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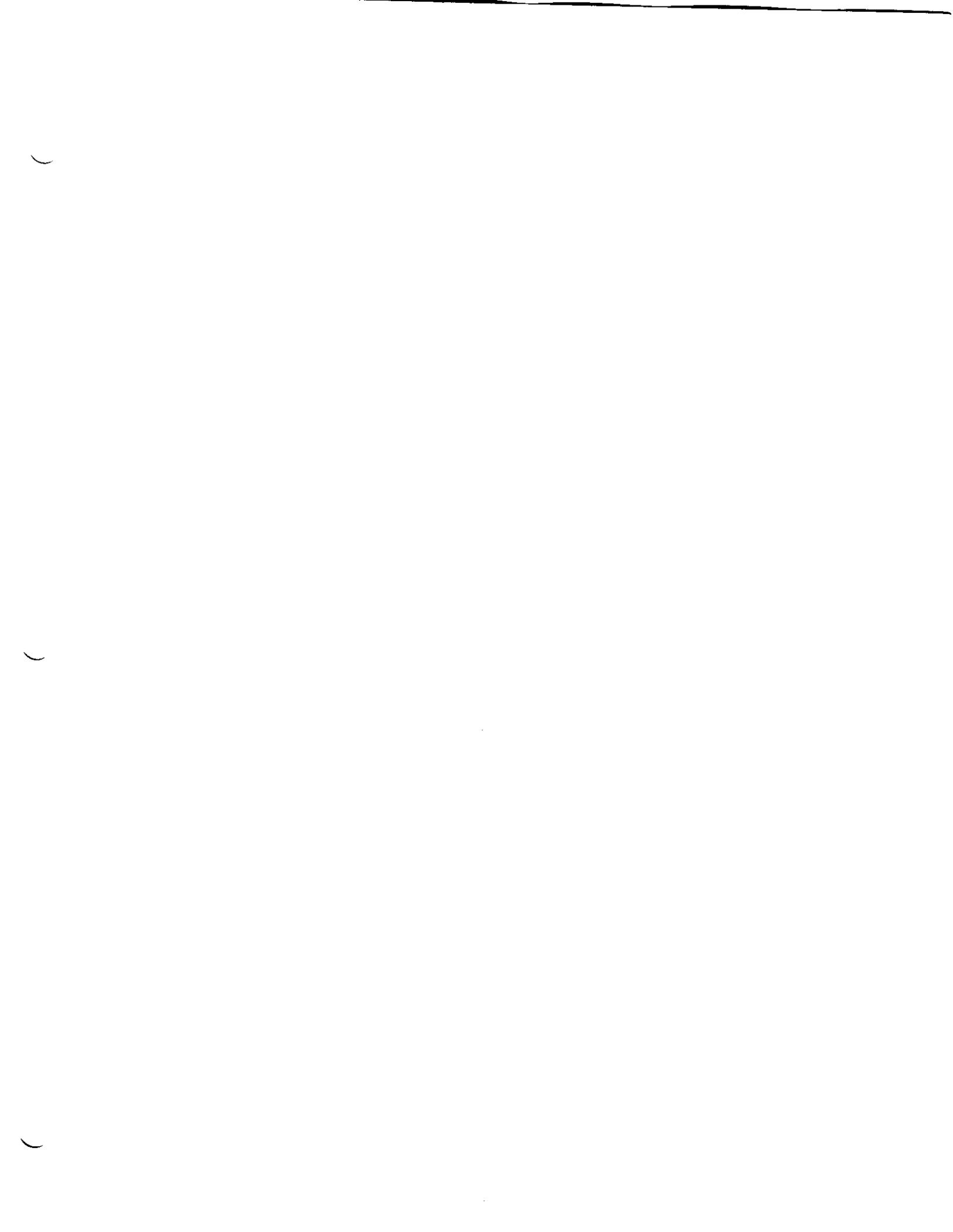
ENFORCEMENT ISSUES IN WATER POLLUTION CONTROL

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**WATER QUALITY CONTROL: INTEGRATING BENEFICIAL
USE AND ENVIRONMENTAL PROTECTION**

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ENFORCEMENT ISSUES IN WATER POLLUTION CONTROL

Henry W. Ipsen

I. INTRODUCTION

- A. The Regulatory Scheme Under the Clean Water Act ("CWA"), Pub. L. No. 95-217, 91 Stat. 1566 (1977).

As recently noted by the Fifth Circuit Court of Appeals, the CWA is strong medicine.

Texas Municipal Power Agency v. Admr. of the United States Environmental Protection Agency, 836 F.2d 1482, 1488 (5th Cir. 1988).

The CWA prohibits the discharge of any pollutant into the nation's waters unless such discharge is authorized by a National Pollutant Discharge Elimination System ("NPDES") permit issued either by EPA or by a state possessing "delegated" permit issuance authority. See 33 U.S.C. § 1342. A companion provision prohibits the discharge of dredged or fill material into the "navigable waters" and adjacent wetlands. This "Section 404" permit program is administered jointly by the U.S. Army Corps of Engineers ("Corps") and the Environmental

Protection Agency ("EPA"). See 33 U.S.C. § 1344(b). The CWA provides powerful enforcement mechanisms to ensure compliance with NPDES and Section 404 permits. Direct regulatory enforcement by EPA is established in Section 309 of the CWA, 33 U.S.C. § 1319. Similar enforcement authority is provided to the Corps by Section 404(s), 33 U.S.C. § 1344(s). Section 309 also recognizes the dual enforcement authority of authorized NPDES states. In the absence of federal or state enforcement, Section 505 of the CWA provides that private citizens may commence civil actions against any person "alleged to be in violation of" the conditions of a federal or state-issued NPDES permit. 33 U.S.C. § 1365.

B. Historical Antecedents to the Enforcement Provisions of the CWA.

1. Section 309 of the CWA has three basic sources:
 - a. Congress perceived that the enforcement conference procedures under the Federal Water Quality Act of 1965, Pub. L. No. 89-234,

79 Stat. 903 (1965) were ineffective. Section 309 was intended as a "fast, effective, and straightforward" enforcement procedure to replace the cumbersome mechanisms of the 1965 act.

- b. Congress perceived that the more direct enforcement provisions under the Rivers and Harbors Appropriation Act of 1899, commonly known as the Refuse Act, 33 U.S.C. § 407, had achieved relative success within the more limited scope of jurisdiction of that statute.
- c. the enforcement provisions of the Clean Air Act, which had been enacted two years earlier, provided a model for the provisions of Section 309. See H.R. Rep. No. 911, 92d Cong., 2d Sess. (1972), reprinted in 1 Congressional Research Service, 93d Cong., 1st Sess., A Legislative History of the Water

Pollution Control Act Amendments of 1972, at 801-802 [hereinafter H.R. Rep. No. 911]; S. Rep. No. 414, 92d Cong. 1st Sess. (1971), reprinted in 2 Congressional Research Service, 93d Cong., 1st Sess., A Legislative History of the Water Pollution Control Act Amendments of 1972, at 1481-1483 [hereinafter S. Rep. No. 414].

2. With some exceptions, the citizens suit provision of Section 505 was modeled on the provisions of Section 304 of the Clean Air Act Amendments of 1970, 42 U.S.C. § 7604. Section 505 was intended to authorize actions by private citizens on their own behalf in cases where federal or state governments failed to exercise their enforcement responsibilities under the act. See S. Rep. No. 414 at 1482, 1499. The definition of the term "citizen" was intended to reflect the concept of the "private attorney

general" doctrine developed in Scenic Hudson Preservation Conference v. Federal Power Commission, 354 F.2d 608 (2d Cir. 1965) cert. denied, sub nom, Consolidated Edison Co. of New York v. Scenic Hudson Preservation Conference, 384 U.S. 941 (1966). H.R. Rep. No. 911 at 821. However, the legislative history of Section 505 clearly reflects Congress' concern that the citizens suit provisions would lead to frivolous or harassing litigation. The cost award provisions in Section 505 were designed to discourage this potential abuse. See S. Rep. No. 414 at 1506; H.R. Rep. No. 911 at 821. As further protection, Congress added the 60 day notice provision in Section 505(b)(1)(A), 33 U.S.C. § 1365(b)(1)(A), to ensure that federal and state agencies would have the first opportunity to initiate enforcement action. The Supreme Court has recently emphasized the "interstitial" role of citizen-plaintiffs

which, according to the Court, is to "supplement rather than supplant" governmental action. See Gwaltney of Smithfield, Inc. v. Chesapeake Bay Foundation, 108 S. Ct. 376, 383 (1987).

II. THE REGULATORY ENFORCEMENT PROVISIONS OF SECTION 309, AS AMENDED BY THE 1987 WATER QUALITY ACT

A. Enforcement Provisions of Section 309 Prior to 1987.

The 1972 Federal Water Pollution Control Act ("FWPCA"), Pub. L. No. 92-500, 86 Stat. 816 (1972) provided extensive enforcement remedies to EPA in Section 309. These remedies consisted of administrative compliance orders (Section 309(a)(3)); civil suits for injunctive relief (Section 309(b)); criminal penalties for willful or negligent violations of the act (Section 309(c)); and judicially-imposed civil penalties (Section 309(d)). The 1977 amendments to the act, Pub. L. No. 95-217, 91 Stat. 1566 (1977), added the power to bring civil suits for injunctive relief against violators of pretreatment standards adopted under Section 307 of the act. 33 U.S.C. § 1319(f).

B. Expansion of Enforcement Authority Under the 1987 Amendments.

The Water Quality Act of 1987 ("WQA"), Pub. L. No. 100-4, 101 Stat. 7 (1987), greatly expanded the nature and scope of EPA's enforcement authority:

1. section 313 of the WQA amended Section 309(d) to raise the civil penalty limit from \$10,000 to \$25,000 per day, and prescribed factors to be considered in the determination of a penalty. Section 313 does, however, limit the scope of Section 309(d) somewhat by providing that separate penalties cannot be assessed for violations of individual parameters in an NPDES permit. This amendment reconciles previous district court rulings on how NPDES violations should be computed. See, e.g., United States v. Detrex Chemical Industries, Inc., 393 F. Supp. 735, 737 (N.D. Ohio 1975); United States v. Amoco Oil Co., 580 F. Supp. 1042, 1046 (W.D. Mo. 1984).

2. The most important addition to EPA's remedies is the creation of new authority for the assessment of administrative penalties. Section 314 of the WQA gives EPA authority to assess administrative penalties for violations of the act by adding a new Section 309(g) to the CWA. Section 314 (to be codified at 33 U.S.C. § 1319(g)) creates two classes of penalties:
- a. class I penalties may not exceed \$10,000 per violation up to a maximum penalty of \$25,000. EPA is required to provide written notice of the violation and proposed penalty, and an opportunity for an informal hearing within 30 days of receipt of such notice by the violator. See WQA § 314(a) (to be codified at 33 U.S.C. § 1319(g)(2)(A)).
 - b. class II penalties may not exceed \$10,000 per day for each day of violation up to a maximum penalty

of \$125,000. Because Class II penalties are more severe, they may not be assessed or collected prior to a formal notice and an opportunity for a formal record hearing in accordance with the Administrative Procedure Act, 5 U.S.C. § 554. See WQA § 314(a) (to be codified at 33 U.S.C. § 1319(g)(2)(B)).

3. A critical provision of WQA § 314(a) (to be codified at 33 U.S.C. § 1319(g)(4)) permits third parties to participate in penalty assessment proceedings. Third parties may also seek administrative and judicial review of the assessment of penalties by EPA.
4. Section 312 of the WQA greatly increases the criminal penalties for "knowing" violations of the CWA. Criminal penalties are increased for second offenders and intentional violators of the act. A very severe penalty is provided for any person who

knowingly violates provisions of the act and who knows at the time of violation that he places another person in "imminent danger of death or serious bodily injury." Violators are subject to a fine of \$250,000 or imprisonment for up to 15 years or both. Corporations can be fined up to \$1,000,000 for this offense. Second offenders may have their penalties doubled. Responsible corporate officers are included within the scope of this penalty provision. See WQA § 312 (to be codified at 33 U.S.C. § 1319(c)).

III. THE ENFORCEMENT ROLE OF THE STATES AND THE PROBLEMS PRESENTED BY DUAL ENFORCEMENT

A. Role of the States Under Section 309 of the CWA.

1. According to the wording and legislative history of the 1972 act, Congress intended that the enforcement provisions of the CWA be supplemental to state enforcement powers, in that they would be exercised in the absence of state action. See 33 U.S.C. § 1251(b)

(recognizing the "primary responsibilities and rights of States"); see also H.R. Rep. No. 911 at 802.

2. Section 309(a) recognizes the dual enforcement responsibilities of EPA and the states. Section 309(a)(1) gives the EPA administrator the option of notifying the state and requesting appropriate enforcement action or proceeding with unilateral enforcement action.
3. As a condition of obtaining NPDES "delegation," states are required to have similar statutory enforcement authority. See 33 U.S.C. § 1342(b)(7); 40 C.F.R. § 123.27. However, even if a state obtains responsibility for administration of the NPDES program within its borders, EPA still retains the right to institute enforcement action against a permit holder, with or without prior notice to, and approval by, the state. See United States v. City of Colorado Springs, 455 F. Supp. 1364, 1366 (D. Colo. 1978).

4. States cannot invoke the federal enforcement authorities provided under Section 309, even if they have received delegation of the NPDES program. See California v. Department of the Navy, 631 F. Supp. 584 (N.D. Cal. 1986).
5. Under Section 309(a)(2), EPA has the power to "preempt" state enforcement of the act in cases where widespread violations of the act are occurring within the state which has received delegation of the NPDES program. This preemption authority has never been invoked by EPA.

B. Issues Created by Dual Enforcement Authority.

1. Case law generally holds that prior state enforcement action is not a bar to subsequent EPA enforcement action on the same matters, even where the state has assumed authority over the NPDES program. See United States v. Town of Lowell, 637 F. Supp. 254, 257 (N.D. Ind. 1985).

2. Defendants in enforcement actions under the CWA have been largely unsuccessful in asserting the abstention doctrine or any of its variants to obtain dismissal of duplicative federal enforcement proceedings. See United States v. SCM Corp., 615 F. Supp. 411, 418 (D. Md. 1985). See also United States v. City of York and York Sewer Authority, 24 Env't Rep. Cas. (BNA) 1637, 1639 (N.D. Pa. 1986). However, one court has relied upon the doctrine to grant a limited stay of EPA enforcement action. See United States v. Cargill, Inc., 508 F. Supp. 734, 751 (D. Del. 1981).
3. Defendants have raised a number of other defenses against duplicate enforcement actions, with limited success:
 - a. res judicata/collateral estoppel: See United States v. ITT Rayonier, Inc., 627 F.2d 996, 1000 (9th Cir. 1980) (CWA does not abrogate res judicata prin-

- principles; identity of interests between EPA and the state precluded relitigation of state enforcement action); Chesapeake Bay Foundation, Inc. v. Bethlehem Steel Corp., 652 F. Supp. 620, 633 (D. Md. 1987) (court requested briefing regarding the preclusive affects of a state administrative consent order).
- b. laches: See United States v. Amoco Oil Company, 580 F. Supp. 1042, 1050 (W.D. Mo. 1984) (defenses rejected even where EPA waited over four years before bringing the action); see also Connecticut Fund for the Environment, Inc. v. Upjohn Co., 660 F. Supp. 1397, 1413 (D. Conn. 1987).
- c. mootness by termination of illegal conduct: See Gardeski v. Colonial Sand & Stone, Inc., 501 F. Supp. 1159, 1161 (S.D.N.Y. 1980) (subsequent plant closure

not a defense to civil action under similar provisions of the federal Clean Air Act). But see Gwaltney of Smithfield, Inc. v. Chesapeake Bay Foundation, 108 S. Ct. 376, 386 (1987) (in dicta).

- d. shifting of compliance obligations: See Wiconisco Creek Watershed Ass'n v. Kocher Coal Co., 646 F. Supp. 177 (M.D. Pa. 1986) (agreement calling for construction of wastewater treatment facilities by state Department of Environmental Resources does not absolve defendant from compliance with CWA requirements).

C. Impact of the WQA.

The WQA partially addressed the "overfiling" problem. WQA § 314(a) (to be codified at 33 U.S.C. § 1319(g)(6)), provides that, if either EPA or a state with an approved NPDES program is "diligently prosecuting" a violation by assess-

ment of an administrative penalty under new Section 309(g) or under a "comparable state law," no civil penalty suit may be commenced by EPA under Section 309(d). This provision would not preclude EPA from seeking injunctive relief or criminal penalties, nor would it bar a subsequent state action covering the same violation. See 33 U.S.C. § 1319(g)(6)(A).

IV. PRIVATE CITIZEN ENFORCEMENT UNDER SECTION 505 OF THE CWA

A. Nature of the Actions authorized Under Section 505.

Section 505 authorizes citizens as "private attorneys general" to bring actions against any person "alleged to be in violation" of the CWA. See 33 U.S.C. § 1365(a)(1).

Section 505 also authorizes a mandamus type action against the EPA where there is alleged a failure to perform a nondiscretionary act. See Id. at 1365(a)(2). The first type of action has become increasingly more common in recent years, as NPDES compliance data has become more readily available to the public, and because EPA's exercise of its enforcement powers has been

held to be discretionary in nature. See,
e.g., DuBois v. Thomas, 26 Env't Rep. Cas.
(BNA) 1209, 1211 (8th Cir. 1987).

B. Procedural Prerequisites to a Citizen Suit.

1. To ensure that the EPA or the state has an opportunity to respond to an NPDES permit violation, the citizen-plaintiff must first give 60 days notice of the alleged violation to the Administrator of EPA, to the state, and to the alleged violator. See 33 U.S.C. § 1365(b)(1)(A); 40 C.F.R. Part 135. If the proper notice is given, EPA or the state must actually commence an enforcement action by filing a complaint prior to the filing of a complaint by the notifying citizen-plaintiff, otherwise the citizen suit must be maintained.

Connecticut Fund for the Environment

v. Upjohn Co., 660 F. Supp. 1397

(D. Conn. 1987); Atlantic States Legal

Foundation, Inc. v. Koch Refining Co.,

27 Env't Rep. Cas. (BNA) 1358 (D.

Minn. 1988). The 60 day notice

requirement is jurisdictional; failure to give notice can result in dismissal of the action. Walls v. Waste Resource Corp., 761 F.2d 311, 347 (6th Cir. 1985). However, the courts have adopted a pragmatic approach to the notice requirement; if the regulatory agencies had actual notice anyway, formal notice need not be given.

Chesapeake Bay Foundation v. Bethlehem Steel Corp., 652 F. Supp. 620 (D. Md. 1987). The notice must be sufficiently detailed to identify the specific effluent limitation or other standard alleged to have been violated, the activity alleged to constitute the violation, and the persons responsible. See National Wildlife Fed'n v. Consumers Power Co., 657 F. Supp. 989 (W.D. Mich. 1987).

2. Section 504 of WQA requires that the citizen-plaintiff must also serve a copy of the complaint on the Attorney General and EPA. EPA has an opportunity to intervene in the action as a

matter of right, and no consent judgment may be entered in the action unless EPA and the Justice Department have had an opportunity to review the proposed consent decree. See 33 U.S.C. § 1365(c)(3).

C. Award of Costs and Attorneys Fees.

1. The WQA also amended Section 505 to make it clear that litigation costs will be awarded only to the "prevailing or substantially prevailing party." This change is in line with prior court decisions interpreting the previous version of Section 505(d). See, e.g., Stoddard v. Western Carolina Regional Sewer Auth., 784 F.2d 1200, 1209 (4th Cir. 1986).
2. However, the award may be limited if the trial court determines that the citizen suit essentially duplicates a parallel governmental enforcement action, even where the citizen suit was filed first. See, Atlantic States Legal Foundation, Inc. v. Koch Refining Co., supra.

D. Statute of Limitations.

The CWA does not contain a statute of limitations provision. In the absence of a specific statute of limitations, the courts have usually held that the general federal five year statute of limitation in 28 U.S.C. § 2462 applies to actions under the CWA. Sierra Club v. Chevron U.S.A., Inc., 27 Env't Rep. Cas. (BNA) 1001, 1006 (9th Cir. 1987). In citizen enforcement actions, the five year statute of limitations period is tolled 60 days before the filing of the complaint, in order to accommodate the statutorily-mandated 60 day notice provision in Section 505(b)(1). Id.

E. Relationship to Common Law Actions.

According to a recent decision by the U.S. Supreme Court, the savings clause of Section 505(e) does not operate to preclude CWA preemption of inconsistent state law. See International Paper Co. v. Ouellette, 107 S. Ct. 805 (1987).

F. Basic Elements of a Citizen Suit.

1. Standing to sue by environmental groups can be established by a demonstration that individual members of

the group engage in recreational activities near the location of the subject discharge, and thus are "adversely affected." See Student Public Interest Research Group v. Jersey Power & Light Co., 24 Env't Rep. Cas. (BNA) 1627, 1630 (D.N.J. 1986).

2. According to the Supreme Court's recent decision in Gwaltney of Smithfield, Inc. v. Chesapeake Bay Foundation, Inc., 108 S. Ct. 376, 386 (1987), private citizens may seek civil penalties against NPDES permit violators only in a suit brought to enjoin or otherwise abate an ongoing violation. Citizen-plaintiffs, in contrast to EPA, cannot seek civil penalties for wholly past violations. Private plaintiffs must allege a state of either continuous or intermittent violations -- that is, a reasonable likelihood that a polluter will continue to pollute in the future. These allegations of violation must be

made in good faith; Fed. R. Civ. P. 11 is the protection against frivolous claims. Gwaltney, 108 S. Ct. at 385.

3. The ruling in Gwaltney probably precludes a citizen suit against a facility which has terminated operations, at least where there is no reasonable likelihood of a resumption of operations. See Brewer v. Environmental Protection Agency, 27 Env't Rep. Cas. (BNA) 1352, 1357 (M.D. Tenn. 1988).

G. Proof of NPDES Permit Violations.

1. The methodology for developing effluent limitations incorporated in NPDES permits virtually assures that such permits will be violated by the permit holder. See, e.g., American Petroleum Institute v. Environmental Protection Agency, 661 F.2d 340 (5th Cir. 1981).
2. The use of a permit holders' daily monitoring reports ("DMR's") which are filed routinely with EPA and the state is usually the basis for the citizen

suit. See, e.g., Student Public Interest Research Group of New Jersey, Inc. v. Fritzsche, Dodge, and Alcott, Inc., 579 F. Supp 1528, 1538 (D.N.J. 1984) aff'd. SRRIG v. Fritzsche, Dodge, and Alcott, Inc., 759 F.2d 1131 (3rd Cir. 1985); Friends of the Earth v. Archer Daniels Midland Co., 24 Env't Rep. Cas. (BNA) 1993, 1996 (N.D.N.Y. 1986).

3. One issue not clarified in Gwaltney is how to compute "average" violations of NPDES permits. Current EPA policy reflects the Fourth Circuit's approach in the Gwaltney case. See, Chesapeake Bay Foundation v. Gwaltney of Smithfield, Inc., 791 F.2d 304, 314 (4th Cir. 1986), vacated, 108 S. Ct. 376 (1987), where the court held that violations of monthly average limitations in NPDES permits are equivalent to daily violations for each day of the month in which the monthly average is exceeded. But see the district court's recent ruling in Student

Public Interest Research Group of New Jersey, Inc. v. Monsanto Co.,

No. 83-2040 (D.N.J. March 24, 1988),

where the court held that an exceedance in a single discharge monitoring sample of the monthly daily average does not establish a violation for each and every day of the month.

H. Defenses to Citizen Suits.

1. Most important is the "diligent prosecution" defense under Section 505(b)(1)(B), usually asserted against an EPA action filed either concurrently with or after a state enforcement action. The success of this defense usually turns on whether the concurrent or prior state action is or was a judicial action. Compare, Sierra Club v. Chevron U.S.A., Inc., 27 Env't Rep. Cas. (BNA) 1001, 1008 (9th Cir. 1987) and Friends of the Earth v. Consolidated Rail Corp., 768 F.2d 57, 63 (2d Cir. 1985) (holding that state administrative action will not bar citizen suits because

they are not actions "in a court")
with the Third Circuit's opposite
conclusion in Baughman v. Bradford
Coal Co., 592 F.2d 215, 219 (3rd Cir.
1979), cert. denied, Bradford Coal Co.
v. Baughman, 441 U.S. 961 (1979).

2. With the enactment of the WQA, state
administrative proceedings now will
operate as a bar to citizen actions
for civil penalties (but not for civil
injunctive relief) if the state agency
is proceeding under a law "comparable"
to the civil administrative penalty
provisions of the CWA. See 33 U.S.C.
§§ 1319(g)(6)(A)(ii), (iii). See also
the recent ruling in Atlantic States
Legal Foundation v. Tyson Foods, Inc.,
No. 87-G-13,190 (N.D. Ala. March 4,
1988) (WESTLAW, DCT File, WL 27480)
(where the district court held that a
state administrative order operated as
a bar to a citizen suit, even though
the agency order did not impose civil
penalties, and even though the state
order specifically left the door open

to civil penalty actions by the state or by third parties).

3. It is likely that the "comparability" test will focus on the state program's allowance of public participation in state enforcement proceedings and by the amount of penalties which can be assessed under the state program. See Student Public Interest Research Group of New Jersey, Inc. v. Hercules, Inc., 23 Env't Rep. Cas. (BNA) 2081, 2086 (D.N.J. 1986).
4. If the state enforcement action is in a state court, the burden of establishing "noncomparability" will likely fall on the citizen-plaintiffs. See Connecticut Fund for the Environment v. Contract Plating Co., 631 F. Supp. 1291 (D. Conn. 1986) (diligence of a state's prosecution of a defendant should be presumed).
5. Other defenses to citizen suits have been largely unsuccessful:
 - a. retroactive permit application to cover past unauthorized dis-

- charges. See Menzel v. County Utilities Corp., 14 Env't Rep. Cas. (BNA) 1126 (E.D. Va. 1979).
- b. upset/bypass defenses. See Public Interest Research Group of New Jersey, Inc. v. United States Metals Refining Co., 26 Env't Rep. Cas. (BNA) 2004, 2009 (D.N.J. 1987).
- c. non-degradation of the receiving water by the permit violator. Public Interest Research Group of New Jersey, Inc. v. CP Chemicals, Inc., 26 Env't Rep. Cas. (BNA) 2017, 2021 (D.N.J. 1987).
- d. estoppel by agency representations. Connecticut Fund for the Environment v. Upjohn Company, 660 F. Supp. 1397 (D. Conn. 1987).

