

# The Diminished Need for Citizen Suits to Enforce the Clean Water Act

## I. Introduction

Congress passed the Federal Water Pollution Control Act<sup>1</sup> ("Clean Water Act" or "CWA") to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."<sup>2</sup> The CWA relies for its enforcement on the Administrator of the United States Environmental Protection Agency (EPA)<sup>3</sup> or the corresponding agency in each state, which monitors the emission of effluents into navigable waters by issuing National Pollutant Discharge Elimination System (NPDES) permits.<sup>4</sup> These permits contain conditions of data collection and reporting by the permit holder, and allow for public notice of the permit. As a result, government agencies remain aware of the type and volume of pollutants that enter the navigable waters of each state, and the agencies can guide each permit holder in the elimination or treatment of such effluents to minimize their threat to the integrity of the water. By enabling the EPA and State environmental agencies to administer the Clean Water Act in this way, Congress has emphasized its policy "to recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution . . ."<sup>5</sup>

While monitoring the discharge of pollutants in each state, the EPA or State agencies are empowered under the original Act to rectify violations of the CWA in three ways. First, these agencies can issue orders under § 1319(a) to comply with the limitations of the NPDES permit if violations occur. Although notice of the violation and the issuance of a compliance order may effect remediation by the violator, these compliance orders lack the force of other remedies available to environmental agencies under the CWA. As a result, the agencies must often seek help in court by commencing a civil action for a temporary or permanent injunction<sup>6</sup> or for a civil penalty.<sup>7</sup> The agencies have the third option of seeking criminal penalties against those who willfully or negligently violate the CWA or make false representations to the environmental agency.<sup>8</sup> Thus, the agencies can address violations of the Clean Water Act in three ways, but only the second and third options, which require time, expense, and judicial resources, will ensure that a CWA violator ameliorates his assault on the environment.

Although an agency's compliance order may not elicit a corrective response from the violator, Congress has enabled private citizens to supplement the governmental enforcement effort by bringing civil suits in federal court that seek injunctive relief and monetary penalties.<sup>9</sup> The primary focus of the CWA is the protection of our Nation's

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1. 33 U.S.C. § 1251 et seq. (1994).

2. *Id.* § 1251(a).

3. *Id.* § 1251(d).

4. *Id.* § 1342.

5. *Id.* § 1251(b).

6. *Id.* § 1319(b).

7. 33 U.S.C. § 1319(d) (1994).

8. *Id.* § 1319(c).

9. *Id.* § 1365(a). Although this section provides that any citizen "may commence a civil action

waters, but the "citizen suit" provision of § 1365 enables private citizens harmed by water pollution to join the government in bringing the strictures of the Clean Water Act to bear on polluters. Still, Congress further preserved the "primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution"<sup>10</sup> by precluding citizen suits under certain circumstances. According to 33 U.S.C. § 1365(b)(1)(B), a citizen may not bring a private action "if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court." Returning to the CWA's three enforcement options, this subsection prevents citizen suits when an agency has commenced a civil action for an injunction under § 1319(b) or civil penalties under § 1319(d), and when the government seeks criminal penalties under § 1319(c). Citizens can, however, sue for harmful and ongoing noncompliance with the CWA despite the issuance of a compliance order under § 1319(a). Thus, § 1365 of the original Clean Water Act enables private citizens to suppress water pollution and protect their own interests, but subsection (b)(1)(B) mandates that citizens must defer to governmental action when an agency sues a CWA violator.

Section 1365(b)(1)(B)'s bar on citizen suits when the government has sought relief in court clearly shows Congress' intent that government agencies should enforce the Clean Water Act. The Supreme Court has recognized this congressional goal, and further restrained citizen suits. In *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*,<sup>11</sup> the Supreme Court held that a "citizen suit" under § 1365 must allege "a state of either continuous or intermittent violation – that is, a reasonable likelihood that a past polluter will continue to pollute in the future."<sup>12</sup> Thus, if an agency has issued a compliance order under § 1319(a), but the violator continues to pollute the water, a citizen who lives or works downstream from the offender may augment the enforcement of the Clean Water Act by seeking injunctive relief and monetary penalties. The citizen suit will be inappropriate, however, when an effective compliance order spurs a polluter to eliminate or treat the effluents he discharges. Courts after *Gwaltney* consider this offense wholly rectified, and demand that citizen suits address only ongoing water pollution that has not been stemmed by governmental action. The Supreme Court in *Gwaltney* illustrated the logic of this policy with an example:

Suppose that the Administrator identified a violator of the Act and issued a compliance order under [§ 1319(a)]. Suppose further that the Administrator agreed not to assess or otherwise seek civil penalties on the condition that the violator take some extreme corrective action, such as to install particularly effective but expensive machinery, that it otherwise would not be obliged to take. If citizens could file suit, months or years later, in order to seek the civil penalties that the Administrator chose to forgo, then the Administrator's discretion to enforce the Act in the public interest would be curtailed considerably.<sup>13</sup>

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on his own behalf," courts have repeatedly held that there is no private right of action for monetary damages under the Clean Water Act. Any penalties levied are payable to the government and not to private plaintiffs. Thus, the citizen suit is purely an enforcement tool, and not meant to compensate private parties harmed by water pollution. See, e.g., *City of Phila. v. Stepan Chem. Co.*, 544 F. Supp. 1135, 1146 (E.D. Pa. 1982), *City of Evansville, Ind. v. Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008 (7th Cir. 1979).

10. 33 U.S.C. § 1251(b) (1994).

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

12. *Id.* at 57.

13. *Id.* at 60-61.

Although actions by private citizens can provide added incentives for cleanup to polluters whose compliance with the Clean Water Act has been ordered by the EPA or a state agency, the government's systematic enforcement of the Clean Water Act takes precedence over citizen suits.

Thus, statutory and judicial restraints, which prevent civil actions by citizens when the government has either taken a CWA violator to court or resolved the matter completely with a compliance order, have limited the role of citizen suits to the context of complete governmental inaction or ineffective compliance orders. Given the recurring emphasis on the government's primary role in enforcing the CWA, it logically follows that if compliance orders under § 1319(a) were more aggressive in curtailing water pollution, citizen suits would not be necessary as a supplement to governmental enforcement. Congress apparently recognized the weakness of § 1319(a) compliance orders as enforcement tools, and the resulting reliance on courts to implement the CWA, because in 1987 the Clean Water Act was amended to include § 1319(g), which empowered the EPA and State agencies to assess penalties on CWA violators. Whereas an agency before the amendment had to choose between issuing a compliance order with no certain consequences for the polluter and pursuing a costly and time-consuming action for damages or injunctions in court, environmental agencies can now issue a type of compliance order with teeth.

The ability to assess administrative penalties greatly strengthens federal and State efforts to enforce the CWA, and as a result raises questions about the need for citizen suits to bolster the government's efforts. Although the compliance order, civil action, and criminal suit remain options for the agencies, they can now assess the penalties that they would have formerly sought in court, which always preclude a citizen suit under § 1365(b)(1)(B).<sup>14</sup> Similarly, agencies can issue an order to comply with the Clean Water Act that includes future penalties for failure to correct the prohibited conduct. The new subsection addresses the role of the citizen suit. 33 U.S.C. § 1319(g)(6)(A) provides:

Action taken by the Administrator or the Secretary, as the case may be, under this subsection shall not affect or limit the Administrator's or Secretary's authority to enforce any provision of this chapter, except that any violation—

- (i) with respect to which the Administrator or the Secretary has commenced and is diligently prosecuting an action under this subsection,
- (ii) with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection, or
- (iii) for which the Administrator, the Secretary, or the State has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under this subsection, or such comparable State law, as the case may be, shall not be the subject of a civil penalty action under subsection (d) of this section or section 1321(b) of this title or section 1365 of this title.

Thus, the statute maintains its deference to the diligent enforcement of the CWA by government agencies, allowing citizen suits only when the EPA or state agency has not commenced "an action" involving the penalties allowed under § 1319(g). Even though

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14. The amount of penalty available from a court is simply greater under § 1319(d) than that which § 1319(g) allows an agency to impose.

the subsection provides guidance for determining the amount of a penalty<sup>15</sup> and giving public notice of the penalty,<sup>16</sup> the language is vague in describing the precise action that triggers the preclusion of citizen suits.

Courts have split into two camps in their interpretation of § 1319(g)(6)(A).<sup>17</sup> When State agencies act pursuant to § 1319(g) of the CWA or a State statute "comparable" to the CWA, the ambiguous language of the statute does not clarify whether preclusion of citizen suits follows only from the State agency actually imposing a penalty or whether the agency can preclude citizen actions by merely threatening to levy a penalty for failure to remediate pollution. The Ninth Circuit examines the language narrowly, requiring State agencies to follow a State statute that truly compares to § 1319(g), including its public notice provisions, and actually to assess a fine. These courts stress the value of the citizen suit to enforcement of the Clean Water Act and hesitate to preclude such suits when the government's action constitutes a mere compliance order.<sup>18</sup> The First Circuit and many district courts analyze § 1319(g)(6)(A) more broadly, allowing preclusion of citizen suits as long as the State statute contains a penalty provision, regardless of whether the state agency actually levies a penalty. These courts emphasize the congressional intent that citizen suits merely supplement unsuccessful enforcement by the government, and as long as an agency can issue penalties, these courts hold that the agency has not shirked its responsibilities when it decides not to impose penalties immediately. Whether the courts examine an EPA action under § 1319(g)(6)(A)(i) or State agency conduct pursuant to § 1319(g)(6)(A)(ii), they ultimately decide whether the agency must levy a penalty or merely offer a penalty as a possibility when demanding compliance for the citizen suit bar to apply.

## II. The Disparate Interpretations by the First and Ninth Circuits

### A. The Broad View

In *North & South Rivers Watershed Ass'n v. Town of Scituate*,<sup>19</sup> the First Circuit examined an Administrative Order issued by the Massachusetts Department of Environmental Protection (DEP) to the Town of Scituate. DEP, with authority from the Massachusetts Clean Waters Act<sup>20</sup> to impose a maximum penalty of \$25,000 for each day of noncompliance, ordered Scituate to upgrade extensively its sewage treatment facility, which discharged pollutants into a coastal estuary without a permit, and report to DEP periodically. As typically occurs in these cases, the plaintiff citizen group brought suit to obtain financial penalties and injunctive relief under the state Clean Waters Act after the issuance of the order.<sup>21</sup>

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15. 33 U.S.C. § 1319(g)(3) (1994).

16. *Id.* § 1319(g)(4)(A).

17. See generally Heather L. Clauson, Note, *How Far Should the Bar on Citizen Suits Extend Under 309 of the Clean Water Act?*, 27 ENVTL. L. 967, 979-982 (1997).

18. *Id.* at 982.

19. *North & South Rivers Watershed Ass'n v. Town of Scituate*, 949 F.2d 552 (1st Cir. 1991).

20. MASS. GEN. LAWS ANN. ch. 21, §§ 26-53 (West 1981).

21. If the plaintiffs file their suit before the government takes any action at all, then their suit will not be precluded. 33 U.S.C. § 1319(b)(6)(B)(i) (1994). See, e.g., *Natural Resources Defense Council v. NVF Co.*, 97-496-SLR 1998 U.S. Dist. LEXIS 9790 (D. Del. June 25, 1998); *Chesapeake Bay Found. v. American Recovery Co.*, 769 F.2d 207 (4th Cir. 1985) (holding that a state enforcement action filed three hours after a citizen suit was filed in federal court did not preclude the citizen suit).

The court explained that the main goal of the Massachusetts Clean Waters Act is to restore and protect the integrity of the water, and because DEP had begun to act in accordance with this plan, the citizen suit was unnecessary and must be precluded. The court emphasized the priority given to State or Federal enforcement by declaring that the "primary function of the provision for citizen suits is to enable private parties to assist in enforcement efforts where Federal and State authorities appear unwilling to act."<sup>22</sup> The State clearly was willing to address Scituate's pollution. By assigning the duty of upgrading the town's existing sewage treatment facilities with severe penalties for failure to begin remediation, the Massachusetts DEP eliminated the need for a citizen suit. Courts adopting a narrower interpretation of the statute would note DEP's failure to issue monetary penalties immediately or pursue the matter in court. Such courts would allow the citizen suit in order to punish the pollution severely, but the *Scituate* court decided that "[d]uplicative actions aimed at exacting financial penalties in the name of environmental protection at a time when remedial measures are well underway do not further this goal. They are, in fact, impediments to environmental remedy efforts."<sup>23</sup> The First Circuit, therefore, focused on the cleanup and preservation of Massachusetts' waterways, rather than steps taken to punish the offender.

Courts that read the statute more narrowly look not only for immediate penalties, but also for the placement of the penalty provision in the State statute and its comparison to the CWA. The *Scituate* court recognized that although "the specific statutory section under which the State issued its Order does not, itself, contain a penalty provision, [internal citation omitted] another section of the same statute does contain penalty provisions. [internal citation omitted] These two coordinate parts are cogs in the same statutory scheme implemented by the State for the protection of its waterways."<sup>24</sup> The First Circuit sees in § 1319(g)(6)(A)(ii) the congressional intent to allow State legislatures considerable freedom in drafting statutes that protect water quality, rather than demanding rigid adherence to the CWA as a template for State clean water legislation. The *Scituate* court envisions State agencies that show familiarity with the State's industry by devising workable solutions to water pollution that draw from many sources of authority and may be more effective than court-imposed penalties. When the court interprets the requirement in § 1319(g)(6)(A)(ii) that the State law be "comparable to" the Clean Water Act, it gives deference to the agency's enforcement as long as the state statute has protection of waterways as its main purpose and somewhere allows for penalties against violators. Thus, the court gives priority to DEP's work, even though the penalty provision of the statute does not appear in exactly the same place as the one in the Clean Water Act.

The Eighth Circuit agreed with the *Scituate* court and similarly precludes citizen suits when a government agency has begun to address an act of pollution in some way involving penalties. In *Arkansas Wildlife Federation v. ICI Americas, Inc.*,<sup>25</sup> the Arkansas Department of Pollution Control and Ecology (PCE) entered a Consent Administrative Order with ICI, which operated a herbicide manufacturing plant where emissions of pollutants exceeded the limits of their NPDES permit. When ICI did not con-

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from going forward).

22. *Scituate*, 949 F.2d at 555.

23. *Id.* at 556.

24. *Id.*

25. *Arkansas Wildlife Fed'n v. ICI Americas, Inc.*, 29 F.3d 376 (8th Cir. 1994).

sistently comply with the terms of this Order, the Arkansas Wildlife Federation filed a suit under the Clean Water Act.

When deciding whether PCE's arrangement to bring ICI into compliance with its NPDES permit precluded a citizen suit, the court rejected the narrow view that an agency must immediately impose penalties under a statute with completely identical provisions to the federal CWA. The court established that preclusion of citizen suits depends on whether:

the overall regulatory scheme affords significant citizen participation, even if the state law does not contain precisely the same public notice and comment provisions as those found in the federal CWA . . . [T]he comparability requirement may be satisfied so long as the state law 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 legitimate substantive interests.<sup>26</sup>

Like the *Scituate* court, therefore, the Eighth Circuit stressed the environmental policies at the heart of the Clean Water Act rather than the precise legislative construction from which it arises.

Some federal district courts have also noticed in the Clean Water Act a regulatory plan focused on State-controlled remediation measures. In *Connecticut Coastal Fisherman's Ass'n v. Remington Arms Co.*,<sup>27</sup> the Connecticut Department of Environmental Protection (DEP) required the owner of a skeet shooting club to assess and correct environmental harm after lead shot and clay targets entered the Long Island Sound. The shooting club ultimately decided to close its business, but a citizen suit followed nonetheless. The court maintained that CWA violators should not face duplicative punishment, because "Congress provided . . . that citizen suits should be subordinate to agency enforcement and devised restrictions to ensure that result."<sup>28</sup> Although citizen groups such as the Connecticut Coastal Fisherman's Association will often perceive lackluster agency enforcement despite horrendous pollution, "[t]he court must presume the diligence of the state's prosecution of a defendant absent persuasive evidence that the State has engaged in a pattern of conduct in its prosecution of the defendant that could be considered dilatory, collusive or otherwise in bad faith."<sup>29</sup> DEP's supervision of Remington's pollution was diligent, because the statute contained provisions for penalties and public notice comparable to those in the CWA. The court, therefore, reinforces the trust that Congress vested in state agencies to achieve the most efficient and enduring compliance with clean water legislation, even if it requires the initial avoidance of monetary penalties.

Courts taking this broad view of the CWA observe that administrative compliance plans can simply induce more prompt and systematic corrective treatment by violators than would follow from civil suits for damages. In *Williams Pipe Line Co. v.*

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26. *Id.* at 381.

27. *Connecticut Coastal Fisherman's Ass'n v. Remington Arms Co.*, 777 F. Supp. 173 (D. Conn. 1991), *rev'd in part on other grounds*, 989 F.2d 1305 (2nd Cir. 1993).

28. *Id.* at 178.

29. *Id.* at 183 (quoting *Connecticut Fund for the Env't v. Contract Plating Co.*, 631 F. Supp. 1291, 1293 (D. Conn. 1986)).

*Bayer Corp.*,<sup>30</sup> the court examined enforcement of water pollution laws by the Iowa Department of Natural Resources (DNR) that involved directing the violator to design and implement a remediation plan, obtain an NPDES permit, comply with permit restrictions, and submit quarterly status reports. The court first noted that, although § 1365(b)(1)(B) precludes citizen suits when an agency has begun an action "in a court," § 1319(g)(6) does not contain the phrase "in a court."<sup>31</sup> Section 1319(g)(6) broadens the range of governmental responses to pollution that preclude citizen suits, encompassing not only those where penalties are sought in court or issued by the agency, but also those where penalties are held out as a possibility for failure to devise a successful remediation scheme. Courts that follow the reasoning of the *Scituate* court enable this more far-reaching preclusion because "the CWA 'calls for a more deferential approach that does not circumscribe the administrator's discretion' to implement corrective steps that, in his expert judgment, adequately address a violation."<sup>32</sup> Thus, the citizen suit may serve as a deterrent, but this court precludes the suit to allow agencies both to ameliorate the water pollution and deter future violations.

### B. The Narrow View

The Ninth Circuit has employed in two recent cases a narrow reading of § 1319(g) that does not preclude citizen suits unless the government agency has actually assessed a penalty. In *Washington Public Interest Research Group v. Pendleton Woolen Mills*,<sup>33</sup> the EPA issued a compliance order that threatened a penalty of \$25,000 per day as long as Pendleton failed to repair its textile mill so that its discharge of oil, chromium, grease, and zinc were in compliance with Pendleton's NPDES permit. When it appeared that Pendleton's wastewater discharge continued to exceed the limits of its permit, the Washington Public Interest Research Group filed a suit for an injunction ordering compliance with the permit and to impose civil penalties. Pendleton had substantially improved its mill in response to the EPA's order, and they believed the citizen suit should be precluded.

The Court held that the citizen suit was not barred. Despite Pendleton's insistence that Congress intended the EPA to control enforcement proceedings free from citizens who seek penalties,<sup>34</sup> the Court explained that:

[t]he plain language of the statute states that such suits are barred only when the EPA is prosecuting an action "under this subsection," i.e., section 1319(g), which deals only with administrative penalty actions. . . . In this case, the EPA was not pursuing an administrative penalty under 1319(g). Rather the EPA acted pursuant to 1319(a) when it issued a compliance order to Pendleton. The imposition of an administrative penalty requires elaborate procedures including hearings as well as public notice and comment, none of which took place.<sup>35</sup>

Thus, the Court refused to consider this an action under § 1319(g) simply because the

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30. *Williams Pipe Line Co. v. Bayer Corp.*, 964 F. Supp. 1300 (S.D. Iowa 1997).

31. *Id.* at 1321; *See also* *Sierra Club v. Colorado Refining Co.*, 852 F. Supp. 1476, 1483 (D. Colo. 1994).

32. *Williams Pipe Line*, 964 F. Supp. at 1324 (quoting *Connecticut Coastal*, 777 F. Supp. at 184).

33. *Washington Pub. Interest Research Group v. Pendleton Woolen Mills*, 11 F.3d 883 (9th Cir. 1993).

34. *Id.* at 886.

35. *Id.* at 885.

EPA named a penalty to be imposed for future noncompliance. Even though the EPA can only derive authority to assess the threatened penalties from § 1319(g), the court decided that the EPA merely issued a compliance order under § 1319(a), and the provision of § 1319(g) barring citizen suits would only come into play when the EPA decided actually to impose the penalty with notice.

This opinion's demanding interpretation of the language of the statute highlights the divide between the First and Ninth Circuits. The congressional intent to allow agencies to enforce the Clean Water Act seems obvious both in the general purpose of the CWA, which refers to the "primary responsibilities and rights of the States"<sup>36</sup> to effect compliance, and in the forestalling of citizen suits by § 1365(b)(1)(B). As the *Pendleton* court argues, however "general arguments about congressional intent and the EPA's need for discretion cannot persuade us to abandon the clear language that Congress used when it drafted the statute. . . . [I]f Congress had intended to preclude citizen suits in the face of an administrative compliance order, it could easily have done so, as it has done in certain other environmental statutes."<sup>37</sup> The court hesitates to prevent a citizen suit when § 1319(g) does not explicitly bar suits upon the mere mention of penalties by an environmental agency, but only when the agency is "diligently prosecuting an action." The environmental statutes to which the court refers are the Resource Conservation and Recovery Act (RCRA),<sup>38</sup> which bars citizen suits when the EPA has issued an abatement order, and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), which bars citizen suits when the EPA is "diligently prosecuting an action . . . to require compliance."<sup>39</sup> Thus, despite the CWA's repeated grants of authority to agencies enforcing the Act, this court refuses to construe "diligently prosecuting an action" under § 1319(g) as including compliance orders with penalties promised for noncompliance.

The Ninth Circuit addressed this issue three years later, and again insisted that the agency issue penalties before a citizen suit could be precluded. In *Citizens for a Better Environment v. Union Oil Co. of California*,<sup>40</sup> the Union Oil Company ("Unocal") was unable to improve its technology in order to decrease its discharge of selenium into the San Francisco Bay. After public hearings were held, California's Regional Board for regulating water quality issued a cease and desist order to Unocal and others, requiring them to pay \$2 million to the State and implement a plan to curtail their pollution. Despite their participation in the public hearings, Citizens for a Better Environment (CBE) contended that their subsequent lawsuit was not precluded because no "penalty" had been issued under "comparable State law," as required by § 1319(g)(6).

The court agreed with CBE, holding that the suit was not barred by either § 1319(g)(6)(A)(iii) or § 1319(g)(6)(A)(ii). The court first rejected the notion that a "penalty" had been issued, because "Unocal itself insisted on characterizing the financial transfer as a 'payment' and not a 'penalty' . . . because of the punitive and bad conduct implications that the general public takes from that term."<sup>41</sup> In addition, the

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36. 33 U.S.C. § 1251(b) (1994).

37. *Pendleton*, 11 F.3d at 886.

38. 42 U.S.C. § 6972(b)(2)(B)(iv) (1994).

39. 42 U.S.C. § 9659(d)(2) (1994).

40. *Citizens for a Better Env't v. Union Oil Co. of Cal.*, 83 F.3d 1111 (9th Cir. 1996).

41. *Id.* at 1116.

court decided that, before the preclusion of citizen suits applies, a penalty under State law must be accompanied by public notice and comment procedures comparable to those specified in § 1319(g). Despite the public hearings that CBE attended, the court found that the state statutory scheme contained no similar notice provisions. Although § 13385 of the California Water Code is analogous to the penalty provision of the Clean Water Act in § 1319(g), this action by the Regional Board was taken under a different portion of the California Code that did not include the same notice and comment provisions as the CWA.

The *Unocal* court interprets § 1319(g) even more narrowly than the *Pendleton* court by allowing a citizen suit after an agency successfully extracted money as a part of an enforcement action against a polluter. The court justifies its insistence that State agencies follow procedures like those in § 1319(g) by reasoning that “[u]nless any penalty is assessed according to the particular provision of State law that is comparable to § 1319(g), there is no guarantee that the public will be given the requisite opportunity to participate or that the penalty assessed is of the proper magnitude.”<sup>42</sup> The court correctly states that the Regional Board acted under a statutory provision that does not call for public notice and comment, but the opinion presents no argument why the public hearings initiated by the Regional Board did not satisfy the notice and comment requirements of § 1319(g)(4).<sup>43</sup> Thus, the Regional Board followed the CWA in combating water pollution while inviting public input, but the court nonetheless allows a citizen suit to interfere with “the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution.”<sup>44</sup>

### C. A Compromise

Although it has not yet been endorsed on the appellate level, a compromise between the narrow and broad approaches emerged in two district court cases. In *Coalition for a Liveable West Side v. New York City Dept. of Envtl. Protection*,<sup>45</sup> the City’s environmental department managed a wastewater treatment plant in noncompliance with its NPDES permit, and the City entered into a compliance order with the State environmental agency (DEC). After three years the plaintiff citizen group doubted the efficacy of the State enforcement, despite the issuance of a \$200,000 penalty, and they sued for an injunction to prevent DEP from allowing any additional sewer connections to the plants.<sup>46</sup> Although the court agreed with the broad view that such a compliance order involving potential penalties precludes a citizen suit, the court allowed this suit for injunctive relief to proceed. The plaintiffs clearly did not seek monetary penalties, and the court looked to the legislative history of the Clean Water Act to decide that “[n]o one may bring an action to recover civil penalties under section [1365] of this Act for any violation with respect to which the Administrator has com-

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42. *Id.* at 1118.

43. See 83 F.3d at 1114. The parties disputed whether the proposed cease and desist order had been released for public comment, but CBE participated in two public hearings.

44. 33 U.S.C. § 1251(b) (1994).

45. *Coalition for a Liveable West Side v. New York City Dep’t of Envtl. Protection*, 830 F. Supp. 194 (S.D.N.Y. 1993).

46. The Department of Environmental Protection for New York City was the target of both the citizen suit and the compliance order and penalty issued by the New York Department of Environmental Conservation. The DEP was responsible for maintaining the wastewater treatment plants in compliance with the NPDES permit.

menced and is diligently prosecuting an administrative penalty action . . . . This limitation would not apply to an action seeking relief other than civil penalties (e.g., an injunction or declaratory judgment)."<sup>47</sup> The court reasoned that actions for civil penalties will be precluded out of deference to state enforcement, but a court may entertain an action for injunctive relief when that enforcement proves inadequate.

The *West Side* court reaffirms both the broad view's opposition to citizen suits when the government has devised a plan to eradicate pollution and also the narrow view's recognition of the value of citizen suits in enforcing the CWA. The court prevents those actions seeking money under the pretense of environmental protection, but allows citizen suits to remain as an enforcement backstop. The court explained that "[a] court which entertains a citizen action for injunctive relief can manage the action so as to ensure that the diligently pursued State enforcement action will dominate and that the [CWA violator] will not be whipsawed by multiple actions."<sup>48</sup> The bottom line of CWA enforcement, according to this logic, is protecting the integrity of our water. State agencies are empowered to curtail pollution to the exclusion of citizen actions because the State has more resources at its disposal and can use those resources to develop a lasting cleanup program. When State enforcement fails, however, the *West Side* court contends that the citizens affected by water pollution should not be left helpless.

Another citizen group challenged the enforcement methods of the New York DEC during the following year when they sued a county that poorly maintained its landfills. In *Orange Environment v. County of Orange*,<sup>49</sup> the court affirmed the *West Side* compromise and allowed a citizen suit for an injunction against the expansion of an environmentally dangerous county landfill into federally protected wetlands. The court reviewed the DEC's enforcement of a State statute comparable to the CWA, complete with a penalty provision for noncompliance, and found that the county simply failed to follow the consent orders despite diligent prosecution by the DEC. The court explained that "[w]hile plaintiffs should not be allowed to seek civil penalties for the same violations that the DEC is prosecuting, the DEC's failure to secure the County's compliance with the CWA has spurred the plaintiffs' suit for declaratory and injunctive relief."<sup>50</sup> The *Orange* court, therefore, remains true to the *West Side* compromise by preventing duplicative punishment of the same violation while allowing citizens to supplement truly ineffectual government enforcement.

### III. Conclusion

The divergent rulings on the preclusion of citizen suits in administrative penalty situations differ in their fundamental approach to Clean Water Act enforcement. The First and Eighth Circuits broadly interpret § 1319's ban on citizen suits because Congress bestowed primary responsibility for CWA enforcement to the States.<sup>51</sup> This approach acknowledges that costly private actions may hinder the environmental agencies by reducing the willingness of violators to cooperate with the government. The broad interpretation of "diligently prosecuting an action," therefore, prevents excessive pun-

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47. *West Side*, 830 F. Supp. at 196, n. 1 (quoting H.R. CONF. REP. No. 1004 at 133 (1986)).

48. *Id.* at 197.

49. *Orange Env't v. County of Orange*, 860 F. Supp. 1003 (S.D.N.Y. 1994).

50. *Id.* at 1018.

51. See 33 U.S.C. § 1251(b) (1994).

ishment of polluters and remains faithful to the CWA's main goal of restoring and maintaining clean water. As long as the government works to curtail water pollution, the purpose of the CWA is served and citizen suits are unnecessary. Furthermore, the government almost always requires polluters to construct wastewater treatment measures whose cost deters future violations. The Ninth Circuit's narrow interpretation of §1319 assumes that water pollution will be stifled only by immediate monetary penalties and the threat of citizen suits. The Ninth Circuit analysis lacks the broad interpretation's tolerance for long-range corrective plans, seeking instead swift and harsh deterrence to protect the environment. This narrow approach seems unsatisfied with the CWA's chief objective to uphold clean water standards, and treats as equally important the stringent punishment of violators, even if immediate penalties fail to affect the discharge of effluents by often wealthy corporate offenders.

Perhaps the Ninth Circuit hopes to deter violators so that cleanup agreements with State agencies will be unnecessary, but the court's zealous attention to the statutory provisions that guide an agency's enforcement often ignores the beneficial progress that the agency achieves. In *Unocal*, the court elevates form over substance by emphasizing the semantic difference between "penalty" and "payment" and by insisting that a public hearing that actually took place be mandated by the same code section that authorizes penalties. The practical importance of this case is that the government imposed a penalty, which was paid, and in the process furthered the central goal of the CWA. The Act only requires state agencies to obey State statutes "comparable to" § 1319(g) of the CWA, because the Act has given States the freedom to find the most effective way to restore clean water as long as they provide public notice and hearings mandated in § 1319(g)(4). The Regional Board in *Unocal* should be congratulated for exacting a penalty and an agreement for the cleanup of pollution, for this serves the primary purpose of the CWA. The Ninth Circuit, however, insists that the State legislation be virtually identical to the CWA. The Clean Water Act, by deferring to the local insights of State legislatures and environmental agencies, provides a guideline for enforcement, not a template to be duplicated in every State regardless of their unique circumstances.

The *Pendleton* court also attempts to justify placing citizen suits on the same enforcement plane as government action despite the obvious congressional intent to prioritize governmental treatment of pollution. This court professes allegiance to the "clear language" of the statute, arguing that "if Congress had intended to preclude citizen suits in the face of an administrative compliance order, it could easily have done so, as it has done in certain other environmental statutes."<sup>52</sup> Although Congress chose to preclude citizen suits when agencies issue compliance orders under RCRA or CERCLA, that choice of language cannot explain the preclusive effects of § 1319(g) of the CWA, which evolved in a different way than the RCRA or CERCLA. The enforcement history of the Clean Water Act differs from that of other environmental statutes, and Congress' reason for not barring citizen suits following compliance orders becomes evident only by comparing the two citizen suit provisions in the CWA.

Comparing the language of the CWA's two provisions barring citizen suits reveals more persuasively that Congress intended to enhance the enforcement power of

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52. Washington Pub. Interest Research Group v. Pendleton Woolen Mills, 11 F.3d 883, 887 (9th Cir. 1993).

environmental agencies with the creation of administrative penalties. Section 1365(b)(1)(B) precluded citizen suits when the agency carried out its enforcement "in a court," because initially the alternative under the CWA was a compliance order that guaranteed no consequences for failing to eliminate pollution. Citizen suits were a necessary supplement to the weak compliance order. When Congress created §1319(g), however, the agencies no longer needed courts to enforce their compliance orders, but could issue compliance orders with the threat of penalties. Citizen suits were suddenly less necessary, because there was no longer a great divide between the compliance order and the actions taken in court. Hence, § 1319(g)(6)(A) removes the phrase "in a court" from its preclusion provision. If agencies accept the greater power and discretion afforded to them under § 1319(g), then a broader range of their enforcement conduct achieves the goals of the CWA, thereby precluding citizen suits.

That State agency programs to reduce pollution take priority over citizen suits is a recurring theme of the CWA. The Supreme Court explained that:

[t]he bar on citizen suits when governmental enforcement action is under way suggests that the citizen suit is meant to supplement rather than to supplant governmental action. The legislative history of the Act reinforces this view of the role of the citizen suit. The Senate Report noted that "[t]he Committee intends the great volume of enforcement actions [to] be brought by the State," and that citizen suits are proper only "if the Federal, State, and local agencies fail to exercise their enforcement responsibility."<sup>53</sup>

This explanation highlights the mistake made by the Ninth Circuit in allowing citizen suits to disrupt calculated enforcement strategies of the State agency. According to the Supreme Court's explanation, citizens harmed by water pollution must trust the Federal and State agencies to combat the problem, but when governmental attempts to thwart pollution prove to be truly dilatory, the citizens may begin an action.

The courts in *West Side* and *Orange* adopted this approach. They maintained the supplementary nature of citizen suits by precluding all private actions for monetary penalties when the government agency had taken some action, even if the agency had not yet issued a penalty. This compromise approach leaves enforcement power in the agency, which has monitored and communicated with the violator before and during the pollution, rather than the citizen, who has relatively little or no prior experience with the violator. The government's more thorough understanding of the violator's circumstances allows the agency to devise a more enduring plan for restoring clean water that takes into account the needs of the violator and the surrounding community. The *West Side* and *Orange* courts allowed private suits for injunctions, however, because this truly supplements governmental enforcement that simply fails to effect remediation. Courts must be cautious when allowing these suits for injunctive relief, however, because the CWA vests primary enforcement authority in the agencies, and even actions for injunctions may disrupt the agency's work to maintain clean water.

Although Congress stated its policy in § 1251(b) of the Clean Water Act to "recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution," Congress could resolve the split among the courts over citizen suit preclusion by clarifying the rights of the States when agencies

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53. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 60 (1987).

employ administrative penalties. The broad interpretation of § 1319(g) accepted by courts in the First and Eighth Circuits best preserves the preeminence of agency enforcement over private actions. Those courts interpret “diligently prosecuting an action” in § 1319(g)(6)(A)(i) and § 1319(g)(6)(A)(ii) to mean an administrative command, subject to immediate or delayed penalties, to begin an organized project to correct pollution. If the statute were amended to clarify this definition of “action,” citizen suits would cease when an agency either issues or threatens to issue an administrative penalty to a violator, thereby enabling the agency to pursue its calculated plan. This amended language, while maintaining important guidelines, would allow environmental agencies to achieve most efficiently the paramount goal of restoring and maintaining clean water.

Congress could further ensure the success of environmental agencies in improving the integrity of navigable waters by making two other amendments to the language of § 1319(g)(6)(A). First, since the Legislature has chosen to grant the right and responsibility to enforce the Clean Water Act to the States,<sup>54</sup> section 1319(g)(6)(A)(ii)’s requirement that the State prosecute violators under “comparable” State law cannot simultaneously dictate to the States the structure of their legislation and the methods of their enforcement. Control of environmental improvements should not shift from State agencies to private citizens simply because the agency drew its authority to issue penalties from more than one section of the State’s clean water legislation. If the States have the primary right and responsibility to maintain clean navigable waters, then Congress should not restrict the creativity and foresight of each State legislature in dealing with their unique environmental threats and industrial needs.

Although consistency and efficiency demand these clarifications to the rights of environmental agencies, Congress will undoubtedly hesitate to rely completely on one avenue of CWA enforcement. The Clean Water Act forbids private actions when an environmental agency regulates and redresses water pollution, but citizen suits can help to protect water purity by deterring future pollution. Accordingly, a second amendment to § 1319(g)(6)(A) should grant federal courts the discretion to hear a citizen suit for injunctive relief when an agency’s administrative penalties simply fail to eliminate water pollution. As the Court explained in *West Side*, “[a] court which entertains a citizen action for injunctive relief can manage the action so as to ensure that the diligently pursued State enforcement action will dominate,”<sup>55</sup> and that no equitable actions by citizens will follow until it is clear that the government’s enforcement has failed. The Clean Water Act relies on the State’s careful negotiations with water polluters, but when pollution endures and intensifies despite the agency’s plan, the citizen suit provides a crucial buttress to the enforcement effort.

Both government regulation and private lawsuits help to restore and maintain clean navigable waters. The Clean Water Act clearly designated the States, however, as the primary guardians of these waters. Government agencies, empowered by § 1319 to order the compliance of violators subject to penalties, work toward lasting pollution control as required by § 1251(a). The congressional intent clearly indicates that citizen suits were not instituted solely to allow financial recovery, but rather to add deterrence

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54. See 33 U.S.C. § 1251(b) (1994).

55. *Coalition for a Liveable West Side v. New York City Dep’t of Envtl. Protection*, 830 F. Supp. 194, 197 (S.D.N.Y. 1993).

to initially weak administrative compliance actions. As a result of the 1987 amendments that created § 1319(g), environmental agencies have more muscle to defend our nation's waters against polluters, and citizen suits are simply not as necessary. Whether the conflict between the First and Ninth Circuits is ultimately resolved by Congress or by the judiciary, the citizen suit should be relegated to its appropriate supplementary role in the enforcement of the Clean Water Act.

*Patrick S. Cawley\**

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\* B.A., Psychology, University of Notre Dame, 1997; Juris Doctor Candidate, Notre Dame Law School, 2000. This Note is dedicated to my parents with sincere gratitude for their "career guidance" in its many forms. I also thank Professor John C. Nagle for carefully analyzing this Note and sharing his valuable insights into the enforcement of environmental legislation.