 1988) (stating that "[c]itizen suits, which first appeared in the Clean Air Act, on which the Clean Water Act was modeled, were intended by Congress 'to both goad the responsible agencies . . . and . . . to provide an alternative enforcement mechanism'") (quoting *Baughman v. Bradford Coal Co.*, 592 F.2d 215, 218 (3d Cir. 1970)).

411. 759 F.2d 1131 (3d Cir. 1985).

412. See, e.g., *Atlantic States Legal Found., Inc. v. Universal Tool and Stamping Co.*, 735 F. Supp. 1404, 1414-15 (N.D. Ind. 1990); *Illinois Pub. Interest Research Group, Inc. v. PMC, Inc.*, 835 F. Supp. 1070, 1074 (N.D. Ill. 1993).

413. *Baughman*, 592 F.2d at 219; see also *Fritzsche, Dodge & Olcott*, 759 F.2d at 1138.

414. *Baughman*, 592 F.2d at 219.

415. *Fritzsche, Dodge & Olcott*, 759 F.2d at 1138.

416. *Baughman*, 592 F.2d at 218-19.

417. *Fritzsche, Dodge & Olcott*, 759 F.2d at 1137-39.

418. Actions by local governmental bodies are not actions by a "state." *Illinois Pub. Interest Research Group, Inc. v. PMC, Inc.*, 835 F. Supp. 1070, 1074 (N.D. Ill. 1993) (holding water reclamation district is not a "state" within the meaning of CWA § 505(b)(1)(B)); *New York Pub. Interest Research Group v. Limco Mfg. Corp.*, 697 F. Supp. 608, 610-11 (E.D.N.Y. 1987) (holding actions commenced by city government do not bar citizen's suit); *Public Interest Research Group of New Jersey, Inc. v. Top Notch Metal Finishing Co.*, 26 Env't Rep. Cas. (BNA) 2012, 2014 (D.N.J. 1987) (holding that county utilities authority is not an arm of the state and therefore does not fall within the plain meaning of CWA § 505(b)(1)(B), 33 U.S.C. § 1365(b)(1)(B)).

419. See *PMC Inc.*, 835 F. Supp. at 1076 (holding that where a state administrative body cannot enforce its own order, its actions will not bar citizen suits); *Atlantic States Legal Found., Inc. v. Universal Tool & Stamping Co.*, 735 F. Supp. 1404, 1414-15 (N.D. Ind. 1990) (holding that the Indiana Department of Environmental Management lacked the

Thus, even an agency with the power to revoke permits, impose civil penalties, issue compliance orders and execute consent orders is not a "court" within the meaning of the statute if the agency must go to a court to obtain injunctive relief against a polluter.⁴²⁰ EPA or state compliance monitoring after entry of a consent decree is not the functional equivalent of court action because EPA cannot obtain civil penalties or injunctive relief without judicial action.⁴²¹ Although the functional equivalence rule has not yet barred any citizen suits, because no court has held any administrative tribunal to be the functional equivalent of a court, the rule does have the potential to expand the government's power to preempt citizen suits and thus limit the role of citizen enforcement.

b. The "Court Means a Court" Rule.—The second line of cases concerning the meaning of "court" within section 505(b)(1)(B) has developed in the Second Circuit. The rule in these cases, which limits the potential preemptive power of government, gives the term "court" its commonly understood legal meaning and refers to traditional fora so named.⁴²² Thus, under this rule, the Second Circuit held that a state administrative enforcement action resulting in an administrative consent order was not the equivalent of an action in a court that would bar a citizen suit relating to the same violation.⁴²³ The court based its decision on the plain language of section 505(b)(1)(B) and congressional intent.⁴²⁴ The court noted that Congress "has frequently demonstrated its ability to explicitly provide that either an administrative proceeding or a court action will preclude citizen suits."⁴²⁵

power to enforce its civil penalty and cease and desist provisions without bringing an action in court, and so it was not the functional equivalent of a court).

420. *Sierra Club v. Simkins Indus., Inc.*, 617 F. Supp. 1120, 1126 (D. Md. 1985). In *Sierra Club*, the court held that it would not be appropriate to consider a state agency that may only seek injunctive relief from a court as a "court" for the purposes of CWA § 505(b).

421. *Student Pub. Interest Research Group of New Jersey, Inc. v. Georgia-Pacific Corp.*, 615 F. Supp. 1419, 1427 (D.N.J. 1985); *cf. Proffitt v. Rohm & Haas*, 850 F.2d 1007 (3d Cir. 1988) (a consent order between a polluter and EPA will not bar a citizen suit where the polluter has not satisfied the mandates of the consent order).

422. *See Friends of the Earth v. Consolidated Rail Corp.*, 768 F.2d 57, 63 (2d Cir. 1985) (holding that an administrative proceeding will not bar citizen suits); *see also infra* notes 426-427 and cases cited therein.

423. *Friends of the Earth*, 768 F.2d at 63. The court stated that citizens are "welcomed participants in the vindication of environmental interests" and held that their enforcement actions could only be barred if the government filed a timely enforcement action in court. *Id.* (citation omitted). The court noted that the administrative tribunal at issue was not a "court" even under the *Baughman* "functional equivalent" test. *Id.* at 62.

424. *Id.* at 63.

425. *Id.*

In *Sierra Club v. Chevron U.S.A., Inc.*,⁴²⁶ the Ninth Circuit joined with the Second Circuit in holding that nonjudicial enforcement by a state agency does not preclude a citizen enforcement suit.⁴²⁷ The court was particularly impressed by the specific reference in section 505 to "court" without reference to any type of administrative proceeding;⁴²⁸ in contrast, citizen suit provisions in other environmental laws provide that citizen suits are barred if the government is prosecuting in either a court or an administrative action.⁴²⁹

In the 1987 amendments to the CWA, Congress added section 309(g), which permits EPA to assess penalties administratively, barring only subsequent actions by citizens for civil penalties, not actions for injunctive relief.⁴³⁰ In so amending the CWA, Congress demonstrated, as the Second Circuit suggested,⁴³¹ that Congress knew the difference between a court and an administrative agency. The 1987 addition of section 309(g) into the CWA did not expand EPA's injunctive authority—EPA administrative orders must still be enforced in court.⁴³² Thus, although an administrative penalty might be assessed by an agency tribunal that is the functional equivalent of a court,⁴³³ administrative compliance orders still require judicial intervention, and therefore, should not bar citizen suits.⁴³⁴

426. 834 F.2d 1517 (9th Cir. 1987).

427. *Id.* at 1525. This approach has also been adopted in *Hawaii's Thousand Friends v. City of Honolulu*, 806 F. Supp. 225 (D. Haw. 1992) and *Lykins v. Westinghouse Elec. Corp.*, 715 F. Supp. 1357 (E.D. Ky. 1989). In *Hawaii's Thousand Friends*, the court followed *Sierra Club*, holding that because Hawaii's Department of Health actions were not initiated by a court, citizen suits were not barred. *Hawaii's Thousand Friends*, 806 F. Supp. at 228-29. The *Lykins* court held that administrative action by the state Natural Resources and Environmental Protection Cabinet did not bar citizen suits because of the plain meaning of the statute. *Lykins*, 715 F. Supp. at 1358-59.

428. CWA § 505(b), 33 U.S.C. § 1365(b).

429. *Sierra Club*, 834 F.2d at 525; see, e.g., Toxic Substances Control Act, 15 U.S.C. § 2619(b)(1)(B) (1988); The Endangered Species Act, 16 U.S.C. § 1540(g)(2) (1988); Resource Conservation and Recovery Act, 42 U.S.C. § 6972(b)(2)(B)(iv) (1988).

430. 33 U.S.C. § 1319(g).

431. *Friends of the Earth v. Consolidated Rail Corp.*, 768 F.2d 57, 63 (2d Cir. 1985).

432. 33 U.S.C. § 1319(g).

433. That question became moot in 1987 when Congress passed the Water Quality Act of 1987, Pub. L. No. 100-4, § 314(a), 101 Stat. 7, 46 (codified at 33 U.S.C. § 1319(g)(6)).

434. However, in *Atlantic States Legal Found., Inc. v. Tyson Foods, Inc.*, 682 F. Supp. 1186 (N.D. Ala. 1988), the court dismissed a citizen suit under § 309(g)(6) where an outstanding administrative order for compliance under a comparable state law existed even though no civil penalties were assessed or collected. *Id.* at 1187-89. The court held that a provision in the order which stated that Tyson's failure to comply would subject the company to civil penalties, criminal fines or other relief was sufficient to bar a subsequent citizen suit based on ongoing violations. *Id.* The court's ruling was particularly harsh because the underlying administrative order specifically did not preclude others from seeking civil penalties, was issued before § 309(g)(6) was added to the CWA, and was issued

2. *"Diligent Prosecution"*.—In deciding whether a government prosecution was diligently prosecuted so as to bar a citizen suit, one federal district court announced the general rule that it will presume that a state or EPA enforcement action is or was diligently prosecuted, absent persuasive evidence that the state engaged in a pattern of conduct considered dilatory, collusive or in bad faith.⁴³⁵ This presumption is not rebutted merely by showing that the settlement in the state action was less burdensome to the discharger than the remedy sought in the citizen suit.⁴³⁶ If widely adopted, this rule would strengthen the ability of states to establish a lenient level of enforcement by virtually immunizing from attack state settlements of enforcement actions that preempt citizen suits seeking more stringent compliance or civil penalties.

However, under essentially identical language in the Clean Air Act, the concept of diligence has been given different meaning.⁴³⁷ For example, in *Gardeski v. Colonial Sand & Stone Co.*,⁴³⁸ the court stated that "complete deference to agency enforcement strategy, adopted and implemented internally and beyond public control, requires a degree of faith in bureaucratic energy and effectiveness that would be alien to common experience."⁴³⁹ By its willingness to examine the specifics of the state enforcement action for evidence of actual diligence, the *Gardeski* approach enables citizens to challenge state enforcement that appears to be lax.⁴⁴⁰ Courts have followed a similar approach in applying the diligent prosecution requirement under CWA section 309(g)(6), restricting state preemptive power by refusing to grant the government unfettered discretion to define what is a diligent prosecution.⁴⁴¹

under a scheme that did not include the right to citizen intervention. *Id.* at 1188. *Contra* Proffitt v. Rohm & Haas, 850 F.2d 1000, 1007, 1013-14 (3d Cir. 1988) (holding that an administrative order issued before initiation of citizen suit did not bar the latter actions).

435. Connecticut Fund for the Env't v. Contract Plating Co., 631 F. Supp. 1291, 1293 (D. Conn. 1986).

436. *Id.* at 1294.

437. 42 U.S.C. § 7604(b)(1)(B) (1988 & Supp. V 1993). Section 7604(b) provides: "No action may be commenced [by a citizen plaintiff] . . . (B) if the Administrator or State has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with [an emission] standard [or] limitation . . ." 42 U.S.C. § 7604(b)(1).

438. 501 F. Supp. 1159 (S.D.N.Y. 1980).

439. *Id.* at 1168.

440. The *Gardeski* court stated that Congress viewed citizen suits as serving an indispensable function in ensuring that government fulfills its enforcement obligations. *Id.* at 1167.

441. See *New York Coastal Fishermen's Ass'n v. New York City Dep't of Sanitation*, 772 F. Supp. 162, 168 (S.D.N.Y. 1991) (finding state enforcement efforts to be "a perfect example of the state's lack of diligence"). Although the New York Department of Environmental

3. "*Prior Action*."—To bar a citizen suit, the state or federal court action must have been commenced before the citizen suit.⁴⁴² The statutory right to maintain a citizen suit is thus based on a race to the courthouse, measured by the date and time of the filing of the complaints with the respective courts.⁴⁴³ For example, a citizen suit filed one day before the state suit is filed is not barred by the subsequent state action.⁴⁴⁴

For a prior state or federal action to bar a citizen suit, the citizen suit must seek the same relief against the same defendant to enforce the same standard, limitation or order as the prior state or federal action.⁴⁴⁵ Thus, a citizen suit will not be barred by a prior government action if the government action did not address the factual grievances asserted by the citizen group.⁴⁴⁶ By allowing citizens to proceed, as long as they are seeking relief for a problem that was not explicitly addressed in the prior government case, the state's preemptive power is sharply limited. Thus, particularly in complex situations, this rule makes it more difficult for states to bar citizen suits by cutting a quick deal with a polluter, unless the state makes the settlement comprehensive enough to bar a citizen suit.

D. *Federal and State Preclusion of Citizen Enforcement*

1. *CWA Section 309(g) and Judicial Activism*.—As drafted by Congress, section 309(g) granted EPA the power to assess civil penalties

Conservation began its enforcement efforts in 1983, as of 1991 the projected compliance date was not until 1995. As a result, the court lacked confidence that the state, left to its own devices without a citizen suit, would enforce the 1995 deadline. *Id.* at 169; *see also* *Friends of the Earth, Inc. v. Laidlaw Environmental Services*, 1995 WL 311983 (D.S.C. Apr. 7, 1995).

442. *See* CWA § 505(b)(1)(B), 33 U.S.C. § 1365(b)(1)(B) (providing "[n]o action may be commenced [by a citizen plaintiff] . . . (B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance . . .").

443. *See* *Connecticut Fund for the Env't v. Upjohn Co.*, 660 F. Supp. 1397, 1404 (D. Conn. 1987) (stating that the court must apply an inflexible rule that determines jurisdiction based on the time of filing the complaint and may not consider acts done in preparation for filing).

444. *See* *Connecticut Fund for the Env't v. Job Plating Co.*, 623 F. Supp. 207, 216 (D. Conn. 1985).

445. *See* *Connecticut Fund for the Env't v. Contract Plating Co.*, 631 F. Supp. 1291, 1294 (D. Conn. 1986) (granting defendant's motion for dismissal of citizen suit where state was already prosecuting an enforcement action against the defendant to require compliance with the same "standard, order or limitation").

446. *See* *Hudson River Fishermen Ass'n v. County of Westchester*, 686 F. Supp. 1044, 1052-53 (S.D.N.Y. 1988) (stating that when corollary government enforcement action does not address the factual grievances asserted by private attorneys general, the citizen suit is not barred).

administratively,⁴⁴⁷ but at the same time moderated that power,⁴⁴⁸ making it more difficult for EPA to assess civil penalties. Section 309(g)(6) limits the ability of EPA or citizens to seek judicial imposition of civil penalties if EPA or a state—using comparable law—has assessed, or is in the process of assessing administratively, civil penalties for the same CWA violations.⁴⁴⁹

Unfortunately, several courts have tried zealously to make citizen suits unambiguously secondary, instead of supplemental, to government enforcement. These courts believe in a compliance theory of enforcement as a matter of substantive environmental policy; under this view, bringing an individual defendant into compliance is more important than sanctioning that violator with civil penalties sufficiently large to deter others.⁴⁵⁰ To impose their compliance theory of enforcement on the CWA, these courts have ignored the plain congressional language of section 309(g)(6), instead favoring their own rule that severely limits citizen suits.

The leading, and most flagrant, of these anti-citizen suit, policy-based rulings is *North and South Rivers Watershed Ass'n v. Town of Scituate*,⁴⁵¹ in which a CWA citizen suit alleged that the defendant was discharging pollutants without an NPDES permit.⁴⁵² The court barred the citizen suit because the state, which did not have an EPA-approved program, had issued an administrative order mandating compliance with state law.⁴⁵³ Both the district court and the court of appeals held that the *unapproved* state law, which did not provide notice to citizens of penalty proceedings or agency orders, was sufficiently comparable to the CWA to trigger the section 309(g)(6) one-bite rule.⁴⁵⁴ The court of appeals held that the issuance of a state administrative order, without any review by or input from citizens or EPA, bars not only subsequent action for civil penalties, but any injunctive relief as well.⁴⁵⁵ The breadth of this holding is particularly remarkable because section 309(g) explicitly addresses only administrative assessment of civil penalties,⁴⁵⁶ and section 309(g)(6) bars only

447. 33 U.S.C. § 1319(g).

448. *See id.* § 1319(g)(6).

449. *Id.*

450. *See infra* notes 451-471 and cases cited therein.

451. 755 F. Supp. 484 (D. Mass. 1991), *aff'd*, 949 F.2d 552 (1st Cir. 1992).

452. *Id.* at 484.

453. *Scituate*, 949 F.2d at 558.

454. *Scituate*, 755 F. Supp. at 485-86.

455. *Scituate*, 949 F.2d at 558.

456. *See* 33 U.S.C. § 1319(g).

section 505 citizen civil penalty actions.⁴⁵⁷ Neither section mentions injunctive actions.

Unfortunately, both the district and circuit courts ignored fundamental statutory and federalism problems. Massachusetts, as a nonapproved state, could not issue an NPDES permit,⁴⁵⁸ and without such a permit any discharger of pollutants is in violation of section 301 (a),⁴⁵⁹ even if the discharger has a permit to discharge under the state's law. A nonapproved state cannot pursue under its own law an enforcement action for the federal CWA violation of discharging without an NPDES permit.⁴⁶⁰ Although the First Circuit and Massachusetts may proclaim that the Massachusetts water laws "closely parallel" the federal CWA,⁴⁶¹ neither the Massachusetts water law, its regulations nor its administrative program have been accepted by EPA as being sufficiently consistent with the CWA to allow EPA to defer to state permitting and enforcement as meeting the minimum requirements of federal law.⁴⁶²

The deficiencies of the Massachusetts law are not *de minimis*. For instance, the CWA mandates public participation in the administrative penalty assessment process⁴⁶³ while Massachusetts law does not. Nev-

457. *Id.* § 1319(g) (6). CWA § 309(g) (6) bars citizen suits when the state is prosecuting the same violations under comparable state law. *Id.*

458. In a nonapproved state, only EPA may issue an NPDES permit. *See supra* note 141 and accompanying text.

459. CWA § 301(a) provides: "Except as in compliance with this section and [other] sections . . . of this title, the discharge of any pollutant shall be unlawful." 33 U.S.C. § 1311(a).

460. CWA § 402(h), 33 U.S.C. § 1342(h). However, a state can bring a citizen suit action as a citizen in federal court under 505. *U.S. Dep't of Energy v. Ohio*, 112 S. Ct. 1627, 1634 (1992).

461. *North & S. Rivers Watershed Ass'n, Inc. v. Town of Scituate*, 949 F.2d 552, 554 (1st Cir. 1992).

462. To be approved by EPA, the state's governor must petition EPA for approval and the state program must meet an extensive list of statutory, administrative and funding requirements, and undergo extensive EPA review. CWA § 402(b), 33 U.S.C. § 1342(b); *see also* State Program Requirements, 40 C.F.R. §§ 123.1 to .64 (1994).

463. CWA § 309(g) (4) (A) requires that "[b]efore issuing an order assessing a civil penalty under this subsection the Administrator . . . shall provide public notice of and reasonable opportunity to comment on the proposed issuance of such order." 33 U.S.C. § 1319(g) (4) (A) (emphasis added); *see also* 40 C.F.R. § 123.27(d), which mandates that:

Any State administering a program shall provide for public participation in the State enforcement process by providing either:

(1) Authority which allows intervention as of right in any civil or administrative action to obtain remedies . . . by any citizen having an interest which is or may be adversely affected; or

(2) Assurance that the State agency or enforcement authority will:

(i) Investigate and provide written responses to all citizen complaints submitted pursuant to the procedures specified in § 123.26(b) (4);

ertheless, the *Scituate* court barred a citizen suit for a violation of the CWA on the grounds that the nonapproved state law was comparable to CWA section 309(g).⁴⁶⁴ On this point, the *Scituate* courts also ignored the relevant legislative history. Senator Chafee, one of the principal sponsors and drafters of the 1987 CWA amendments explained prior to the passage of the bill:

[T]he limitation of 309(g)(6) applies only where a State is proceeding under a State law that is comparable to section 309(g). For example, in order to be comparable, a State law must provide for a right to a hearing and for public notice and participation procedures similar to those set forth in section 309(g); it must include analogous penalty assessment factors and judicial review standards; and it must include provisions that are analogous to the other elements of section 309(g).⁴⁶⁵

An EPA-approved state law that requires notice for hearings but not for enforcement efforts concluded by administrative consent decrees is not comparable to section 309(g)(6). Such a law does not provide the public with a reasonable opportunity to comment on penalty assessments or to seek judicial review similar to that provided for in section 309(g)(8).⁴⁶⁶ Thus, section 309(g)(6) will not bar a judicial citizen action subsequent to an enforcement proceeding under this type of state law.⁴⁶⁷ The legislative history supports this conclusion.

(ii) Not oppose intervention by the citizen when permissive intervention may be authorized by statute, rule or regulation; and

(iii) Publish notice of and provide at least 30 days for public comment on any proposed settlement of a State enforcement action.

Id.

464. *Scituate*, 949 F.2d at 556.

465. 133 CONG. REC. S737 (daily ed. Jan. 14, 1987).

466. 33 U.S.C. § 1319(g)(8).

467. See, e.g., Public Interest Research Group of New Jersey, Inc. v. New Jersey Expressway Auth., 822 F. Supp. 174, 184 & n.14 (D.N.J. 1992) (holding that where state statute or regulations under which the New Jersey Department of Environmental Protection and Energy brought an enforcement action required no notice to public, allowed no opportunity for the public to comment, or granted no public participation in a hearing, the state law was not comparable and the citizen action was not barred); Public Interest Research Group of New Jersey, Inc. v. GAF Corp., 770 F. Supp. 943, 949-50 (D.N.J. 1991) (holding that the New Jersey Water Pollution Control Act was not comparable to the CWA because it did not provide for public notice and opportunity to participate in civil penalty assessments); Atlantic States Legal Found., Inc. v. Universal Tool & Stamping Co., 735 F. Supp. 1404, 1415-16 (N.D. Ill. 1990) (holding that a state law under which the Indiana Department of Environmental Management brought an administrative action against a manufacturing company was not comparable to the CWA and thus did not bar subsequent citizen suit because the state agency was not authorized to enforce its civil penalty provisions without court action).

Congress explicitly recognized the importance of public participation and notice so that citizens could contest inadequate civil penalties. "There are several safeguards in this provision to prevent abuse of the administrative order authority, such as . . . significant violators escaping with nominal penalties. . . . Public notice . . . must be given in a manner that will apprise interested citizens of the proceeding."⁴⁶⁸ Ignoring this legislative history, the *Scituate* court held that the Massachusetts law, which provided no notice to the public, no opportunity to comment and no absolute right to participate, to be comparable to the CWA based on the fiction of its public participation provisions. The court reasoned that because the state administrative order was technically a public document, if someone happened upon it in time, they could petition, upon a showing of good cause, to intervene.⁴⁶⁹ In essence, the court held that the possibility of citizen intervention *after* a final order is issued by the state is comparable to commenting on a proposed order *before* it is made final. In so holding, the court disregarded the plain statutory language⁴⁷⁰ of section 309(g)(6), effectively substituting "after" for "before" and "final" for "proposed."⁴⁷¹ Follow-

468. S. REP. NO. 56, 99th Cong., 1st Sess. 18 (1985), *reprinted in* 1986 U.S.C.A.N. 1566, 1583.

469. *North & S. Rivers Watershed Ass'n, Inc. v. Town of Scituate*, 949 F.2d 552, 556 (1st Cir. 1992). The court found that the public could have no idea that the order existed, or even that the state administrative agency was taking any enforcement action against the defendant. *See infra* text accompanying note 475.

470. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984); *see infra* notes 494-499 and accompanying text.

471. *Cf.* 33 U.S.C. § 1319(g)(6) ("*Before* issuing an order assessing a civil penalty . . . the Administrator or Secretary . . . shall provide public notice of and reasonable opportunity to comment on the *proposed* issuance of such order.") (emphasis added). *Arkansas Wildlife Fed'n v. ICI Americas, Inc.*, 29 F.3d 376 (8th Cir. 1994), adopted *Scituate's* rejection of the plain statutory language by holding Arkansas's law to be comparable to CWA § 309(g)(6). *Id.* at 381-83. The Eighth Circuit panel held that a state water pollution statute should be presumed comparable if it "contains comparable penalty provisions which the state is authorized to enforce, has the same overall enforcement goals as the federal CWA, provides interested citizens a meaningful opportunity to participate at significant stages of the decision-making process, and adequately safeguards their substantive legitimate interests." *Id.* However, Arkansas's statute only provides citizens with an *ex post facto* right to intervene, no public notice at any time, and no opportunity to comment while the consent order is being considered. *Id.* Nevertheless, the court found the law to be comparable because the citizen had actual knowledge that the order had been issued before the citizen suit was filed, and because the court, without any facts in the record, had "no reason to believe that AWF would be denied meaningful participation in the administrative process had it intervened" after the order was issued. *Id.* at 382. Although the court failed to indicate what that after-the-fact participation might have been or its possible effect on the completed state enforcement, the court nevertheless barred the federal CWA citizen suit because the suit might have the effect of collaterally attacking the state order. *Id.*

ing this reasoning, a final agency decision under the Administrative Procedure Act,⁴⁷² which mandates public notice and opportunity to comment,⁴⁷³ would be upheld despite the lack of prior notice and opportunity for public comment if an interested party could intervene or even petition the agency to reconsider its decision. However, such a contortion of the meaning of public notice and opportunity to comment has long been rejected.⁴⁷⁴

The practical implications of *Scituate* are especially troublesome because the right to intervene is of little benefit to the public if the public is unaware of the proceedings. More specifically:

The detailed, mandatory safeguards of citizen participation contained in section 1319(g)(4) [CWA section 309(g)(4)] are not comparable to simply having a public record on file somewhere for a citizen to look at should that citizen somehow discover that a particular action has been taken. Public notice is fundamental to protecting citizen participation in agency decisions. If the public does not know about agency actions, it cannot avail itself of any right to participate.⁴⁷⁵

In fact, most state administrative enforcement activity is completely hidden from the public.⁴⁷⁶ Even when the public has a specific inter-

472. 5 U.S.C. § 551-559, 701-706 (1988 & Supp. V 1993).

473. See, e.g., 5 U.S.C. §§ 553-554. Sections 553 and 554 require prior public notice published in the Federal Register or prior actual notice as a precondition for both agency rule-making and adjudication. *Id.*

474. See, e.g., *Natural Resources Defense Council, Inc. v. EPA*, 683 F.2d 752, 767-68 (3d Cir. 1982) (holding that EPA's post-promulgation notice and comment procedures could not cure its failure to provide such procedures prior to promulgation of rule postponing amendments to regulations dealing with the discharge of toxic pollutants); *Sharon Steel Corp. v. EPA*, 597 F.2d 377, 381 (3d Cir. 1979) (holding that the period for comments after promulgation of a rule cannot substitute for the notice and comment that the APA requires before a rule's promulgation); *U.S. Steel Corp. v. EPA*, 595 F.2d 207, 214-15 (5th Cir. 1979) (stating that "[s]ection 533 [of the Administrative Procedure Act] is designed to ensure that affected parties have an opportunity to participate in and influence agency decision making at an early stage, when the agency is more likely to give real consideration to alternative ideas"); *Wagner Elec. Corp. v. Volpe*, 466 F.2d 1013, 1020 (3d Cir. 1972) (stating "the Administrative Procedure Act requires notice *before* rulemaking, not after. The right of interested persons to petition for the issuance, amendment or repeal of a rule, granted in . . . [the] Act, is neither a substitute for nor an alternative to compliance with the mandatory notice requirements [of the Act].").

475. *Natural Resources Defense Council, Inc. v. Vygen Corp.*, 803 F. Supp. 97, 102 (N.D. Ohio 1992).

476. See, e.g., *Atlantic States Legal Found., Inc. v. Eastman Kodak Co.*, 933 F.2d 124, 126 (2d Cir. 1991) (recounting that during the ongoing litigation of a properly commenced citizen suit filed in federal court in the absence of any state or federal enforcement against a long-standing violator, "after several months of private negotiations" the defendant and the state entered into a consent agreement).

est in a specific case, despite citizens' previous 60-day notice letter or jurisdictionally proper citizen suit in federal court, the state and discharger regularly exclude interested citizen groups from enforcement-oriented negotiations.⁴⁷⁷

Scituate's flawed analysis is particularly unfortunate because the issue of comparability should never have been reached due to the threshold problem that Massachusetts, because it was unapproved, could neither prosecute nor remedy the defendant's CWA violation of discharging without an NPDES permit.⁴⁷⁸ According to Senator Chafee, the section 309(g) citizen suit bar applies "only in cases where the State in question has been authorized [by EPA] under section 402 to implement the relevant permit program."⁴⁷⁹ The district court sloughed off Senator Chafee's explication of the law as irrelevant on the grounds that the statute on its face refers to "comparable" law, not "comparable EPA-approved law."⁴⁸⁰ However, the court failed to observe comparability is an issue only if there has been prior state enforcement of a CWA violation under comparable law.⁴⁸¹ A state law that is not approved by EPA under section 402(b) can never constitute enforcement of a federal CWA violation, for otherwise state law, without congressional or EPA approval, would preempt federal law; an impossibility under our constitutional system, where federal law is supreme.⁴⁸²

477. This observation is based on the personal knowledge of author from his experience as Director from 1989-1992 of the Widener University School of Law Environmental Law Clinic. This experience has been corroborated in conversations with lawyers representing citizen groups and environmental law clinics across the country.

478. CWA § 309(g)(6)(A) only precludes subsequent EPA or citizen suits over "any violation . . . with respect to which the State is diligently prosecuting an action under a state law comparable to this subsection, or for which . . . the State has issued a final order . . . and the violator has paid a penalty." 33 U.S.C. § 1319(g)(6)(A) (emphasis added).

479. 113 CONG. REC. S737 (daily ed. Jan. 14, 1987). Senator Chafee further noted: [I]f a nonauthorized State takes action under State law against a person who is responsible for a discharge which also constitutes a violation of the Federal permit, the State action cannot be addressed to the Federal violation, for the State has no authority over the Federal permit limitation or condition in question. In such case, the authority to seek civil penalties for violation of the Federal law . . . would be unaffected

Id.

480. *North & S. Rivers Watershed Ass'n v. Town of Scituate*, 755 F. Supp. 484, 485 (D. Mass. 1991), *aff'd*, 949 F.2d 552 (1st Cir. 1992). The court stated that "[n]owhere is there any suggestion of an additional requirement that the state program have received federal approval." *Id.*

481. Just as action by a nonapproved state can never constitute enforcement of the CWA, similarly, EPA and federal courts do not have subject matter jurisdiction to impose civil penalties or other relief under the CWA for a violation of nonapproved state water pollution law.

482. See *supra* notes 204-208 and accompanying text.

The district court did not address this fundamental principle of federal-state relations under the CWA, but on appeal EPA, as amicus curiae, attempted to argue this very point.⁴⁸³ The First Circuit, however, refused to consider EPA's submittal on the grounds that the issue had not been raised below,⁴⁸⁴ even though the district court's opinion specifically acknowledged the citizen group's position that "the Massachusetts Act cannot qualify as a comparable state law unless the United States Environmental Protection Agency . . . has sanctioned the permit approval system created by that Act."⁴⁸⁵

The court ignored this fundamental problem by maintaining essentially, that if a state unilaterally declares its law to be the equivalent of federal law, then it is federal law. According to the district court, because the state legislature had unilaterally declared its law to implement the provisions of the CWA and meet EPA standards for delegation, Massachusetts had "*effectively* ordered compliance with both state and federal standards simultaneously."⁴⁸⁶ However, states are not left to decide whether their program meets federal CWA standards for approval; that decision rests with EPA. But EPA had not approved Massachusetts's program or otherwise delegated any NPDES authority to the state;⁴⁸⁷ thus the Massachusetts agency was not effectively ordering compliance with federal law. Nevertheless, the district court, in the best Lewis Carroll tradition,⁴⁸⁸ allowed the state to declare its law good enough for EPA, without allowing EPA to determine the state law's adequacy, as Congress required. The court essentially allowed this unilateral self-delegation, disregarding the importance of EPA's extensive evaluative process⁴⁸⁹ which involves insuring public participation before ruling on the state's application⁴⁹⁰ and insuring af-

483. *Scituate*, 949 F.2d at 556 n.8 ("The EPA, in its amicus brief takes the position that in order for a state law to be comparable to section 309(g), it must have been certified by the EPA under section 402 of the Federal Clean Water Act. This argument was not raised by the parties below. Hence, we decline to consider it here.").

484. *Id.*

485. *Scituate*, 755 F. Supp. at 485.

486. *Id.* at 487 n.4 (emphasis added).

487. *Id.* at 485.

488. Consider the following exchange:

"When *I* use a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean—neither more nor less."

"The question is," said Alice, "whether *you* can make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master—that's all."

LEWIS CARROLL, *THROUGH THE LOOKING GLASS* 80-81 (MacGibbon & Kee 1972) (1872).

489. CWA § 402(b), 33 U.S.C. § 1342(b) (1988).

490. CWA § 402(b)(3), 33 U.S.C. § 1342(b)(3).

fecting neighboring state participation.⁴⁹¹ Perhaps most significantly, the court barred citizen enforcement of the CWA without the state taking on the substantial obligations of actually administering an approved NPDES program for EPA.

On appeal, the First Circuit ignored this issue entirely by simply announcing the remarkable fiction that the issue had not been raised in the proceeding below.⁴⁹² Instead, it found the nonapproved state law sufficiently comparable to section 309(g) to bar a citizen suit for civil penalties.⁴⁹³ The court of appeals did not stop there: it proceeded to extend the preclusive effect beyond the plain language of section 309(g), which only bars subsequent *judicial actions for civil penalties* by EPA and citizens,⁴⁹⁴ to rule that it would be "absurd" to have the statute preclude only civil penalties without also precluding claims for injunctive relief.⁴⁹⁵ In effect, the court rewrote section 309(g) to preclude all citizen suits, including both actions for civil penalties and prayers for injunctive relief. In so doing, the court ignored the plain language in CWA section 309(g)(6)(B), which creates a safe harbor from citizen suit preclusion by state enforcement.⁴⁹⁶ Without referring to the statute or the legislative history, the court concluded, based solely on out-of-context dicta from *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*,⁴⁹⁷ that "citizen suits are intended to

491. CWA § 402(b)(5), 33 U.S.C. § 1342(b)(5).

492. *Scituate*, 949 F.2d at 556 n.8; see *supra* note 483.

493. *Scituate*, 949 F.2d at 556.

494. 33 U.S.C. § 1319(g)(6)(A). This section bans civil penalty actions under CWA § 309(d) and CWA § 505 with respect to which the EPA or a state has commenced and is diligently prosecuting an action under a comparable law, or for which EPA or a state has issued a final order and the violator has paid a penalty. *Id.*

495. *Scituate*, 949 F.2d at 558. *But see* *Orange Env't, Inc. v. County of Orange*, 860 F. Supp. 1003, 1017-18 (S.D.N.Y. 1994) (holding that the CWA does not preclude actions for declaratory or injunctive relief); *Coalition for a Liveable Westside, Inc. v. New York Dep't of Env'tl. Resources*, 830 F. Supp. 194, 197 (S.D.N.Y. 1993) (stating that § 309(g)(6) ensures that a CWA violator will not be subject to duplicative civil penalties, but that the statute does permit "a federal district court to entertain an action for injunctive relief for situations where, for example, a permit holder may have paid the relevant civil penalties but continues to violate its permit limitations or where the injunctive relief obtained in the state proceedings turns out to be inadequate to address the violations at issue"). Ironically, in *Scituate*, no civil penalties were ever assessed or paid.

496. 33 U.S.C. § 1319(g)(6)(B)(i), (ii). This section provides that the limitations contained in subparagraph (A) on *civil penalty actions* under CWA section 505 shall not apply with respect to any violation for which a citizen suit has been filed prior to the commencement of a state enforcement action, or for which 60-day notice has been given prior to the commencement of state action and the citizen suit was filed within 120 days of the notice. *Id.*

497. 484 U.S. 49 (1987). The Court in *Gwaltney* addressed the limited question of whether CWA § 505(a) permitted citizens to sue for wholly past CWA violations. *Id.* at 56. The Court's analysis centered exclusively on the meaning of § 505(a)'s limitation that citi-

supplement" governmental primary enforcement responsibility,⁴⁹⁸ and that "it is inconceivable to us that the section 309(g) ban is only meant to extend to civil penalty actions."⁴⁹⁹ Although the ordinary dictionary meaning of supplemental is "added to complete," "extend or strengthen the whole," or "make up for a deficiency,"⁵⁰⁰ it is assumed from the context that the First Circuit employed the term to demote citizen suits to secondary⁵⁰¹ status.⁵⁰²

zens could only sue persons "alleged to be in violation," which the Court characterized as a state in which violations were likely to recur, even if just sporadically. *Id.* at 59-61. In its decision, the *Gwaltney* Court noted that "[t]he [§ 505] bar on citizen suits when government enforcement action [in a court] is underway suggests that the citizen suit is meant to be supplemental rather than to supplant government action." *Id.* at 60 (emphasis added). The Court uses "suggests" because Congress never used "supplemental" in the CWA nor in its legislative history. Although there had been no government enforcement in the case, the Court speculated, without reference to the language of the CWA, its legislative history, or any relevant fact in the case, that allowing suits for wholly past violations might interfere with a government settlement of an enforcement action. *Id.* at 60-61.

In contrast, the discharger in *Scituate* was actually in violation, so *Gwaltney* should have had no relevance. See *Hawaii's Thousand Friends v. City and County of Honolulu*, 806 F. Supp. 225, 229 (D. Haw. 1992) (holding that *Gwaltney* does not address the question whether the CWA bars citizen suits not judicially enforced). Nevertheless, the First Circuit applied *Gwaltney's* dicta as though it were black letter statutory law and rejected the specific statutory language and legislative history of § 309(g)(6) as though it were an ill-conceived use of dicta by a floundering litigant. *Scituate*, 949 F.2d at 555-58.

This court-made enforcement policy ignored Congress's lack of concern over the timeliness issue, which is reflected by several statutes that allow citizen suits for wholly past violations. See Resource Conservation and Recovery Act § 7002, 42 U.S.C. § 6972 (1988) (permitting a citizen suit against any person "who has contributed . . . to past handling, storage, treatment, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment") (emphasis added); Emergency Planning and Community Right-to-Know Act § 326, 42 U.S.C. § 11046 (1988) (permitting a citizen suit against any person who has failed to do any of certain enumerated acts). Simple statutory interpretation that compared the use of present tense phrasing in CWA § 505 with the use of past tense in other citizen suit provisions would have been sufficient to decide these cases. In 1990, when Congress amended the Clean Air Act, it specifically modified the present tense wording by adding a past tense provision as a *Gwaltney* fix. See Clean Air Act § 304, 42 U.S.C. § 7604 (1988 & Supp. V 1993) (permitting citizen suits against any person "who is alleged to have violated [the Act] if there is evidence that the violation has been repeated"). Thus, by the time the First Circuit decided *Scituate* in 1992, there was ample evidence that the *Gwaltney* enforcement policy dicta did not reflect congressional intent and should not have been the foundation for interpretation of the CWA.

498. *Scituate*, 949 F.2d at 558.

499. *Id.*

500. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1804 (3d ed. 1992).

501. "Secondary . . . a. Of the second rank; not primary. b. Inferior. c. Minor; lesser." *Id.* at 1629.

502. However, because the Supreme Court failed to define "supplemental" it is presumed the word is to have its ordinary dictionary meaning. Accordingly, *Scituate's* notion that citizen suits should be supplemental means that citizen suits are either added to com-

If the court had reviewed the legislative history of the CWA, it would have discovered that Congress had intended specifically that section 309(g) operate as written. According to the conference report accompanying the final version of the 1987 CWA amendments, the limitations of section 309(g)(6) would not apply to (1) an action seeking relief other than civil penalties; (2) an action under section 505(a)(1) filed prior to commencement of an administrative civil penalty proceeding for the same violation; or (3) a violation which has been a subject of a notice of violation under section 505(b)(1) prior to the initiation of the administrative penalty process, provided that an action under section 505(a)(1) is filed within 120 days of the notice of violation.⁵⁰³ The Agency can prevent duplicate proceedings by intervening in the ongoing citizen enforcement suit or by bringing its own judicial action before a citizen suit is filed.⁵⁰⁴ Despite this expression of legislative intent, other courts have taken *Scituate* as leave to limit citizen suits in ways never intended by Congress.⁵⁰⁵

There has been a similar reliance on *Gwaltney's* dicta instead of the CWA's plain language in construing other aspects of section 309(g)(6). For instance, when Congress amended CWA section 309(g)(6)(B)(ii) it explicitly created a citizen suit safe harbor that allows federal court actions to proceed despite citizen-state prosecution if the citizens filed suit within 120 days of issuing their 60-day notice letter and if the state does not commence its enforcement action until after the 60-day letter was sent to the defendant, state agency, and EPA.⁵⁰⁶ Nevertheless, in *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.*,⁵⁰⁷ the Second Circuit allowed an otherwise timely and proper citizen suit to be dismissed because the state agency *subsequently* brought and concluded an administrative enforcement ac-

plete enforcement of the CWA, to make up for a deficiency in enforcement, or to extend or strengthen the EPA and state CWA enforcement as a whole.

503. H.R. CONF. REP. NO. 1004, 99th Cong., 2d Sess. 44, 133 (1986).

504. *Id.* at 43-44, 133.

505. See, e.g., *Arkansas Wildlife Fed'n v. ICI Americas, Inc.*, 29 F.3d 376 (8th Cir. 1993). The *Arkansas Wildlife* court held that a state consent decree constituted diligent prosecution under comparable state law despite the assessment of *de minimis* penalties, which ignored the violator's economic benefit. *Id.* at 380-81. Despite stipulated penalties in the pre-existing consent order of over \$50,000 and \$120,000 respectively, *id.* at 378, the court characterized the low penalties actually assessed, only \$500, as within the agency's discretionary powers to remedy the permit violation so long as the state did not "fail to exercise [its] enforcement responsibility." *Id.* at 380. Agreeing with *Scituate*, the court stated that the policy considerations which prevent a plaintiff from bringing a contemporaneous civil penalty action also must preclude a plaintiff's requests for injunctive and declaratory relief. *Id.* at 383-84.

506. 33 U.S.C. § 1319(g)(6)(B)(ii).

507. 933 F.2d 124 (2d Cir. 1991).

tion.⁵⁰⁸ The court held that if the subsequent EPA-approved state settlement reasonably assures that the discharger's violations will cease, then, despite the statutory language, the properly commenced citizen suit for injunctive relief and civil penalties may not proceed.⁵⁰⁹ In reaching this result, the court heeded only dicta in *Gwaltney* which cautioned against changing "the nature of citizen suits from interstitial to potentially intrusive."⁵¹⁰ Remarkably, the court simply ignored Congress's carefully considered statutory balancing of government and citizen enforcement activity. The same result could have been reached without contorting the statute.⁵¹¹ The district court could have found the discharger liable for CWA violations, and then invoked its equitable discretion to refrain from imposing any further injunctive relief. The court then might have determined independently whether the penalties imposed by the settlement were adequate,⁵¹² using the factors mandated by section 309(d).⁵¹³

Because most states are reluctant either to impose meaningful penalties that deprive violators of their economic benefit or to add a gravity component for deterrence,⁵¹⁴ decisions such as *Eastman Kodak* allow states to undercut citizen enforcement intended to prevent states from racing to the bottom by lax enforcement. In *Eastman Ko-*

508. *Id.* at 127.

509. *Id.*

510. *Gwaltney of Smithfield, Ltd., v. Chesapeake Bay Found., Inc.*, 484 U.S. 54, 61 (1987).

511. *See, e.g., Atlantic States Legal Found., Inc. v. Pan Am. Tanning Corp.*, 993 F.2d 1017 (2d Cir. 1992) (holding that a properly commenced citizen suit for civil penalties was not mooted by a subsequent settlement between the violator and a local agency in which a \$6600 penalty was assessed and \$250,000 was to be invested in treatment system upgrades). The *Pan American Tanning* court distinguished this case from its decision in *Eastman Kodak* on the grounds, *inter alia*, that the \$2 million "extracted" by the state from Kodak represented a "dispositive administrative and criminal settlement." *Id.* at 1021 (quoting *Eastman Kodak*, 933 F.2d at 127).

512. *Public Interest Research Group of New Jersey, Inc. v. Hercules*, 830 F. Supp. 1525, 1538-40 (D.N.J. 1993), *aff'd in part, rev'd in part*, 50 F.3d 1239 (3d Cir. 1995) (holding that although civil penalties assessed under non-comparable state law did not bar a subsequent citizen suit, the federal court, when ordering civil penalties, might nevertheless consider the adequacy of the previously assessed state penalties).

513. Under § 309(d) violators

shall be subject to a civil penalty not to exceed \$25,000 per day for each violation. In determining the amount of a civil penalty the court *shall* consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and *such other matters as justice may require.*

33 U.S.C. § 1319(d) (emphasis added).

514. *See supra* Part IV.B.2.

dak, the state assessed a civil penalty in excess of \$1 million.⁵¹⁵ In *Scituate*, however, the state administrative order did not assess any civil penalty; nevertheless, the court barred the otherwise proper citizen suit even though Congress explicitly limited section 309(g) preclusion to final state orders where “the violator has *paid* a penalty assessed” under section 309(g) or a comparable state law.⁵¹⁶ The First Circuit rejected plaintiff’s “paid a penalty assessed”⁵¹⁷ argument as “a narrow reading of Section 309(g) (6) (A) which turns on the logistical happenstance of statutory drafting.”⁵¹⁸ Preferring compliance-based enforcement policy over sanction-based policy, the court held that civil penalties should not be imposed on violators engaging in remedial efforts because penalties “are, in fact, impediments to environmental remedy efforts.”⁵¹⁹ In contrast, both Congress and EPA have long declared civil penalties to be central to the CWA’s enforcement scheme because without adequate and consistently imposed civil penalties, particularly in judicial actions, polluters will have little motivation to

515. *Eastman Kodak*, 933 F.2d at 126.

516. 33 U.S.C. § 1319(g) (6) (iii).

517. Plaintiffs had argued that “a citizens suit for penalties is only barred when a previously brought state action seeks to sanction an offender monetarily.” *North & S. Rivers Watershed Ass’n v. Scituate*, 949 F.2d 552, 555 (1st Cir. 1991); *cf.* *Public Interest Research Group of New Jersey, Inc. v. GAF Corp.*, 770 F. Supp. 943, 949 (D.N.J. 1991) (noting that CWA § 309(g) (6) (A) expressly states that a citizen suit is barred after a state concludes an action only if the violator has paid a penalty assessed). *Contra* *New York Coastal Fishermen’s Ass’n v. New York City Dep’t of Sanitation*, 772 F. Supp. 162, 165 (S.D.N.Y. 1991) (ignoring the statutory language and holding that the issuance of consent orders without the assessment of monetary penalties will bar a citizen suit). The *New York Coastal Fishermen’s* court further held that the failure of a state to impose civil penalties, where it had the power to do so, does not require a finding that the state is not enforcing a comparable statute. *Id.* See also *Connecticut Coastal Fishermen’s Ass’n v. Remington Arms Co.*, 777 F. Supp. 173, 181 (D. Conn. 1991) (“33 U.S.C. § 1319(g) bars citizen suits where a state agency conducting enforcement proceedings against the defendant has authority to assess civil penalties, regardless of whether the agency has actually assessed such penalties.”).

518. *Scituate*, 949 F.2d at 556.

519. *Id.* The First Circuit did not indicate the factual or legal basis upon which it disregarded Congress’s enforcement design for the CWA. Section 309 authorized civil penalties that deprive a violator of the economic benefit of noncompliance and imposes a gravity component for assessed penalties. These elements are crucial to the enforcement system around which the entire Act is built, and are vitally necessary to achieve widespread voluntary compliance with the CWA. The First Circuit apparently adopted the opposite view: violators should not comply until the government makes them, and they should not be deprived of the economic benefit of their illegal conduct if, as the result of government’s enforcement efforts, they agree to come into compliance sometime in the future. See *Scituate*, 949 F.2d at 557 (noting that the administrative order “leaves open the possibility of imposing penalties upon the town”).

comply voluntarily with the law.⁵²⁰ Thus, *Scituate* and *Eastman Kodak* represent substantive judicial activism in the extreme.⁵²¹

Other courts have not been so hostile to citizen suits or congressional enforcement policy. Where a government's enforcement action failed to address the factual grievances and violations alleged by a citizen group, the New York federal district court held the citizen suit not barred by the prior government action.⁵²² The New Jersey federal

520. See *supra* notes 306-310 and accompanying text. The Senate Committee on Environment and Public Works, which authored the 1987 CWA amendments, agrees. On May 10, 1994, after extensive hearings on a variety of issues, including enforcement, the full committee reported out the Water Pollution Prevention and Control Act of 1994, S.2093, which explicitly rejects *Scituate*. S. REP. No. 257, 103d Cong., 2d Sess. 90 (1994), which accompanied the bill to the full Senate, provides:

Section 309(g) (6) (A) currently provides that neither the Administrator nor a citizen suit plaintiff may bring an action for a civil penalty with respect to certain violations, including violations "with respect to which a State has commenced and is diligently prosecuting an action" under comparable State law, or for which "the State has issued a final order not subject to further judicial review and the violator has paid a penalty." Some courts have interpreted this provision broadly. In *North and South Rivers Watershed Ass'n v. Town of Scituate*, 949 F.2d 552 (1st Cir. 1991), the court held that an administrative order issued by the Commonwealth of Massachusetts barred a subsequent citizen suit plaintiff from seeking penalties or injunctive relief, even though the Commonwealth had not been authorized to operate the Act's permit program, its administrative order had not assessed any penalty, and there was no public notice or comment on the proposed order.

The broad interpretation of section 309(g) (6) (A) in the *Scituate* decision and other decisions undermines vigorous enforcement. The Act's enforcement system relies on states assuming primary enforcement authority, but preserves a residual Federal role for the rare but important cases where State enforcement actions are inadequate to fully protect public health and the environment. In such cases, as EPA Assistant Administrator Herman testified, "it is crucial that the power of the Federal government is available to insure that the violations are halted, that the violator is adequately penalized and does not profit from the violation, and that the violator addresses any environmental damage caused by the violations." Accordingly, the bill amends section 309(g) (6) (A) to eliminate the State bar to overfiling with respect to both Federal and citizen actions.

Id.

521. This activism has been explained as a negative reaction by courts to the hybrid statutory creations that citizen suits represent. James M. Hecker, *The Citizen's Role in Environmental Enforcement: Private Attorney General, Private Citizen, or Both*, 8 NAT. RESOURCES & ENV'T, Spring 1994, at 62. These courts appear to be uncomfortable with citizen suits because of the traditional judicial deference toward government's prosecutorial discretion. See, e.g., *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (holding that the presumption of reviewability of agency action does not apply to an agency's decision not to undertake certain enforcement actions). As a result, many courts, without regard to statutory language or congressional intent, rigidly and incorrectly alternate between two different paradigms of citizen suits: (1) citizens as "private attorneys general" who "stand in the shoes" of the federal government, and (2) citizens as private litigants enforcing a cause of action independent of the government. Hecker, *supra*, at 31.

522. *Hudson River Fishermen's Ass'n v. County of Westchester*, 686 F. Supp. 1044, 1052 (S.D.N.Y. 1988).

district court noted that under the explicit terms of section 309(g)(6)(B)(ii), subsequent parallel state proceedings will not preempt a citizen suit if the citizen group gave sixty days notice of the violation to the violator, EPA, and the state, neither government filed suit in court, and the citizen group filed its complaint within 120 days of the notice.⁵²³ According to the court, "Congress was presumably aware of the risks and inefficiencies of parallel actions when it drafted [CWA section 309(g)(6)(B)] and determined that some duplication is acceptable."⁵²⁴ Other courts have held that section 309(g)(6)(B) does not bar a citizen suit because of a prior federal administrative enforcement action, unless the action specifically sought civil penalties under section 309(g), as opposed to a compliance order issued under the general enforcement authority of section 309(a).⁵²⁵

The language of section 309(g)(6) is a clear statement of Congress's precise balancing of power between citizen and government enforcement. In fact, the Federal District Court for the Eastern District of Texas described the language as "unambiguous."⁵²⁶ Properly, courts looking to the clear language of the statute have rejected *Scituate*, stating that *Scituate* redrafts a "clear and unambiguous" statute.⁵²⁷

523. Public Interest Research Group of New Jersey, Inc. v. Yates Indus., Inc., 757 F. Supp. 438, 444 (D.N.J. 1991).

524. *Id.* at 444-45; see also Public Interest Research Group of New Jersey, Inc. v. Elf Atochem N. Am., Inc., 817 F. Supp. 1164, 1173 (D.N.J. 1993). In *Elf Atochem*, the court considered whether under § 309(g)(6) a state had commenced an enforcement action before or after the citizens sent their 60-day letter. The court held that only a formal administrative notice and order "issued pursuant to state regulations specifically providing for due process protections in the initiation of enforcement proceeding, was the actual initiation or 'commencement' of an enforcement proceeding" by the state agency. *Id.*; accord *Atlantic States Legal Found., Inc. v. Koch Ref. Co.*, 681 F. Supp. 609, 611 n.2 (D. Minn. 1988) (holding that notice of violation issued by the state did not constitute commencement of an enforcement action).

525. See *Washington Pub. Interest Research Group v. Pendleton Woolen Mills*, 11 F.3d 883, 885 (9th Cir. 1993); *Arkansas Wildlife Fed'n v. Bekaert Corp.*, 791 F. Supp. 769 (W.D. Ark. 1992). Faithfully following the language of the CWA, the *Bekaert* court stated, "Congress has defined when citizen suits are barred by administrative action in section 1319(g)(6). Congress has not provided that citizen suits are barred whenever an administrative action is underway or simply because there may be some duplication with a government proceeding." *Id.* at 775.

526. *Natural Resources Defense Council, Inc. v. Fina Oil & Chem. Co.*, 806 F. Supp. 145, 146 (E.D. Tex. 1992) (holding that the § 309(g)(6)(A)(i) presumption applies only when EPA has brought an action assessing administrative civil penalties after public notice and other statutory requirements have been met).

527. *Coalition for a Livable West Side, Inc. v. New York City Dep't of Env'tl. Protection*, 830 F. Supp. 194, 197 (S.D.N.Y. 1993). The district court held that CWA § 309(g)(6) only bars subsequent judicial actions for civil penalties, so that a violator will not be subject to duplicative civil penalties, one administratively and the other judicially assessed, for the same CWA violations. *Id.*

in which "the express words of section 1319(g)(6)'s bar provision appear to have been chosen with care."⁵²⁸ Unfortunately, as the next section of the Article shows, by making citizen suits secondary instead of supplemental, *Scituate*, *Eastman Kodak* and their progeny enable the states to weaken their enforcement effects while simultaneously precluding citizen suits that seek more vigorous enforcement.

2. *State Preclusion of Citizen Enforcement: The Unlevel Playing Field, Part 2.*—Both the federal government and the states can preempt CWA citizen suits by diligently prosecuting an action in court against the violator before a citizen suit is filed for the same violations. However, it has long been the established practice of EPA not to initiate preemptive enforcement in response to a sixty-day letter;⁵²⁹ although a sixty-day letter will not necessarily stop EPA action on a matter that is already proceeding down the EPA enforcement pipeline.⁵³⁰ Several reasons exist for this practice. First, sixty days is simply far too short a time for EPA to get a case through its system.⁵³¹ Second, EPA's transaction costs of pursuing a case are too high to warrant initiating enforcement solely to preempt a citizen suit. Finally, EPA supports citizen suits as an important enforcement supplement, and thus does

528. *Id.*

529. *See infra* note 531.

530. Telephone Interview with David Drelich, Attorney/Adviser, Office of Enforcement, Water Enforcement Division, EPA (Oct. 18, 1993).

531. A rare preemption occurred on a Sierra Club citizen suit against a discharger that was already in EPA's enforcement pipeline. When EPA headquarters received the 60-day notice, it directed the regional staff to tell the Sierra Club that EPA was already pursuing the case and intended to prosecute. However, the Sierra Club also desired to pursue the case because they wanted to prosecute a broader range of violations than the narrower EPA enforcement action contemplated. Apparently, there was a disagreement between the EPA regional staff and the citizen group, which erupted into a race to the courthouse. The region tried to accelerate its internal processing on the case in order to file before the citizen group. Acting as fast as it could, EPA filed the case 77 days later. The citizen group filed its case 77 days and one hour later. Litigation erupted over the preemption issue. For tactical reasons, the region did not want interference in the case from the citizen group. However, EPA headquarters was afraid that case law might result that would allow citizen suits to be unnecessarily preempted. *Id.*; *see also* Chesapeake Bay Found. v. American Recovery, 762 F.2d 207 (4th Cir. 1985) (citizen group filing two hours before government group did).

For a case that did create unfavorable precedent, see *EPA v. City of Forest Green*, 921 F.2d 1394, 1403-05 (8th Cir. 1990), which holds that a consent order in federal court between EPA and a polluter barred, on the basis of *res judicata* and collateral estoppel, a previously filed CWA citizen suit against the same defendant for the same CWA violations. *Id.* at 1405. This preclusion rule only applies in the limited circumstances of concurrent actions by citizens and EPA in federal court for the same violations. *See Hawaii's Thousand Friends v. City and County of Honolulu*, 806 F. Supp. 225, 229 n.19 (D. Haw. 1992) (noting that *res judicata* and collateral estoppel were not applicable because the government agency did not pursue its enforcement action in court).

not wish to discourage them by preemption. In fact, over the last several years EPA has actively tried to support citizen suits by opposing court decisions that would allow state administrative actions to preempt CWA citizen suits unnecessarily.⁵³²

However, citizens face regular battles at the state level for enforcement primacy. Preemption for the sole purpose of removing citizen suits from a state's enforcement arena has become more of a rule than an exception. If citizen suits result in preemptive state action because the state wants vigorously to enforce clean water laws against polluters, then the citizen efforts have been successful in protecting the environment. However, states sometimes take action against a polluter at its request in order to shield that polluter from a citizen suit;⁵³³ this type of preemptive action does not succeed in protecting the environment. Elsewhere, a hostile and perhaps embarrassed environmental official attempted to discourage citizen suits by the Chesapeake Bay Foundation, threatening that the state would preempt *every* CWA citizen suit which the group tried to bring in the future.⁵³⁴

Several states have adopted this preclusion approach in practice, if not in explicit words.⁵³⁵ Natural Resources Defense Council (NRDC), one of the groups that began bringing CWA citizen suits in the early 1980s, has been preempted by states at least fifty times since

532. Although EPA and DOJ resources are extremely limited, they nevertheless filed amicus briefs in the *Scituate*, *ICI Americas*, *Pan Am. Tanning*, and *Pendleton Woolen Mills and Laidlaw* cases.

533. See, e.g., *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 1995 WL 311983 (D.S.C. Apr. 7, 1995).

534. Interview with Ann Powers, Vice President and General Counsel, Chesapeake Bay Foundation (CBF) (July 21, 1994). Powers recounted an explicit threat of future preemption made to her in the late 1980s by a senior environmental official in the State of Maryland. Around the time of the warning, the group had been a litigant in several major citizen suits such as *Chesapeake Bay Found., Inc. v. Bethlehem Steel Corp.*, 652 F. Supp. 620 (D. Md. 1987), and *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 611 F. Supp. 1542 (E.D. Va. 1985), *aff'd*, 791 F.2d 304 (4th Cir. 1986), *vacated and remanded*, 484 U.S. 49 (1987).

According to Powers, a change in leadership at the state agency has now resulted in a marked shift in attitude. Recently, the state and CBF cooperated in a CWA enforcement effort against a municipality. However, this cooperative attitude of the agency is being undermined by legislative efforts to restrict citizen challenges to state-issued NPDES permits. These efforts are loosely modeled on similar efforts in Virginia. In CBF's view, the Virginia NPDES program is so ineffective that EPA should withdraw approval. CBF currently has a petition to that effect pending before EPA Region III. See *Chesapeake Bay Foundation, Petition for Corrective Action, An Order Commencing Withdrawal Proceedings, and Other Interim Relief with Respect to Virginia's Water Pollution Control Program* (submitted to EPA, Region III, Nov. 5, 1993).

535. These states include Alabama, Connecticut, Georgia, Maine, Michigan, and New Jersey. See *infra* notes 540-547 and accompanying text.

1986.⁵³⁶ In each case, the state enforcement action, whether judicial or administrative, resulted in lenient sanctions and relief to local dischargers, who sought protection from NRDC's citizen suit.⁵³⁷

In response to NRDC's suits, states developed the practice of wholesale preemption of the citizen enforcement. Michigan set the example in 1986. In Michigan, NRDC had sent out nineteen sixty-day notices to eighteen different industrial CWA violators. Before suits were filed, all eighteen companies approached NRDC together with a single offer to settle in bulk all CWA claims for the lump sum civil penalty of \$1.5 million.⁵³⁸ NRDC refused this offer as insignificant compared to the widespread, serious violations of each company. On the fifty-ninth day after the sixty-day notices were given, the State of Michigan filed nineteen judicial settlements in state court, obtaining penalties NRDC considered slaps on the wrist, and preempting all of the NRDC cases.⁵³⁹ Neither the state nor the violators reimbursed NRDC for the \$43,000 in attorneys fees, expert expenses and other costs incurred in preparing the cases.⁵⁴⁰

Two years later, NRDC was planning to prosecute a series of cases in Connecticut. Mindful of its bitter experience in Michigan, NRDC initially contacted the state officials to determine if the state and NRDC could work together. After reviewing the cases with the state and reaching an understanding that it would not interfere with the citizen suits, NRDC proceeded to send twenty-two sixty-day notices to industrial indirect dischargers in serious violation of their pretreatment obligations. Despite the prior understanding, Connecticut, for unexplained reasons, responded by preempting all the best cases, leaving what the state viewed to be the weakest cases for NRDC to pursue. Although NRDC had prepared all of the cases, the state let many of the cases it preempted languish, and it obtained generally weak enforcement results. In comparison, NRDC pursued the weak cases in federal court, and obtained significantly greater sanctions

536. Telephone Interview with Nancy Marks, Staff Attorney, Natural Resources Defense Council (July 5, 1994) [hereinafter Marks Interview].

537. *Id.* It was NRDC's policy not to settle any citizen suits without obtaining (1) a compliance order that would rapidly bring the violator into full compliance with the CWA; (2) civil penalties payable to the U.S. Treasury or payments for environmental projects, instead of civil penalties, in an amount that, at a minimum, deprived the violator of the economic benefit of its violation; and (3) payment of its attorneys' and experts' fees. *Id.*

538. *Id.*

539. *Id.*

540. *Id.*

from the court and in settlement than the state obtained in the strong cases it had preempted.⁵⁴¹

Alabama preempted eight NRDC cases in 1988-1989.⁵⁴² After NRDC sent sixty-day notices to CWA violators, the violators sought protection from Alabama state legislators, who successfully petitioned the Alabama Attorney General to preempt the citizen suits.⁵⁴³ The State of Maine also preempted NRDC on the last round of cases NRDC filed in that state.⁵⁴⁴ Georgia also has pursued this course,⁵⁴⁵ as has South Carolina.⁵⁴⁶ Some states effectively preempt citizen suits, without doing so explicitly, by executing administrative agreements with the violators that can interfere significantly with the federal lawsuit. This practice has become common in many states.⁵⁴⁷

The routine preemption via administrative action that *Eastman Kodak*, *Scituate*, and *ICI Americas* permit will allow interested states to protect local industries and municipalities from citizen suits. These states can use a state inspector or engineer to issue administrative consent orders to dischargers without notice to the public, and with low or no civil penalties. At the same time, those citizen suits that are not preempted are burdened routinely with litigation over a group's standing⁵⁴⁸ and *Gwaltney* parameter-by-parameter disputes,⁵⁴⁹ which extend litigation and consume the valuable time and resources of small citizen group staffs.⁵⁵⁰ The public interest environmental com-

541. *Id.*

542. *Id.*

543. Interview with James Simon, Director of Natural Resources Defense Council's Enforcement Project (Mar. 21, 1989).

544. Marks Interview, *supra* note 536.

545. *Id.*

546. *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 1995 WL 311983 (D.S.C. Apr. 7, 1995).

547. *Id.*; Telephone Interview with James Hecker, Attorney, Trial Lawyers for Public Justice (July 5, 1994); *see, e.g., Atlantic States Legal Found., Inc. v. Eastman Kodak Co.*, 933 F.2d 124 (2d Cir. 1991) (holding that a citizen suit may not challenge the terms of a settlement between a violator and the state unless there is a realistic prospect that the violation alleged in the citizen complaint will continue regardless of the settlement).

548. *See, e.g., Public Interest Research Group of New Jersey, Inc. v. New Jersey Expressway Auth.*, 822 F. Supp. 174, 179-83 (D.N.J. 1992) (holding that citizen group did not have standing to sue violator); *Natural Resources Defense Council, Inc. v. Texaco Ref. and Mktg., Inc.*, 800 F. Supp. 1 (D. Del. 1992) (holding that injury to aesthetic or recreational interests is sufficient to confer standing).

549. *See supra* note 497; *see also Public Interest Research Group of New Jersey, Inc. v. Hercules, Inc.*, 830 F. Supp. 1549, 1557 (D.N.J. 1993), *aff'd in part, rev'd in part*, 50 F.3d 1239 (3d Cir. 1995) (noting that newly-filed complaint in extended litigation may run afoul of *Gwaltney's* wholly post violation language).

550. For instance, NRDC's Enforcement Project, one of the largest in the country, was comprised of only four attorneys and one scientist. Marks Interview, *supra* note 536.

munity has become increasingly demoralized, most noticeably at NRDC, which recently disbanded its CWA enforcement project because it was too expensive to maintain in light of the litigation burdens resulting from state preemption, standing, and *Gwaltney*.⁵⁵¹

E. Citizen Suits: The Enforcement System's Safety Net

When Congress created citizen enforcement authority in the CWA and other environmental statutes, Congress realized that its "hopes for reliable enforcement required the efforts of citizen attorneys general."⁵⁵² As one commentator notes:

To rely on the existing bipolar institutions for zealous application of new standards and procedures was to ask too much of institutional self-interest and good-ol'-boy human nature. . . . Citizen outsiders who understood the new paradigm and were willing to take on the burdens of volunteer pluralism were a structural necessity if reform was to be brought into the system over the passive or active resistance of the old insiders. . . . [I]f citizens did not enforce the law, no one would.⁵⁵³

Congressional hopes for reliable private enforcement have been met. The regulated community has become extremely concerned about citizen suits,⁵⁵⁴ and greater voluntary compliance among polluters now exists as a result of the increase in citizen suits in the mid-1980s.

Additionally, citizen suits account for most of the important CWA enforcement court decisions, almost all of which have made CWA enforcement easier. For instance, citizen suits have established that DMRs containing permit violations are a sufficient basis for obtaining summary judgment against the polluter.⁵⁵⁵ Citizen suits have also lim-

551. *Id.* Although over the project's 10 year span, NRDC brought hundreds of cases, and eventually recovered sufficient attorneys fees and expenses to cover its costs, it did so at substantial financial burden—as of 1993, the project was about \$1,000,000 in the red.

552. Zygmunt J.B. Plater, *From the Beginning, A Fundamental Shift of Paradigms: A Theory and Short History of Environmental Law*, 27 *LOY. L.A. L. REV.* 981, 1006 (1994).

553. *Id.* at 1007.

554. *See, e.g.*, Written Statement of Hal Bozarth, Executive Director, Chemical Industry Council of New Jersey, Before the Environmental and Natural Resources Subcommittee Regarding H.R. 2727 and Enforcement Under the Clean Water Act, 1994 WL 224047 (F.D.C.H.) (Mar. 22, 1994) (asserting that "granting third parties the ability to sue is bad public policy, and I adamantly oppose the use of citizen suits"); Brief of Amicus Curiae Connecticut Business and Industry Association, *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 54 (1987) (No. 86-473) (suggesting that citizen suits should be limited because they are overly burdensome).

555. *See* Student Pub. Interest Group of New Jersey, Inc. v. Georgia-Pacific Corp., 615 F. Supp. 1419, 1430 (D.N.J. 1985) (rejecting defendant's argument that the violations cited in the DMRs were "within the margin of analytic error").

ited some defenses that polluters can assert,⁵⁵⁶ and have led courts to reject other defenses as a matter of law.⁵⁵⁷

Citizen suits are valuable for many other reasons. First, a citizen suit in federal court exposes the violator to the risk of substantially greater civil penalties than tend to be at stake in state courts or agencies or in EPA administrative actions.⁵⁵⁸ Citizen suits also expose violators to the equitable power of federal courts to order expensive abatement. As a result, polluters seem to be more fearful of citizen enforcement than state enforcement, and are thus more willing to settle the citizen suits than state judicial actions.⁵⁵⁹

Second, citizens are outsiders to permit deals and POTW plan approvals.⁵⁶⁰ This institutional distance may remove certain constraints from the enforcement process. For example, sometimes a state agency may approve new designs or technologies in a discharge permit. If the plant fails to meet the effluent limitations in the permit, the state may be unwilling to enforce permit violations resulting

556. For example, federal courts in New Jersey have restricted the ability of polluters to assert the "upset" defense. See *Student Pub. Interest Research Group, Inc. v. P.D. Oil & Chem. Storage, Inc.*, 627 F. Supp. 1074, 1085-87 (D.N.J. 1986); *Student Pub. Interest Research Group, Inc. v. Jersey Central Power & Light Co.*, 642 F. Supp. 103, 108 (D.N.J. 1986). An upset is "an exceptional incident in which there is unintentional and temporary non-compliance with technology permit effluent limitations because of factors beyond the reasonable control of the permittee." *P.D. Oil & Chem. Storage*, 627 F. Supp. at 1086.

557. In *Natural Resources Defense Council, Inc. v. Outboard Marine Corp.*, 702 F. Supp. 690, 692 (N.D. Ill. 1988), the Federal District Court for the Northern District of Illinois rejected the polluter's argument that the method specified by its NPDES permit to monitor its own effluents could not monitor pollutant levels appropriately, and thus the polluter should not be bound by that method. *Id.* at 692-93. The court stated, "DMC may not contend here that the use of its test results is not part and parcel of its NPDES permit." *Id.* at 693.

In *Natural Resources Defense Council, Inc. v. Texaco Ref. and Mktg., Inc.*, 719 F. Supp. 281 (D. Del. 1989), the court rejected defendant's attribution of permit violations to sampling errors because that argument contradicted Congress's intent to hold entities strictly liable for pollution levels in excess of permit limits. *Id.* at 288-89. The court further rejected defendant's argument that some permit violations should be overlooked as statistical outliers. *Id.* at 289.

558. For example, compare the median penalties collected by EPA regions reported in the tables in note 347, *supra*, with the \$1.285 million verdict imposed in *Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd.*, 791 F.2d 304, 313 (4th Cir. 1986), *aff'd in part, rev'd in part*, 890 F.2d 690 (4th Cir. 1988). This penalty was subsequently reduced to \$289,822. 890 F.2d at 698.

559. Interview with Robert F. Kennedy, Jr., Esq., Pace University Law School Environmental Litigation Clinic and Natural Resources Defense Council (Apr. 5, 1989) [hereinafter Kennedy Interview]. Kennedy is convinced that this increased likelihood of settlement makes citizen enforcement a crucial supplement to federal and state CWA enforcement.

560. Generally, the state agency must approve sewage treatment plant plans before the plants are built; an NPDES permit is needed to operate them. Typically, every NPDES permit prohibits any construction without prior agency approval.

from the deficient designs or technologies which it had previously approved. Naturally, citizen groups have no such reluctance to seek plant modifications that will abate the pollution.

Third, citizen suits are not subject to the individual reluctance some regulators bring to the enforcement arena. Because government engineers tend to move on to industry positions during their careers, disincentives may exist for a state engineer to antagonize local industry or to earn a reputation for being unreasonable by refusing to tolerate small deviations from permit limitations. On a deeper level, government and industry engineers often share similar professional outlooks, which can blur the line separating the two sides and result in a mindset that perceives certain violations as too insignificant to enforce.

Fourth, citizen enforcement is not subject to the political pressures that might hinder state enforcement. An example is the Hudson Valley Tree case in Newburgh, New York.⁵⁶¹ Newburgh, an economically depressed city, had approved a plastic Christmas tree manufacturing plant to be constructed on a wetland without the necessary permits or an environmental impact statement. The citizen group, followed by the state, sued to protect the wetland from destruction.⁵⁶² The company brought to the ensuing negotiations a union representative, a city official, the local Congressman's legislative aide, and a representative of the federal grant office.⁵⁶³ Simultaneously, the state agency's headquarters office, which was itself being pressured by the Congressman, pressured the state's attorney to back off enforcement.⁵⁶⁴ However, the project's proponents realized that political pressure would not solve their problem because the citizen group was not susceptible to the political pressure and was prepared to litigate regardless of the state's position. The proponents thus agreed to a negotiated solution that protected the wetlands. The citizen group is convinced that without its presence, the state would not have been able to protect the wetland.⁵⁶⁵

Fifth, for similar political reasons, citizen groups are more willing and better able to enforce the CWA against municipalities and state facilities than is the state. As a result of vigorously prosecuted citizen

561. Kennedy Interview, *supra* note 559.

562. *Id.*

563. *Id.*

564. *Id.*

565. *Id.* Ironically, under *Eastman Kodak*, *ICI Americas*, and *Scituate*, any state action today would deprive the citizen group of the ability to shield the state agency from outside political pressure.

suits, state agencies now can improve compliance from municipalities by threatening to turn cases over to citizen groups if the municipality does not bring its POTW into compliance. When states and citizens understand and respect each other's strengths and weaknesses and use their respective strengths in support of the others' weaknesses, the impact of the enforcement program can be greater than the sum of its parts.

Sixth, without citizen suits, regulators would pursue few, if any, actions against nonmajor polluters, those discharging less than 1,000,000 gallons per day.⁵⁶⁶ In New York, for instance, small dischargers' DMRs are sent only to the local county health departments. Neither the state agency nor EPA ever see them, and the county health officials do nothing more than store them.⁵⁶⁷ Interested citizens are the only potential regulators who look at the DMRs, and citizen suits are the only potential enforcement of violations in this category.⁵⁶⁸

Seventh, citizens are better able than state inspectors to discover unpermitted discharges. Sneak pipe discharging and intermittent dumping, often called "midnight dumping," take place at odd hours in hidden locations. Catching a polluter in the act may require days of continuous observation, which state inspectors, who are already overburdened and who usually work only normal business hours, cannot maintain. But regional citizen groups with dedicated memberships can and do maintain the intensive, prolonged surveillance necessary to catch these polluters. Unfortunately, because of *Gwaltney*, citizens cannot sue under the CWA to enforce against wholly past violations. Therefore, citizens probably cannot prosecute these violators under the CWA. Additionally, state agencies may already be so overburdened that they will not bring administrative actions against these unpermitted violations, although they may support a criminal prosecution by a state attorney general or local county district attorney.⁵⁶⁹ Thus, because of *Gwaltney*, unless the state brings a criminal charge, many of the most flagrantly illegal discharges may not be subject to CWA enforcement.

Finally, EPA, and EPA-approved state agencies, given their limited resources, naturally should focus on nation-wide and state-wide

566. *Id.*

567. *Id.* In counties that have no health departments, the permittees keep their DMRs in their own files.

568. *Id.*

569. Interview with Cesare Manfredi, Director, Region 2, New York State Department of Environmental Conservation (Apr. 24, 1989) [hereinafter Manfredi Interview].

concerns. Pollution that does not trigger national or state enforcement may nevertheless raise legitimate local or regional concerns. Acting as private attorneys general, local citizens can bring CWA enforcement actions against violators who would not otherwise be prosecuted by EPA or the states.

Ironically, because of the success of citizen suits, the regulated community now understands that regulators may not overlook permit violations that permittees may consider minor. This understanding has motivated many dischargers to minimize potential violations by seeking more liberal permit terms through tougher permit negotiating. Permit disputes over what is a reasonable detection level can be especially protracted when permits contain limitations at or near detection levels. At these levels, minor variations in testing technique, within an acceptable margin of error, may lead to differences in reportable discharge quantities that can mean the difference between compliance with or violation of the permit.⁵⁷⁰ To an already overloaded office, even one permit challenge, which can require at least two weeks of engineer and attorney time for an administrative hearing, is onerous.⁵⁷¹ Moreover, even if a hearing is not needed, the increased attorney involvement at all levels and the increased challenges to proposed permit limitations by dischargers have made permit limitations discussions more protracted. Some state environmental officials attribute, with some irritation, part of this extra workload to citizen suits pursuing what state personnel consider minor permit violations that the officials never would have prosecuted.⁵⁷²

CONCLUSION

The ability of citizens to bring and settle cases favorably⁵⁷³ prompted EPA to enforce the CWA more stringently than before citizen enforcement began in the early 1980s.⁵⁷⁴ Industry, except in those states that regularly preempt citizen groups, now understands that it cannot make private deals with EPA or the states over enforce-

570. *Natural Resources Defense Council, Inc. v. Outboard Marine*, 692 F. Supp. 801 (N.D. Ill. 1988).

571. Manfredi Interview, *supra* note 569.

572. Telephone Interview with unnamed water enforcement official, Pennsylvania Department of Environmental Resources (Feb. 27, 1992). This common phenomenon of official irritation may be driven by a sense of "[o]rganizational self-preservation [which] makes it imperative for the [agency staff] 'to manufacture the appearance of activity, . . . the symbolic reality of impact, the fiction of real power.'" HAWKINS, *supra* note 68, at 10 (citations omitted).

573. See *supra* note 537 (describing NRDC's settlement policy).

574. However, EPA's enforcement activity in approved states is negligible.

ment of permit limitations. However, the widespread state preemption of citizen suits points to a widening crack in the structure of the enforcement system. Because the federal government has all but abandoned its enforcement role in approved states, states can and do offer the inducement of weak enforcement as a method of economic competition. Moreover, those states that prefer a compliance-based enforcement policy over the CWA's sanction-based policy can and do abandon civil penalties as an enforcement tool. As the CWA case law has developed, states can now protect their industries and their enforcement policy preferences from active challenge by routinely preempting citizen suits. It is unlikely that any citizen group will invest significant time and resources on CWA enforcement in a state that has previously preempted a large number of citizen suits.

If a consistent pattern of state preemption of citizen suits develops, it would undermine the entire CWA federalist enforcement system. While states that preempt citizen suits may assuage companies' fears when the citizen group is threatening to sue, the states may also drive away the substantial enforcement support citizen groups can deliver. If enough states maintain weak enforcement programs or maintain antagonism towards effective civil penalties,⁵⁷⁵ and if enough states preempt citizen enforcement efforts, then the CWA will become merely a state-oriented law enforced according to local state concerns. For the CWA to achieve the national goal of improved water quality, the federal government either must become more active in enforcement or it must better protect citizen groups, as its surrogates, from preemption by states. If the federal government does not reassert its CWA power, directly or through its citizen surrogates, then the nation will be left with the prospect of states competing for industry by demonstrating a consistent commitment to lackadaisical CWA enforcement.

The CWA is the product of the tensions in a federal system between a desire for uniform, national pollution standards and a desire for local control responsive to local needs. Its substantive goals and effluent limitations are set nationally by EPA, but enforcement and designation of water quality standards are an almost exclusively local activity. The CWA can only achieve its national goals if the regulated community complies with it, yet the enforcement engine that drives compliance is state-based, not federal. EPA's almost total abandonment of its enforcement role in approved states allows each state to

575. Effective civil penalties must deprive polluters of the economic benefit of their pollution. See *supra* Part IV.B.1.

use its enforcement discretion to determine the meaning of the CWA. In the absence of a strong federal presence, the only check on state discretion is citizen enforcement, and this check is fragile if states can preempt citizen suits. Even in states which value enforcement by citizens, the state-citizen relationship is paradoxically strained: the more successful the citizen enforcers are, the greater the pressures dischargers exert to liberalize permits. Unfortunately, in CWA permitting issues, the time and expense required by attorneys and experts are so great that it is nearly impossible for citizens either to assist in or to monitor permit design. Hypertechnical enforcement by citizens could result in subtle permit changes allowing increased discharges if overworked state engineers bend under industry pressure. On the other hand, vigorous citizen enforcement probably accounts for much of the compliance that does occur.

On balance, only a strong state/citizen leg of the CWA enforcement triangle will achieve the level of enforcement necessary to assure widespread compliance with the CWA. This partnership can be strong only if states are prevented from using their preemption power to oust citizens from the partnership, and if citizens can recover their attorneys fees and expert expenses incurred in the CWA permit drafting process. Citizen enforcement would be further enhanced by an amendment to the CWA allowing citizens to seek civil penalties for solely past violations, as the Clean Air Act and the Emergency Planning and Community Right-to-Know Act now allow.

These changes would allow citizens to play the supplemental role Congress envisioned: to extend and strengthen the CWA enforcement system. EPA enforcement is insufficient to keep the CWA a federal law with national goals. Stronger citizen suit provisions will better enable citizens to monitor state enforcement and directly ensure enforcement of national requirements when state enforcement is weak. A triangle with three strong sides is a remarkably strong configuration, but without fully empowered citizens as private attorneys general, the strength of the CWA's triangular federalist enforcement system will not be achieved.