Citizen lawsuits to promote clean water

John H. Minan *

Abstract:

This research is relevant to the following conference theme stated in the call for papers: "The role of civil society organizations in promoting rights and freedoms and addressing violations." The human right of access to clean water is the "right and freedom" at the center of my proposed research.

As the former chairman of a California water agency tasked with the enforcement of the federal and state water pollution laws, I have practical and scholarly experience with the importance of citizen participation in promoting and protecting water resources.

This topic is critically important. The United Nations Conference on the Human Environment has declared that access to clean water is an absolute and fundamental human right. Yet, it also reports alarming statistics on the impact water pollution has on human health and mortality. Every nation, whether wealthy or poor, is impacted and at risk from inadequate access to clean water. The problem transcends political borders.

The state is the principal protector of the right to water that is free from harmful water pollutants. This obligation is not of recent origin. Early Roman law, for example, declared that certain water resources are held by the state in trust for the people and for the benefit of its citizens. This obligation continues to exist today.

But often the public agencies responsible for ensuring clean water fall short. Political pressures, economic forces, and other factors may contribute to this failing. One solution to this shortcoming is to develop an adequate legal theory of enforceable public rights authorizing citizens to use the courts to enforce those obligations through "citizen

* **Professor of Law Emeritus University of San Diego School of Law San Diego, California**

suits." This approach generally requires the grant of standing to citizens to pursue appropriate remedies through the judicial system.

The goal of citizen suits is not to provide compensation for injuries, but rather to ensure more effective enforcement of clean water laws. Thus, citizen suits allow citizens to act as "private attorneys general" by permitting them to sue private organizations or individuals alleged to be in violation of clean water laws. They also authorize suits against public officials who fail to carry out mandatory obligations, such as the promulgation of required regulations or enforcement of the law. The availability and use of citizen suits continues to be extremely important to the promotion of rights and freedoms by allowing private citizens to have a direct public role in enforcing clean water laws.

This research will explore the most recent use of clean water citizen suits in the United States. It will explore the following: 1) Who is a proper plaintiff? 2) Who is a proper defendant? 3) What are actionable violations? 4) What procedural requirements exist? 5) What government action bars citizen suits? 5) When is citizen intervention in pending litigation allowed? 6) What are the available remedies, including attorney fees?

I. Introduction:

This paper is intended to provide a useful guide to the international community on citizen suits as it grapples with the global, national, regional, and local aspects of water pollution and the role of citizen participation.

One of a nation's greatest resources in enforcing clean water laws is its citizenry. In the context of environmental enforcement, the government and its citizens share a common goal–protecting the beneficial use of water for society.

Addressing water pollution is a major challenge in the twenty-first century. Pollution is commonly conceptualized in terms of anthropogenic additions to water. The federal law follows this approach by broadly defining pollution as "man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." (1)

The "integrity of water" in this definition is important, because it introduces the concept of the beneficial use of water. The ultimate goal is the protection of water that is useable. Beneficial use takes into account the maximum concentration of materials present in the water before they interfere with uses such as human consumption, fish propagation, recreation, agriculture, and other uses.

One of the important developments in environmental law in the United States has been granting citizen groups a direct enforcement role.(2)This innovation, which is immune from concerns of regulatory capture and political influence, added a third player to the traditional two-party regulatory model of regulated dischargers and the governm ent. The citizen suit introduced a third party to the former bipolar model: citizen groups.

(1) Clean Water Act (CWA) § 502(19), 33 U.S.C. § 1362(19).

(2) The availability of citizen suits does not preclude the use of other legal theories. Traditionally, private nuisance and trespass are the most commonly invoked tort actions for water pollution. CWA § 505(e) recognizes this tradition. It provides: "Statutory or common law rights are not restricted Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency)."

As the former chairman of a California water agency tasked with the enforcement of the federal Clean Water Act (CWA)[3]and the California Porter Cologne water pollution law,[4] I have both practical and scholarly experience with citizen participation in promoting and protecting water resources. In my view, citizen suits play an important role in encouraging citizen participation in enforcing the CWA in the United States.

II. Historical Foundations

The public's general right to water is based on ancient concepts. This right was recognized as early as the second century in the Institutes and Journal of Gaius, in sixth century Roman civil law, in medieval England, and in the common law as it developed. This human right was transplanted from England to the American colonies and then to the individual states. Today, clean water laws exist at both the federal and state levels.

Although the focus in this paper is on the legislative grant of citizen suit standing to achieve clean water goals, the public trust doctrine is an independent legal theory for citizen action.[5] Public trust defines the legal relationship between private owners and the environment. Pursuant to this doctrine, waters and closely-related lands, such as tide lands, are held by the sovereign in trust for the people. The underlying theory is that private property rights never attach to the property subject to the public trust, and therefore the public's rights are superior to the assertion of any private claim or entitlement.

III. Contemporary International Considerations

The right to clean water is fundamental to human existence. The United Nations Conference on the Human Environment has declared that access to clean water is an absolute and fundamental human right.

Global water pollution is on the rise. The Pacific Institute estimates that two million tons of sewage, industrial and agricultural waste are discharged into the world's waterways every day. For comparison

(3) CWA § 505, 33 U.S.C. § 1365.

(4) CA Water Code §§ 13000-14958. The CWA generally preserves state authority to enforce stricter standards or limitations respecting the discharge of pollutants. CWA § 510.

(5) See, National Audubon v. Society v. Superior Court, 658 P.2d 709 (Cal. 1983).

purposes, the amount of waste is the equivalent weight of the world's population of about 6.8 billion people.(6)

The United Nations has also recognized the important role of citizen groups.

Non-governmental organizations play a vital role in shaping and implementation of participatory democracy. . . . The nature of the independent role played by non-governmental organizations calls for real participation; therefore, independence is a major attribute of non-governmental organizations and is the precondition of real participation. United Nations Conference on Environment & Development, Rio de Janeiro, Brazil, 1992, Agenda 21, Section 27.1.

Governments will need to promulgate or strengthen . . . any legislative measures necessary to enable the establishment by non-governmental organizations of consultative groups, and to ensure the right of non-governmental organizations to protect the public interest through legal action. United Nations Conference on Environment & Development, Rio de Janeiro, Brazil, 1992, Agenda 21, Section 27.13.

These statements by the United Nations reflect the global importance of non-governmental organizations to environmental protection. Not surprisingly, nation states also recognize this importance.(7) Citizens and citizen groups are a critical constituency because they are frequently the most directly impacted by pollution.

Once water is contaminated, remediation is difficult, costly, and often impossible.(8) According to the United Nations, a staggering 80 percent

(6) Pacific Institute, World Water Quality Facts and Statistics, available at www.pacinst.org/wp-content (last visited March 8, 2018).

(7) See, e.g., The Convention on the Protection of the Environment between Denmark, Finland, Norway and Sweden (Nordic Convention) grants all legal persons, including individuals and non-governmental organizations, the right to protest and vindicate environmental rights and duties in the legal systems of the parties. L. Guruswamy, International Environmental Law, 4th ed., (West 2012).

(8) CWA § 402(p) establishes permit requirements for industrial and municipal storm water discharges. Permits for discharges from municipal storm sewers are subject to the following restriction: they "shall include a requirement to effectively prohibit non-stormwater discharges into (emphasis added) the storm sewers . . .." CWA § 402(p)(3)(B)(ii). This prohibition aims to prevent the pollutants from entering the conveyance system in the first place, which eliminates or minimizes the pollution-removal problem.

of global wastewater goes uncollected or untreated, and consequently contains everything from human waste to industrial toxic contaminants. On average, low-income countries treat only 8 percent of domestic and industrial wastewater.(9)

The United Nations reports alarming statistics that show water pollution adversely affects human health, mortality, and the environment. Unsafe water results in 2.2 million deaths a year, mostly among children under the age of five.(10) Every nation, whether wealthy or poor, is at risk from water pollution and impacted by it.

Water pollution does not respect political borders. It frequently migrates from one nation state to another creating transborder national and international legal issues.

Cross-border water pollution between Mexico and the United States illustrates this problem.(11)For years, Southern California has been under continuing siege from the flow of untreated and partially treated sewage and other pollutants from the Tijuana region in Mexico.

In March 2018, the Port of San Diego and several local cities filed a citizen suit against the U.S. branch of the binational International Boundary and Water Commission (IBWC) for violating the CWA.(12)Plaintiffs argue that they can no longer tolerate the IBWC's failure to prevent sewage, trash, industrial waste and pesticides from flowing through the Tijuana River and into the Pacific Ocean on the United States' side of the border. The pollution has been so severe that portions of the shoreline and beaches in the United States were closed for health reasons during at least 160 days in 2015, 2016, and 2017. Plaintiffs ask that the IBWC build a number of projects to address the problem, including infrastructure to divert polluted flows of wastewater from the

(9) World Water Development Report 2017, 22 March 2017, available at www. unwater.org (last visited Feb.23, 2018).

(10) Supra, note 6.

(11) Minan, Recent Developments in Wastewater Management in the Coastal Region at the United States-Mexico Border, 3 San Diego International Law Journal 51 (2002).

(12) The International Boundary and Water Commission (IBWC) is a binational commission charged with managing water issues along the border. It consists of a U.S. Section and a Mexican Section.

Tijuana River to the International Wastewater Treatment Plant in the United States for treatment.

The failure to properly manage the flow of cross-border pollution affects a wide array of public interests on both sides of the border and is a continuing source of international tension. Human health is obviously affected. In addition, property values, ecosystems, and the tourist industry suffer adverse impacts. An ever expanding population in the border region of Mexico compounds the challenge to secure a solution through the courts.

IV. Citizen Suits

The state is the principal protector of the right to water that is free from harmful water pollutants. The enforcement tools available to the government include civil administrative action, civil judicial enforcement, and criminal action. Often the public agencies responsible for ensuring clean water fall short in meeting their responsibilities. Political pressure, public and private economic forces, inadequate funding, and numerous other considerations may contribute to these failings.

One solution is to adopt an adequate legal theory of enforceable public rights by authorizing citizens to use the courts to enforce those obligations through "citizen suits." This solution, which recognizes that citizen lawsuits supplement government action and are not a substitute for it, requires a legislative grant of "standing" to citizens to pursue appropriate remedies. The existence of a free and independent judiciary is critical to meaningful citizen participation.

Nearly every major federal environmental statute contains a citizen suit provision.[13] Although differences have developed in the various

(13) See, e.g., Clean Air Act (CAA) § 304, 42 U.S.C. § 7604; Clean Water Act (CWA) § 505, 33 U.S.C. § 1365; Endangered Species Act § 11, 16 U.S.C. § 1540(g)(1)(A); Surface Mining Control and Reclamation Act § 520, 30 U.S.C. § 1270(a)(2); Safe Drinking Water Act § 1449, 42 U.S.C. § 300j-8; Resource Conservation and Recovery Act § 7002, 42 U.S.C. § 6972; Comprehensive Environmental Response, Compensation, and Liability Act, § 310, 42 U.S.C. § 9659. Although the citizen suit provisions are similar among the various environmental laws, the substantive pollution control strategies are quite different. The CWA, for example, generally reverses the approach of the CAA. Instead of starting with ambient water concentrations and working backwards to determine individual emission levels, the CWA starts with individual effluent levels.

citizen suit statutes as they have been amended over time, the statutes are similar in approach, structure, and wording. Thus, cases involving citizen suits brought under one environmental statute are often useful as a guide to interpreting other environmental statutes.

As a matter of policy, citizen suits foster the rule of law, agency accountability, representational democracy, and environmental stewardship. In a democratic system, ultimate power resides in the citizenry, and citizen suits provide a mechanism for citizen participation in the life of the community and an opportunity to have their voices heard. As discussed below, citizen suits are not without governing limits.

The goal of citizen suits is to ensure the more effective enforcement of clean water laws. It is not to provide financial compensation for citizen injuries. Other legal theories are available to accomplish that objective.

Citizen suits allow citizens to act as "private attorneys general" by enabling them to sue private parties alleged to be in violation of clean water laws. They also authorize suits against public officials or public agencies that fail to carry out mandatory obligations, such as the promulgation of required regulations or the enforcement of the law.

Numerically, more government clean water complaints are filed than citizen suits. State and federal agencies, unlike citizens, can pursue administrative sanctions and criminal prosecutions. Although most enforcement actions are brought by the government, citizen suits make an important contribution to enforcement of the CWA.

A.The federal Clean Water Act (CWA)

The structure and operating detail of the CWA is complex and beyond the scope of this paper. It is sufficient for our purpose to understand that Congress's principal goal(14)in passing the CWA was to reduce the discharges of waste from point sources.(15)

(14) CWA § 101 contains Congress's broad "declaration of goals and policy." Among the various stated goals, the "restoration and maintenance of the chemical, physical, and biological integrity of the Nation's water" is identified.

(15) CWA § 502(14) defines the term "point source" to mean "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel ... from which pollutants are or may be discharged."

The CWA provides that "except in compliance" with the law, "the discharge of any pollutant by any person is unlawful."(16) The National Pollution Discharge Elimination System (NPDES) establishes a permit system for regulating the discharge of pollutants, and any discharge without a permit or in violation of it is unlawful.(17) Before a permit is issued, however, it is subject to public notice and comment. Thus, citizens have the opportunity to comment on the issuance of a proposed permit and its terms.

The law defines the "discharge of a pollutant"1(18)as "any addition of any pollutant from any point source" (19)to waters of the United States, including territorial seas.(20) NPDES permits establish effluent limits from a treatment plant, sewer, or industrial site. These limits restrict how much and what types of pollutants can be added to a particular receiving water, taking into account the beneficial uses of that receiving water. The limits stated in the permit also depend on whether the facility is a sewage treatment plant or other facility.

NPDES permits also establish monitoring and reporting requirements. These requirements underlie the popularity of citizen suits, because the information in these reports, which are available to the public, often provide the evidentiary basis for a citizen lawsuit.

The CWA is being used by citizens in the struggle to combat the effects of climate change. In late 2017, for example, a citizens' group sued Shell Oil Company alleging that its stormwater pollution prevention plan for the company's Rhode Island Terminal violated the CWA.(21)The group argues that Shell's stormwater plan (22)fails to account for sea level

(16) CWA § 502 (5). The term "person" means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a state.

(17) CWA § 402.

(18) The definition of "discharge of a pollutant" is contained in the Code of Federal Regulations at 40 C.F.R. § 122.2.

(19) CWA § 502 (12).

(20) CWA § 502 (7).

(21) Conservation Law Foundation, Inc. v. Shell Oil, Case 1:17-cv-00396, available at dlbib-jzgnk95t.cloudfront.net (last visited March 16, 2018).

(22) Shell is required by the CWA to have a Storm Water Pollution Prevention Plan (SWPPP). This plan requires Shell "to be prepared in accordance with good engineering practices and identify potential sources of pollutants, which may reasonably be expected to affect the qual- =

rise, the increased and/or more intense precipitation, the increased magnitude and frequency of storm events, and related storm surges due to climate change. The citizens' group seeks declaratory and injunctive relief, civil penalties, and environmental restoration. Additional lawsuits based on the CWA and climate change are inevitable.

B. The plaintiff

Prior to the enactment of the CWA in 1972, recognition was widespread that the government failed to adequately enforce the federal water pollution law. The addition of citizen suits to the law responded to this enforcement problem.

CWA section 505(a) broadly authorizes "any citizen" to bring suit:

(a) Authorization; jurisdiction

Except as provided in subsection (b) of this section and section 1319(g)(6) [23] of this title, any citizen may commence a civil action on his own behalf--

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator [24] or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.[25]

= ity of storm water discharges associated with industrial activity from the facility." Id., complaint, para. 71, p.17.

(23) CWA § 309(g)(6), 33U.S.C. §1319(g)(6) deals with the "diligent prosecution" rule discussed below.

(24) Administrator means the Administrator of the Environmental Protection Agency, or an authorized representative. 40 C.F.R. § 122.2.

(25) CWA 505 (a)(1)(A) violations of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation.

Citizens are defined as "persons having an interest which is or may be adversely affected."(26)

The "case or controversy" clause on federal authority underpins the doctrine of standing.(27)The Supreme Court requires a plaintiff to meet three requirements to pursue a legal claim in the federal courts: 1) An injury-in-fact; 2) caused by and traceable to the defendant; and (3) that is redressable by a favorable decision. An injury may be shown by a reasonable concern that the pollution has harmed an aesthetic or recreational interest in the affected waterbody. (28)

Additional requirements apply when the plaintiff represents an environmental organization. Representational standing is met by showing that 1) its members would have standing; 2) the interests the organization seeks to protect are related to its purpose; and 3) neither the claim it asserts nor the relief requested requires its members to participate in the litigation.(29)

The government enjoys "prosecutorial discretion," which means that citizens cannot force it to taken an enforcement action. Although citizens cannot force an agency to take an enforcement action, citizens may take on the role declined by the government. In such cases, citizen suits typically fall into either the discharger's failure to have or comply with the permit standards or limitations,(30)or the government's failure to comply with mandatory duties, such as the failure to promulgate pollution standards.

Suits against the government for regulatory inaction frequently focus on whether the particular responsibility is characterized as discretionary or mandatory. Government decisions regarding whether to prosecute a violation are discretionary.(31)In contrast, statutory mandates, such

(26) CWA § 505(g).

(27) US Const., Article III, § 2, cl 1.

(28) Friends of the Earth v. Laidlaw, 528 U.S. 167 (2000).

(29) Id.

(30) Two types of cases fit within this category. One involves the government operating the facility in noncompliance, and the other involves a non-governmental entity operating in noncompliance.

(31) Prevailing in discretionary lawsuits is unusual, but possible when the government's substan- =

as the requirement that regulations be implemented by a certain date, are mandatory, and therefore are actionable by citizens against the government. When the citizens prevail, the court typically orders the government to perform the delayed act or duty.

One important challenge for a citizen to secure standing is proving causation between the defendant's action and the alleged injury. Establishing causation is difficult when numerous sources of pollution and multiple parties exist.

C. The defendant

Section 505(a)(1) authorizes a lawsuit against "any person" alleged to be in violation of the CWA. Most citizen suits fit into claims that a person is "discharging without a permit," or "discharging in violation of a permit." The scope of this section clearly is broad.

The Supreme Court in Gwaltney v. Chesapeake Bay Foundation [3(32)2] held that Section 505(a) did not confer federal jurisdiction over citizen suits for past violations. A factual question frequently litigated is whether the "alleged violations" are wholly in the past. This issue is significant because only continuing violations are actionable.

Section 505(a)(2) includes as potential defendants the United States and other governmental entities to the extent allowed by the Eleventh Amendment to the Constitution.(33)This section constitutes a limited waiver of sovereign immunity by the federal government.

The Eleventh Amendment states that no federal jurisdiction exists for a suit against a state by citizens of another state. The Supreme Court has construed the language to preclude all private lawsuits against the states in the federal courts based on the theory that the federal government is limited in its ability to abrogate state sovereign immunity. This view does not prevent, however, the federal government from suing a state for violating the CWA.

= tive decision is arbitrary and capricious, which means that the discretionary decision has no reasonable basis in fact.

(32) Gwaltney v. Chesapeake Bay Foundation, 484 U.S. 49 (1987) (holding that citizen suits are unavailable for violations "wholly unconnected with any present . . .wrongdoing.").

(33) U.S. Const., 11th Am.

D. Notice of intent to sue

The CWA does not have a specific statute of limitations. Consequently, the courts generally apply a five-year statute of limitations to citizen suits.(34)

The law requires citizens to give 60-days notice of the alleged violation to 1) the United States, 2) to the state where the alleged violation occurred, and 3) to the alleged violator.(35)Disputes about notice typically concern factual compliance with the notice regulations. Most courts hold that the notice requirement is a jurisdictional prerequisite.3(36)6 Thus, if a defect in notice is discovered after the 60-day period, the citizen suit is dismissed.

The legislative history to the CWA suggests that the purpose of notice is to allow the government to assume its primary enforcement obligation. The 60-day notice period gives the government a reasonable period of time either to act or stand aside. An alternate rationale is that the notice gives the alleged violator an opportunity to come into compliance with the law. Compliance renders the citizen suit unnecessary, because citizen groups cannot sue for past violations.

The notice regulations contain considerable detail.(37)For violations of a discharge standard or limitation, the notice must contain sufficient information to allow the recipient to identify the specific standard, limitation, or order alleged to have been violated, the activity alleged to constitute a violation, the person or persons responsible for the alleged violation, the location of the alleged violation, the date or dates of such violation, and the full name, address, and telephone number of the

(34) 28 U.S.C. § 2462 provides: "Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon."

(35) One exception to the 60-day notice period is for violations involving the discharge of toxic pollutants. See, CWA § 505 (b) (2) referencing § 1317.

(36) See, e.g., Washington Trout v. McCain Foods, Inc., 45 F.3d 1351 (9th Cir. 1995) (holding the citizen suit should be dismissed because the 60-day notice letter failed to properly identify the plaintiffs).

(37) 40 C.F.R. § 135.3.

person giving notice. Complying with this regulatory detail poses a hurdle for many citizen plaintiffs.

For alleged failure-to-act violations by the government, the notice must identify the provision of the CWA that requires the action or creates such duty, describe with reasonable specificity the action taken or not taken which is alleged to constitute a failure to perform such action or duty, and fully identify the person giving the notice.

E. Barring actions

The overarching goal of citizen lawsuits is vigorous enforcement of the law. Congress sought to balance the preference for government enforcement against the policy of allowing citizens to effectively participate in the enforcement process while avoiding the confusion and conflicts that could result from simultaneous lawsuits by both private citizens and the government involving the same violation.

Section 505(b) states that "No action may be commenced . . . 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. . . ." This section clearly states that the action applies to "a court" proceeding. By judicial construction, Section 505(b) also has been applied by the courts to administrative proceedings.

Requiring citizens to notify the government before filing a citizen suit allows the government to assume the role of primary enforcer of the CWA. Thus, if the government brings an enforcement action, the citizen suit is barred, [38]and any pending civil citizen suit alleging the same violations will be dismissed by the court.[39]

One notable exception to the dismissal rule is the "diligent prosecution" requirement. Congress created this exception to prevent collusion between the government and industry whereby the citizen suit might

(38) CWA § 505(b)(2).

(39) All may not be lost for a citizen group. The U.S. Department of Justice policy requires that consent decrees settling environmental cases be subject to public notice and comment prior to submission to the court for entry. 28 C.F.R. § 50.7. This provides a method for citizen input to settlements of environmental cases.

be barred by the government simply filing an action. The exception to the bar is designed to prevent violators from escaping liability. If the government fails to "diligently prosecute" the administrative, civil, or criminal claim, the citizen suit may proceed. Citizen plaintiffs bear the burden of proving that the government action was not diligent, however. This procedural burden is significant, because the courts routinely presume diligence by the government.

Although the amount of a monetary penalty may be evidence of non-diligent prosecution, citizens who disagree with the size of a penalty sought by the government generally are barred from suing. However, if the penalty sought by the government is less than the economic benefit of the noncompliance with the law, this fact may be argued as evidence of non-diligent prosecution. Allowing the citizen suit to proceed under these circumstances is designed to remove a violator's economic incentive to ignore the law, and is consistent with the principle that a monetary penalty should deter noncompliance.

Another notable exception that may thwart a citizen suit is res judicata. This doctrine might apply when the government settles a lawsuit with the defendant. The settlement will bar the citizen suit from continuing when (1) the government action resulted in a final judgment on the merits, (2) involved the same cause of action, and (3) both actions involved the same parties.

One of the most effective defenses to a citizen suit is the previously discussed 60-day notice period. A violator who corrects any alleged violations within this period may bar the citizen suit, because only ongoing violations are actionable by citizen plaintiffs. Another common defense is settling the violation with the government agency during this 60-day period, which also bars the claim unless the matter was not "diligently prosecuted" by the government. Other possible defenses include defects in the required notice, lack of standing, protections under the "permit shield,"[(40)] estoppel, and mootness.

(40) In most cases, compliance with the terms of a NPDES permit provides an affirmative "shield" or defense to enforcement actions, and potentially even to those pollutants not specifically identified in the permit. See CWA § 402.

F. Available remedies for violations: Consent decrees, Monetary penalties, Supplemental Environmental Projects (SEPs), and Injunctive Relief

Consent decrees: Few CWA civil cases go to trial. Parties settle most disputes using a consent decree where the penalty and required compliance are agreed to by the parties before being approved by the court. The law requires the government to be given 45-days notice to comment on citizen suit consent decrees before they are ordered by the court.(41) This notice allows the government sufficient time to discharge its oversight responsibility to ensure the agreement is in the public interest.

The settlement embodies both a judicial and a contractual aspect. The contractual aspect is the agreement by the parties to the terms of the settlement, whereas the judicial aspect is the court's order.

Before entering its order, the court discharges its oversight function by reviewing the settlement to ensure the following: 1) the agreement is consistent with the requirements of the CWA; 2) the terms are a result of good-faith negotiating; and, 3) the terms are "fair, just, and equitable." Unless convincing evidence shows that the agreement fails to comply with the law, courts commonly defer to the parties' proposing the settlement, which is consistent with the contractual aspect of the agreement.

A federal district court in Alaska, in addressing an intervenor's objection to the proposed consent decree, illustrates the deference accorded to the parties agreement:

While it may well be true that each of these provisions extracted less than was possible from defendant it must be remembered that a consent decree by its very nature will contain some elements of compromise. The court has examined the records herein and it does not appear that the government was unusually lenient nor that the public interest has been subverted in any manner. It further appears that the mandate of

(41) CWA § 505(3).

the Clean Water Act will be met by these provisions.(42)

Courts have neither the time nor the resources to try most civil cases. The expense of litigation is another reason most cases settle. The Federal Judicial Conference reports that only 4 percent of all civil cases filed in federal court result in a trial on the merits is not surprising. One reason CWA cases fit within this normative statistic is that the monitoring and reporting requirements, which must be certified for accuracy,(43)make proving many violations relatively easy. Because the CWA is a strict liability statute, a violator's good faith or lack of knowledge is irrelevant to establishing civil liability.

Monetary penalties: The Supreme Court has held that monetary fines or penalties against the federal government are not available under the CWA.(44) The Court reasoned that Congress had not clearly intended to waive its claim of sovereign

immunity based on construing the term "persons" used in the CWA.(45) The elimination of civil penalties against the federal government operating federal facilities in violation of the CWA eliminates a potent enforcement tool. From a policy perspective, federal facilities that pollute illegally should be subject to the same enforcement mechanism as other facilities.

When monetary penalties are assessed against a third party, the penalty must be paid to the government, and not to the citizen enforcer. As discussed below, consent decrees that require violators to make payments for other purposes, such as Supplemental Environmental Projects (SEPs) or payments for citizen monitoring, are allowed so long as the payments are not designated as a monetary penalty. Thus, although financial penalties are payable only to the government,

(42) United States v. Ketchikan Pulp Co., 430 F.Supp. 83, 87 (1977).

(43) Criminal penalties are available for false statements, which encourages the reporting entity to be accurate. CWA § 309(c).

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

(45) CWA § 505(a) says the federal court may "apply any appropriate civil penalties" under CWA § 309. The definition of "person" in § 309(d) dealing with civil penalties did not include the United States. The fact that other sections of the CWA defined "persons" to include the United States did not control.

citizen plaintiffs often settle their lawsuits on terms that include not only the cessation of violations, but also payment of monies to support qualifying activities.

Defendants in a CWA civil action are constitutionally entitled to a jury trial. But the constitution does not entitle defendants a jury trial on the size of any monetary penalty. This determination is entrusted solely to the judge.(46)Section 505(a) grants the courts authority to "enforce" the law and to assess "any appropriate civil penalties." In determining the amount of a civil penalty, the court must consider the seriousness of the violation or violations, the economic benefit 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.(47)

Different approaches have been used to determine the amount of a penalty. Some courts assess monetary penalties by determining the maximum amount available under the statute(48)and then adjusting the amount downward by taking into account mitigating factors, such as good-faith efforts to comply. Other courts initially set the penalty by determining the economic benefits associated with noncompliance, often using computer models, and then adjusting the penalty upwards based on aggravating factors, such as a history of violations. The top-down approach of starting with the maximum amount and reducing it tends to result in higher penalties.

Supplemental Environmental Projects (SEPs): The law encourages SEPs, and they are quite common. They must be actions that the defendant is not otherwise legally required to perform. The government frequently accepts a wide range of SEP "public benefit" projects that are proposed in lieu of some portion of a monetary penalty.

A geographic link, commonly referred to as a "nexus," between the

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

(47) CWA § 309(d).

(48) CWA § 309(d) provides that civil penalties shall not exceed $25,000 per day for each violation, whereas § 309(g) dealing with administratively assessed penalties may not generally exceed $10,000 per violation.

violation and the proposed SEP is required. Considerable creativity is used in identifying this link. The federal government has set out eight categories of projects that can be acceptable SEPs. To qualify, a SEP must fit into at least one of the following:

Public Health: SEPs may include examining residents in a community to determine if anyone has experienced any health problems because of the company's violations.

Pollution Prevention: These SEPs involve changes so that the company no longer generates some form of pollution. For example, a company may make its operation more efficient so that it avoids making a hazardous waste along with its product.

Pollution Reduction: These SEPs reduce the amount and/or danger presented by some form of pollution, often by providing better treatment and disposal of the pollutant.

Environmental Restoration and Protection: These SEPs improve the condition of the land, air or water in the area damaged by the violation. For example, by purchasing land or developing conservation programs for the land, a company could protect a source of drinking water.

Emergency Planning and Preparedness: These projects provide assistance to a responsible state or local emergency response or planning entity to enable these organizations to fulfill their obligations under the Emergency Planning and Community Right-to-Know Act (EPCRA.) Such assistance may include the purchase of computers and/or software, communication systems, chemical emission detection and inactivation equipment, HAZMAT equipment, or training. Cash donations to local or state emergency response organizations are not acceptable SEPs.

Assessments and Audits: A violating company may agree to examine its operations to determine if it is causing any other pollution problems or can run its operations better to avoid violations in the future. These audits go well beyond standard business practice.

Environmental Compliance Promotion: These are SEPs in which

an alleged a violator provides training or technical support to other members of the regulated community to achieve, or go beyond, compliance with applicable environmental requirements. For example, the violator may train other companies on how to comply with the law.

Other Types of Projects: Other acceptable SEPs would be those that have environment merit but do not fit within the categories listed above. These types of projects must be fully consistent with all other provisions of the SEP Policy and be approved by EPA.(49)

Any part of the SEP not successfully completed removes the suspended liability and renders that amount immediately due and payable to the government. The defendant has the responsibility to pay this suspended amount regardless of any third-party agreements contracted or used to implement the terms of the SEP. Consequently, a defendant who relies on a third party to perform part or all of the SEP typically will require the third-party to provide a performance bond or other assurance should the SEP project not be completed as promised.

Injunctive relief: Injunctive relief is tailored to the alleged violations. For example, injunctions related to sanitary overflow violations are different from those arising out of point source violations. All injunctions require compliance with the permit that was violated.

Preliminary injunctions are commonly sought to prevent a continuing harm. As in other areas of the law, injunctive relief is a discretionary remedy. The Supreme Court in Weinberger v. Romero-Barcelo (50)applied this principle when it held that the CWA did not mandate the issuance of an injunction against the unpermitted dropping of practice bombs by the U.S. Navy in the coastal waters of Puerto Rico. The question before the Court was whether the CWA required the trial court to immediately enjoin all discharges that violated the CWA. The lower court concluded that an injunction was not necessary to ensure suitably prompt compliance by the Navy. The Supreme Court agreed that fines and criminal penalties were available to promote compliance. Thus,

(49) www.epa.gov/supplemental environmental projects (last visited March 2, 2018).
(50) Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982).

the lower court retained equitable discretion to determine whether the Navy should be ordered to secure a permit, be fined, otherwise sanctioned, or immediately enjoined.

The courts retain considerable equitable discretion. To obtain injunctive relief the citizen group or government must demonstrate: 1) the substantial likelihood of success on the merits; 2) irreparable harm will result if the injunction is not granted; 3) the injunction will not substantially harm other interested parties; and 4) the public interest is served.

G. Attorney's fees

Under the so called "American Rule," each party in civil litigation has the responsibility to pay its own attorney's fees regardless of which party prevails. There are exceptions to this general rule, and the CWA contains such an exception. Section 505(d) provides: "The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate." The legislative history to the CWA suggests that Congress expressly intended to provide fees to citizen groups when their enforcement actions resulted in compliance with the law. Attorney's fees theoretically may be awarded to the plaintiff or the defendant, so long as the party is a prevailing or substantially prevailing party. Attorney's fees to a prevailing defendant are exceedingly rare, however.(51)

As a matter of policy, the privatized enforcement of the CWA saves the government enforcement expense. The question of whether attorney's fees are proper has produced a considerable body of law. The reason is rather straightforward: the possibility of attorney's fees has been a driving force behind many citizen suits. Without a provision for attorney's fees, citizen suits would be rare.

(51) See, e.g., United States v. Sheyenne Tooling and Mfg. Co., 1998 WL 544413 (8th Cir. Aug. 27, 1998) (denying attorney's fees to the defendant in a civil action where the assessed penalties were substantially below those sought by the government).

V. Conclusion

Water pollution is a global, national, regional, and local problem. Developing public policies to confront this problem is the responsibility of the government. It may be assisted by granting citizens the power to use the courts to enforce clean water laws. Public involvement in enforcing the law gives citizens a meaningful opportunity to ensure government action is taken, or to challenge government decisions, or to independently sue violators. Many countries have strict environmental laws that exist on paper only. Allowing citizens to participate in the enforcement process provides a mechanism to make enforcement of the laws against water pollution a reality.

At a theoretical level, government changes the traditional bilateral regulatory enforcement process when it grants citizens standing to pursue a direct enforcement remedy. Citizens become a separate but a complementary constituency with the power to sue private parties as well as the government. When the government fails to diligently prosecute violations of the law, citizens can act to remedy the inaction. Even when unsuccessful, a citizen suit may elevate the complaint for consideration by the general public.

Citizen enforcement of the CWA has had a positive effect on clean-water efforts in the United States. This does not mean, however, that the struggle for clean water has been solved. But by having a direct enforcement remedy, citizens have a powerful tool against unreviewable government no enforcement. The approach to citizen lawsuits outlined in this paper may be useful as a guide to the international community.

Table of Contents