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# Preclusion of Citizens' Suits Under the Clean Water Act

ELIZABETH MCKINNEY\*

To every advantage there is a disadvantage. An unfortunate disadvantage of the industrialization of the United States has been the pollution of America's waterways and water supplies. In an effort to combat this problem, Congress, in 1972, passed the Federal Water Pollution Control Act, more commonly known as the Clean Water Act (CWA).<sup>1</sup> Congress declared that the goal of this Act was the "restoration and maintenance of chemical, physical and biological integrity of [the] Nation's waters."<sup>2</sup> To achieve this goal, Congress sought to eliminate the discharge of pollutants into navigable waters by 1985, to prohibit the discharge of toxic pollutants into waters, and to protect wildlife and promote recreational uses.<sup>3</sup>

As a supplemental means of enforcement, the CWA has a citizen suit provision which allows "any citizen [to] commence a civil action on his own behalf."<sup>4</sup> The citizen suit provision allows citizens<sup>5</sup> to "appoint" themselves private attorneys general and to

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<sup>1</sup> Federal Water Pollution Control Act [Clean Water Act], Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified at 33 U.S.C. §§ 1251-1373 (1982), *amended by* Clean Water Act, Pub. L. No. 95-217, 91 Stat. 1566 (codified as amended in scattered sections of 33 U.S.C.), *amended by* Pub. L. No. 96-483, 94 Stat. 2360-63 (codified as amended at 33 U.S.C. §§ 1251-1387 (1988 & Supp. III 1991)).

<sup>2</sup> 33 U.S.C. § 1251(a).

<sup>3</sup> 33 U.S.C. § 1251(a)(1)-(3).

<sup>4</sup> The CWA states that a citizen may bring a civil action:

(1) against any person . . . who is alleged to be in violation of (A) an effluent standard or limitation under this Act or (B) an order issued by the Administrator 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 actor duty under this Act which is not discretionary with the Administrator.

33 U.S.C. § 1365(a)(1)-(2).

<sup>5</sup> The statute defines a "citizen" as a "person or persons having an interest which

directly sue the violator in federal court when the public authorities do not, or will not, act to enforce the statute themselves.<sup>6</sup> As the focus of the environmentalist groups shifts from the passage of new laws to the enforcement of the existing ones, the citizen suit has become an important mechanism in the enforcement of CWA provisions.<sup>7</sup>

Citizens do not have free reign to sue as they desire, though, citizen suits are precluded when the government is prosecuting an action diligently or has commenced an action.<sup>8</sup> What constitutes "diligently prosecuting" and "commencement" of an action has been the source of dispute between government agencies and those attempting to bring citizen suits. This Note begins with an overview of the provisions of the CWA, including a detailed explanation of the requirements for a citizen suit, along with the legislative history and barriers to bringing such a suit. In addition, this Note will examine the recent decisions in *Washington Public Interest Group v. Pendleton Woolen Mills*<sup>9</sup> and *Public Interest Research Group, Inc. v. Elf Atochem North America, Inc.*,<sup>10</sup> both of which addressed the preclusive effect of governmental action on citizen suits.

## I. PROVISIONS OF THE CLEAN WATER ACT

### A. Overview of the Citizen Suit Provision

The citizen suit is not a new concept; it has existed for centuries in England and has been in the United States since the nation's birth.<sup>11</sup> Citizens suits re-emerged in the 1970's as a tool to guard

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is or may be adversely affected." 33 U.S.C. § 1365(g) (1988).

<sup>6</sup> Sharon Elliot, Comment, *Citizen Suits Under the Clean Water Act: Waiting for Godot in the Fifth Circuit*, 62 TUL. L. REV. 175, 176 (1987).

<sup>7</sup> Jeannette L. Austin, Comment, *The Rise of Citizen-Suit Enforcement in Environmental Law: Reconciling Private and Public Attorneys General*, 81 NW. U. L. REV. 220, 221-22 (1987)[hereinafter Austin].

<sup>8</sup> 33 U.S.C. § 1319(g)(6)(A). This provision limits actions taken pursuant to other sections. As applied to citizens suits, the statute mandates that "any violation with respect to which the Administrator or the Secretary has commenced and is diligently prosecuting an action under this subsection . . . shall not be the subject of a civil penalty action under . . . § 1365." *Id.*

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

<sup>10</sup> *Public Interest Research Group of N.J., Inc. v. Elf Atochem N. Am., Inc.*, 817 F. Supp. 1164 (D. N.J. 1993) [hereinafter *Elf Atochem*].

<sup>11</sup> George R. Rogers, Comment, *Legislative Intent vs. Executive Non-Enforcement: A New Bounty Statute as a Solution to Executive Usurpation of Congressional Power*, 69

against environmental destruction.<sup>12</sup> The Environmental Protection Agency (EPA), environmentalists, and industry have since come to appreciate the citizen suit as an effective means to achieve the objectives of the CWA.<sup>13</sup> Although not invoked much in the beginning, the last few years have seen an explosion in the use of citizen suits.<sup>14</sup> The explosion of suits occurred for a number of reasons.<sup>15</sup> One is the recognition by environmental groups that environmental laws are meaningless without adequate enforcement.<sup>16</sup> Another is the dramatic increase in regulated activities which, in turn, increases the potential number of violators.<sup>17</sup> Perhaps the most important reason is the decrease in enforcement efforts by the federal government in the 1980's, which caused increased distrust of the federal government's ability to enforce environmental regulations.<sup>18</sup>

The majority of citizen suits are brought by environmental groups, although individual citizens are entitled to invoke the citizen suit provisions.<sup>19</sup> Plaintiffs usually need only show injury to themselves (or a member of their group) in order to establish standing.<sup>20</sup> Citizens may establish an injury by alleging that the violation has adversely affected their use of the environmental resource.<sup>21</sup> The idea behind citizen standing is that citizens will act as private attorneys general to help the government, or force the government to act, even when the citizen is without personal injury.<sup>22</sup> Standing provisions have been construed liberally by the Supreme Court and have included injuries which are "noneconomic and probably noncompensable."<sup>23</sup> Citizens may also intervene as a

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IND. L.J. 1257, 1268 (1994) [hereinafter Rogers].

<sup>12</sup> Rogers, *supra* note 11, at 1268.

<sup>13</sup> Jeffery M. Silverstein, *Application of the Mootness Doctrine to Citizen Suits Under the Clean Water Act After Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc.: Polluters Can't Escape the Controversy*, 14 VT. L. REV. 273, at 281 (1989) [hereinafter Silverstein].

<sup>14</sup> Rogers, *supra* note 11, at 1263. During the years 1984-88, eight hundred notices of suit were filed under the CWA alone. *Id.*

<sup>15</sup> Austin, *supra* note 7, at 233.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> James L. Thompson, *Citizen Suits and Civil Penalties Under the Clean Water Act*, 85 MICH. L. REV. 1656, 1659 n.17 (1987) [hereinafter Thompson].

<sup>20</sup> Austin, *supra* note 7, at 227.

<sup>21</sup> *Id.*

<sup>22</sup> Rogers, *supra* note 11, at 1261.

<sup>23</sup> Austin, *supra* note 7, at 228 (citing *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 17 (1981)).

matter of right when the government files a civil suit against the polluter.<sup>24</sup>

Despite the liberal access to the federal court system allowed by the citizen suit provision, there are several procedural hurdles that must be cleared as a prerequisite to the institution of an action.<sup>25</sup> One of the most significant barriers is the notice requirement,<sup>26</sup> in which a plaintiff must notify the government and the alleged violator of her/his intent to sue.<sup>27</sup> In order to give the alleged violator and the governmental authority an opportunity to take corrective action, the notice requirement does not allow a citizen suit to be filed until sixty days after giving such notice.<sup>28</sup> Due to the mandatory nature of the provision, failure to give the sixty day notice requires dismissal of the citizen suit.<sup>29</sup> In addition, there must be a reasonable chance that the alleged polluter will pollute in the future.<sup>30</sup> The courts have generally used a five-year statute of limitations even though the CWA does not contain such a provision.<sup>31</sup>

Another provision of the CWA provides that when the United

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> The notice provision in § 1365 states:

No action may be commenced—

(1) under subsection (a)(1) of this section—

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator, except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 306 and 307(a) of this Act [33 U.S.C. §§ 1316, 1317(a)]. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

33 U.S.C. § 1365(b).

<sup>27</sup> Austin, *supra* note 7, at 228-29, (citing 33 U.S.C. § 1365(b) (1988)).

<sup>28</sup> *Id.*

<sup>29</sup> David S. Mann, Comment, *Polluter-Financed Environmentally Beneficial Expenditures: Effective Use or Improper Abuse of Citizen Suits Under the Clean Water Act?*, 21 ENVTL. L. 175, 184 (1991) [hereinafter Mann].

<sup>30</sup> *Id.* at 184 n. 52.

<sup>31</sup> *Id.*

States is not a party to a consent decree these agreements are not final for forty-five days after both the Administrator and the Attorney General have received a copy.<sup>32</sup> As mentioned previously, citizens may not bring suit if the government is "diligently prosecuting" an alleged violator in "court."<sup>33</sup> Additionally, no citizen suit may be filed once the Administrator has assessed an administrative penalty against the alleged polluter.<sup>34</sup> However, if the citizen suit is filed before the administrative action this limitation does not apply.<sup>35</sup>

## B. Remedies Under the CWA

The CWA provides for discharge permits which allow discharge limited amounts of pollutants into surface waters.<sup>36</sup> Acceptable levels of wastewater discharge are established by the National Pollutant Discharge Elimination System (NPDES), which issues the permits.<sup>37</sup> Failure to comply with these permits is a violation of the CWA itself.<sup>38</sup> Permit-holders are responsible for monitoring and reporting pollution levels in their discharges through the submission of "discharge monitoring reports" (DMR's).<sup>39</sup> Citizens and the EPA examine these DMR's to determine whether an entity is in violation of the CWA.<sup>40</sup>

The remedies available under the CWA to citizen suit plaintiffs will determine the ultimate effectiveness of citizen suits.<sup>41</sup> The CWA authorizes injunctions as well as civil penalties against polluters as incentives to comply with the statute.<sup>42</sup> The objectives of imposing these civil penalties are both to deter the violation and to deprive the violator of the economic benefit derived from the viola-

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<sup>32</sup> Austin, *supra* note 7, at 229.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 229 n.61.

<sup>36</sup> Public Interest Research Group of N.J., Inc. v. Elf Atochem N. Am., Inc., 817 F. Supp. 1164, 1168 (D. N.J. 1993).

<sup>37</sup> Elliot, *supra* note 6, at 179.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 180.

<sup>40</sup> Leroy C. Paddock, *Environmental Enforcement at the Turn of the Century*, 21 ENVTL. L. 1509, 1523 (1991) [hereinafter Paddock].

<sup>41</sup> Austin, *supra* note 7, at 229.

<sup>42</sup> Beverly McQueary Smith, *The Viability of Citizens' Suits Under the Clean Water Act After Gwaltney of Smithfield v. Chesapeake Bay Foundation*, 40 CASE W. RES. L. REV. 1, 18 (1990) [hereinafter Smith].

tion.<sup>43</sup>

The courts have broad discretion in deciding whether to grant injunctions under the CWA.<sup>44</sup> Injunctions requiring shutdown of the violator's facility are rare, but when issued require the violator to completely cease operations until the compliance standards are met.<sup>45</sup> Normally the injunctions require the violator to comply within a reasonable time frame.<sup>46</sup> Perhaps the most controversial component of remedies under the CWA is the civil penalty.<sup>47</sup> The CWA permits the assessment of up to \$25,000 per day in fines against the violator.<sup>48</sup> Despite the fact that the civil fines imposed under the CWA are paid directly to the U.S. Treasury and not to the citizen plaintiff, the incentive for the citizen plaintiff to sue rests in her feeling that the violator should be fined for her misconduct.<sup>49</sup> By forcing the violator to pay for her past wrongs, the citizen plaintiff is able to stop current violations while preventing future violations.<sup>50</sup> The policies behind the civil penalty are two: fair and equitable treatment of the regulated community; and, deterrence and expeditious settlement of environmental problems.<sup>51</sup> The legislative history and statute furnish little more than the maximum penalties as guidance for the courts.<sup>52</sup>

Citizens plaintiffs may recover some legal costs in citizen suit actions.<sup>53</sup> The CWA allows the court to "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."<sup>54</sup> Judicial interpretation of this provision has been criticized because it may serve to limit the num-

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<sup>43</sup> *Id.*

<sup>44</sup> Mann, *supra* note 29, at 185.

<sup>45</sup> *Id.* at 185-86.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 186.

<sup>48</sup> *Id.* 33 U.S.C. § 1319(d) states that violators:

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

<sup>49</sup> Thompson, *supra* note 19, at 1657 and n.11.

<sup>50</sup> *Id.* at 1657-58.

<sup>51</sup> Silverstein, *supra* note 13, at 285.

<sup>52</sup> Mann, *supra* note 29, at 186.

<sup>53</sup> Austin, *supra* note 7, at 231.

<sup>54</sup> 33 U.S.C. § 1365(d) (1988).

ber of citizen suits due to a feeling that the chance of recovery is uncertain.<sup>55</sup> The legislative history indicates that this provision was intended to encourage citizen suits that have merit, which in turn promotes enforcement of the CWA.<sup>56</sup> That Congress elected to authorize the award of attorney fees to citizen plaintiffs signifies Congress considered these plaintiffs to be performing a public service for which compensation was in order.<sup>57</sup> However, common law or other statutory remedies are not precluded.<sup>58</sup>

In order to prevent or discourage frivolous citizen suits, the courts are allowed to order the plaintiff to pay the attorney fees of the defendant in an unsuccessful suit.<sup>59</sup> In addition, the plaintiffs may be required to post a bond when seeking a preliminary or temporary injunction.<sup>60</sup>

## II. LEGISLATIVE HISTORY OF PRECLUSION PROVISIONS

Without statutory limitations, proceedings under this Act would be controlled by whomever got to the courthouse first. In order to prevent this coordination problem, the CWA provides that if the government agency (federal or state) has already commenced and is "diligently prosecuting" an action, or if the agency has issued a final order, the violator will not be subject to civil penalties under a citizen suit.<sup>61</sup> However, these limitations do not apply if the citizen brought suit before the governmental agency's attempt to enforce the statute.<sup>62</sup> The CWA does provide that the EPA may intervene

<sup>55</sup> Austin, *supra* note 7, at 231-32.

<sup>56</sup> Gail J. Robinson, *Interpreting the Citizen Suit Provision of the Clean Water Act*, 37 CASE W. RES. L. REV. 515, 521 (1987) [hereinafter Robinson].

<sup>57</sup> *Id.*

<sup>58</sup> Elliot, *supra* note 6, at 182.

<sup>59</sup> Thompson, *supra* note 19, at 1674.

<sup>60</sup> Elliot, *supra* note 6, at 182.

<sup>61</sup> 33 U.S.C. § 1319(g)(6)(A).

<sup>62</sup> 33 U.S.C. § 1319(g)(6)(B) states:

The limitations contained in subparagraph (A) on civil penalty actions under [33 U.S.C. § 1365] shall not apply with respect to any violation for which—

(i) a civil action under [33 U.S.C. § 1365(a)(1)]

has been filed prior to commencement of an action under this subsection, or

(ii) notice of an alleged violation of [33 U.S.C. § 1365(a)(1)] has been given in accordance with [33 U.S.C. § 1365(b)(1)(A)] prior to commencement of an action under this subsection and an action under [33 U.S.C. § 1365(a)(1)] with respect to such alleged violation is filed before the 120th day after the date on which such

as a matter of right in any suit in which it is not a party.<sup>63</sup> Presumably, this was intended to serve as protection against inconsistent enforcement of the Act.<sup>64</sup>

Section 1365(b) of the CWA clearly states that only if the government is "diligently prosecuting a civil or criminal action in a court" may a citizen suit be precluded.<sup>65</sup> Based on this specific language, one would assume that it would be difficult to justify preclusion of a citizen suit based on agency action which is not a judicial action.<sup>66</sup> Generally unambiguous, this language in a statute is conclusive unless there is clearly expressed legislative intent to the contrary.<sup>67</sup> In the case of the CWA, despite the fact that the statutory language suggests that agency proceedings do not preclude CWA citizen suits,<sup>68</sup> the legislative history clearly expresses a contrary intent.

The CWA citizen suit provision was modeled after the citizen suit provision in the Clean Air Act (CAA).<sup>69</sup> The legislative history of the CAA shows that the Senate clearly intended that an agency action need not be an official court action in order to preclude a citizen suit.<sup>70</sup> Senator Hart, a sponsor of the CWA, addressed this issue by stating that the notice requirement "it is expected, will have the effect of prodding these agencies to act. In many cases, it is hoped, they will be able to act without resorting to the courts."<sup>71</sup> In support of this proposition, Senator Muskie, the bill's principal sponsor and its floor leader, said that the notice requirement was designed so that "[the citizen] might trigger administrative action to get the relief that he might otherwise seek in the courts."<sup>72</sup> In addition, Senator Muskie stated that, "in those instances where . . .

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notice is given.

<sup>63</sup> 33 U.S.C. § 1365(c)(2).

<sup>64</sup> Robinson, *supra* note 56, at 530.

<sup>65</sup> 33 U.S.C. § 1365(b)(1)(B).

<sup>66</sup> Robinson, *supra* note 56, at 518.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 518.

<sup>69</sup> Elliot E. Polebaum & Matthew D. Slater, *Preclusion of Citizen Environmental Enforcement Litigation by Agency Action*, 16 ENVTL. L. REP. 10,013, at 10,017 (1986) [hereinafter Polebaum & Slater].

<sup>70</sup> *Id.* at 10,016 (citing 116 CONG. REC. 32927 (1970)).

<sup>71</sup> *Id.* at 10,016 (quoting 116 CONG. REC. 33104 (1970) (remarks of Sen. Hart), reprinted in 1 Environmental Policy Division of the Congressional Research Service, A Legislative History of the Clean Air Amendments of 1970, 93d Cong., 2d Sess. 629 (Comm. Print 1974) at 355) [hereinafter Clean Air History].

<sup>72</sup> *Id.* (quoting 116 Cong. Rec. 32,927 (1970) (remarks of Sen. Muskie), reprinted in 1 Clean Air History, *supra* note 71, at 437).

enforcement action by the administrative agency was not triggered, then it seemed to us the citizen ought to be able to pursue the judicial remedy."<sup>73</sup> From these remarks, it seems reasonable to assume that Senator Muskie intended administrative actions as an alternative, rather than an identical substitute for, judicial action.<sup>74</sup> The House and Senate compromise bill, which became law, limited the citizen suit provision further by adding the sixty day notice requirement and the preclusion of a citizen suit if an agency enforcement action was pending in federal or state court.<sup>75</sup> Further, in the CWA legislative history the Senate explained, "the courts would be expected to consider the [citizen's] petition against the background of the agency action and could determine that such action would be adequate to justify suspension, dismissal, or consolidation of the citizen petition."<sup>76</sup>

Preclusion of citizen suits exists for many reasons. Despite the citizen's ability to pursue violators under the CWA, all sources indicate that Congress intended for the government to be the primary enforcer of this statute. One significant sign of this intention is the fact that criminal actions can be brought by the government but not by citizens.<sup>77</sup> The combination of the federal preemption provision, the notice provision, and partiality to agency enforcement makes obvious the intention that the government and its agencies were to be the primary enforcer of the CWA.<sup>78</sup> That the powers granted to citizens should supplement or complement, but not surpass or duplicate, the government's enforcement actions under the CWA was clearly designated by Congress.<sup>79</sup> The importance of agency enforcers would be greatly reduced if citizens had been granted equal enforcement powers.<sup>80</sup>

Another reason for preclusion of citizen suits is an effort to spare the judicial system extra work. Congress' goal was twofold: (1) to prevent flooding judicial dockets, while (2) allowing citizen

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<sup>73</sup> *Id.* (quoting 116 Cong. Rec. 32,927 (remarks of Sen. Muskie), *reprinted in* 1 Clean Air History, *supra* note 71, at 437).

<sup>74</sup> *Id.*

<sup>75</sup> Polebaum & Slater, *supra* note 69, at 10,016-17.

<sup>76</sup> *Id.* at 10,017 (quoting S. REP. No. 414, 92d Cong., 1st Sess. 80 (1971), *reprinted in* 2 Environmental Policy Division of the Congressional Research Service, A Legislative History of the Water Pollution Control Act Amendments of 1972, at 1498 (1973)).

<sup>77</sup> Elliot, *supra* note 6, at 18,889.

<sup>78</sup> Thompson, *supra* note 19, at 1667.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 1667-68.

enforcement.<sup>81</sup> However, this has not been the case as the number of citizen suits has risen dramatically over the years.

### III. JUDICIAL INTERPRETATIONS OF THE CITIZEN SUIT PROVISION

Citizen suit enforcement expanded in the mid-1980's because of a sense that the EPA was not pursuing violators as vigorously as it should have been.<sup>82</sup> This explosion in citizen suits increased the confusion in interpreting the provision.<sup>83</sup> This confusion can be attributed to the fact that Congress never directly specified the relationship between the roles of citizen plaintiff and the public enforcement effort.<sup>84</sup> In their attempt to define these roles, courts have repeatedly emphasized that the inclusion of provisions for citizen suits under the CWA is a manifestation of Congress' intention that citizen plaintiffs not be treated as "nuisances or troublemakers but rather as welcome participants in the vindication of environmental interests."<sup>85</sup> The nature of this mandated participation has not been determined by the courts.<sup>86</sup>

#### A. Washington Public Interest Research Group v. Pendleton Woolen Mills

The Ninth Circuit recently held, in *Washington Public Interest Research Group v. Pendleton Woolen Mills*<sup>87</sup>, (*WashPIRG*) that an EPA compliance order issued prior to a citizen suit does not bar a citizen suit for the same violation.<sup>88</sup>

In *WashPIRG*, the EPA had notified Pendleton Mills of a NPDES permit violation on August 5, 1989.<sup>89</sup> This compliance order directed Pendleton Mills to prepare a report detailing the causes of the violation and to identify actions to enable them to come into compliance.<sup>90</sup> Only the threat of sanction was included in the

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<sup>81</sup> Elliot, *supra* note 6, at 193.

<sup>82</sup> Mann, *supra* note 29, at 178.

<sup>83</sup> *Id.*

<sup>84</sup> Austin, *supra* note 7, at 233.

<sup>85</sup> *Id.* (quoting *Fishel v. Westinghouse Elec. Corp.*, 23 Env't Rep. Case. (BNA) 1329, 1333 (D. Md. 1985)).

<sup>86</sup> *Id.* at 233-34.

<sup>87</sup> *Washington Public Interest Research Group v. Pendleton Woolen Mills*, 11 F.3d 883 (9th Cir. 1993).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 884.

<sup>90</sup> *Id.* at 884-85.

order.<sup>91</sup> Later, on December 21, 1990, WashPIRG notified the EPA and Pendleton Mills of their intent to bring a citizen suit under the CWA for alleged NPDES permit violations.<sup>92</sup> WashPIRG then filed suit asking for an injunction and civil penalties.<sup>93</sup> The district court held that the compliance order against Pendleton barred this citizen suit.<sup>94</sup>

The Ninth Circuit reversed, holding that this citizen suit was not barred by the compliance order.<sup>95</sup> The court examined the plain language of Section 1319(g)(6), which precludes citizen suits, and noted that that section contained provisions which ensure that administrative penalties will not be duplicated.<sup>96</sup> Thus, the court determined that Section 1319(g)(6) only precludes citizen suits when the EPA is diligently pursuing administrative penalty actions.<sup>97</sup> The court further found that the EPA had issued the compliance order pursuant to Section 1319(a) and was not pursuing an administrative action under Section 1319(g) which serves to preclude citizen suits.<sup>98</sup> The Ninth Circuit went on to state that if Congress had intended to allow a Section 1319(a) compliance order to preclude a citizen suit, it could have easily done so, much like it did in other environmental statutes.<sup>99</sup>

#### B. Public Interest Research Group of New Jersey, Inc. v. Elf Atochem North America, Inc.

In *Public Interest Research Group of New Jersey v. Elf Atochem North America, Inc.*,<sup>100</sup> the district court held that a settlement agreement between the government and the polluter, reached after the citizen plaintiffs sent their notice of intent to sue and under which substantial fines were paid, did not preclude a citizen suit under the CWA.<sup>101</sup>

In this case, the New Jersey Department of Environmental

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 884.

<sup>96</sup> *Id.* at 885.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 886.

<sup>100</sup> *Public Interest Research Group of New Jersey v. Elf Atochem North America, Inc.*, 817 F. Supp. 1164 (D. N.J. 1993).

<sup>101</sup> *Id.* at 1173.

Protection and Energy (NJDEPE) sent the violator a "Compliance Evaluation Inspection Report" informing them that they had been rated "unacceptable" and must take corrective actions.<sup>102</sup> On August 25, 1989, the NJDEPE issued an administrative order proposing substantial penalties against the violator.<sup>103</sup> Subsequent to that action, the plaintiffs, after providing the required notice (on July 20, 1989), filed this action on September 18, 1989.<sup>104</sup> The environmental group established standing by submitting the affidavits of four members who owned property near the polluted area and who claimed that the smell and appearance of the river had adversely affected their recreational activities connected with the river.<sup>105</sup> A settlement between the NJDEPE and the polluter was eventually reached and, on April 24, 1992, a consent order was signed by the parties in which the violator paid a \$275,000 fine.<sup>106</sup> The agreement stated that it was "in full settlement of all civil and administrative claims and liability that might have been asserted by the NJDEPE under the [CWA]".<sup>107</sup>

The citizen plaintiffs argued that this order was not the type which triggers preclusion under the CWA while the defendants argued that this suit is statutorily precluded.<sup>108</sup> In its analysis, the court examined Section 1319(g)(6) which mandates that a citizen suit is precluded regarding violations "with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection."<sup>109</sup> In addition, this provision states that a citizen suit is not barred if the citizen plaintiff provided the required notice prior to the commencement of the state enforcement action.<sup>110</sup> As a result, the court stated that the resolution of this preclusion issue turns on what constitutes "commencement of an action."<sup>111</sup> However, this is unclear as the statute does not define "commencement."<sup>112</sup>

The court next analyzed the Compliance Evaluation Inspection Report, and found no mention of formal charges, a hearing, or pen-

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<sup>102</sup> *Id.* at 1169.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 1177.

<sup>106</sup> *Id.* at 1169.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 1170.

<sup>109</sup> *Id.* at 1172 (quoting 33 U.S.C. § 1319(g)(6)).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Elf Atochem*, 817 F.Supp. at 1172.

alties. The court held that this report was just one in a series of like reports which had been issued to the polluter over the years.<sup>113</sup> In addition, the court found that the wording of the letter only said that an enforcement action might be commenced in the future, not that one had been.<sup>114</sup> Given these findings, the court found that the Compliance Evaluation Inspection Report dated March 31, 1989 did not "commence" an enforcement action against the polluter.<sup>115</sup> The court further found that the August 31, 1989 Order and Notice was actually the "commencement" of an enforcement action by the NJD-EPE.<sup>116</sup>

In accordance with these findings, the court held that since the "commencement" of the state action occurred after the citizen plaintiff's notice of intent to sue, this suit was not subject to the bar set forth under Section 1319(g)(6).<sup>117</sup> Therefore, the violator's motion to dismiss this case was denied.<sup>118</sup>

#### CONCLUSION

There is no question that Congress intended for citizens to play a significant role in the enforcement of environmental statutes.<sup>119</sup> Making citizen suits a part of environmental policy making is quite logical.<sup>120</sup> These suits have proved to be a legitimate enforcement mechanism.<sup>121</sup> They have been successful in goading government to act, in supplementing government enforcement actions, in deterring violators, and in encouraging compliance.<sup>122</sup> Due to this success, a more active role for citizens in the enforcement effort may be one method of apportioning the expanding enforcement workload.<sup>123</sup>

The *Pendleton* decision, holding that a citizen suit under the CWA is barred only by an administrative penalty action rather than a compliance order, should serve as a model for courts dealing with this issue in the future. The result in this case clearly conforms to

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<sup>113</sup> *Id.* at 1173.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> Austin, *supra* note 7, at 260-61.

<sup>120</sup> *Id.* at 261-62.

<sup>121</sup> Elliot, *supra* note 6, at 194.

<sup>122</sup> *Id.*

<sup>123</sup> Paddock, *supra* note 40, at 1524.

the intent of Congress regarding the preclusive effects of agency enforcement actions. The Ninth Circuit "consider[ed] the [citizen's] petition against the background of the agency action"<sup>124</sup> and determined that this compliance order, in which no penalty action was taken, was not sufficient in its enforcement effort to warrant preclusion of the citizen suit.

Likewise, the *Elf Atochem* decision, which held that a citizen suit was not barred because the notice of intent to sue was filed before the government "commenced" action, should serve as a model for future disputes involving this issue. The court correctly interpreted what the term "commencement" meant under the statute. As the court found, "commencement of an action" involves more than a notice of violation and threat of action in the future; it must include some sort of formal charge, provision for a hearing on the matter, or provisions for penalties. Clearly, the government had not met that standard prior to the notice of intent to sue filed by the citizen plaintiffs. Perhaps a more equitable handling of this matter for the polluter would have been for the government to have joined the citizen suit (as they can as a matter of right) rather than reaching a separate settlement which exacted penalties from the violator.

The results of these decisions should prod the government to do more sooner in the enforcement area or be faced with dealing with citizen plaintiffs more and more often. The government cannot act as though it is prosecuting on a blank slate given Congress' desire for citizens to play a substantial role themselves and given the opportunities for prior government action either through intervention in citizen suits or its own enforcement efforts.<sup>125</sup> Striking the proper balance between the roles intended for public and private attorneys general has proven to be a challenging task given the construction of the statute, and will only become more important in the future as the number of citizen suits brought increases.<sup>126</sup> In deciding these issues in the future, courts should use the decisions in this Note as guideposts.

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<sup>124</sup> See *supra* note 76 and accompanying text.

<sup>125</sup> Austin, *supra* note 7, at 262.

<sup>126</sup> *Id.*