I. Responding to Government Enforcement

1. Overview

The maturity of the Clean Water Act ("CWA"), 33 U.S.C. § 1361 et seq., and the ease of enforcement due to the self monitoring and reporting requirements, has led to a relatively effective pollution abatement scheme against "conventional" point sources, as opposed to such sources as animal feed lots and combined sewers.\(^1\)

The mechanisms of this point source enforcement scheme are varied and include civil administrative and judicial actions for fines and injunctive relief. In addition, criminal actions brought against institutions as well as individuals have become increasingly frequent. This enforcement scheme is further complicated by the delegation of the CWA permitting and enforcement responsibilities to approximately 33 states. Moreover, the enforcement scheme includes CWA’s citizen suit provisions\(^2\), which allow citizens to act as private attorneys general. Thus the regulated community faces enforcement in its various forms from at least two levels of government as well as independent citizen litigants.

2. The Critical Problem: Prosecutorial Discretion

The government enforcer has significant discretion in pursuing enforcement. The number of violations that can be calculated from a single act resulting in an ongoing discharge

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\(^1\) Enforcement and compliance programs relating to wet weather events from concentrated animal feeding operations, storm water runoff, combined and sanitary sewers deal with major water quality problems, and unfortunately are not mature.

\(^2\) 33 U.S.C. § 1365, discussed infra at Section II.
can be daunting. The calculation of the fine amount per violation and concomitant demand, although circumscribed by penalty formulas and policy, are significant areas of prosecutorial discretion.\(^3\)

Perhaps, of greater significance is the “general intent” scienter requirement associated with the CWA’s criminal provisions, which allows a prosecutor to exercise his or her near unfettered discretion to convert some hapless discharger into a felon. In recent years, the U.S. Environmental Protection Agency (“EPA”) and various state environmental agencies have pursued an increasing number of prosecutions against corporate officers and employees arising from their company’s environmental violations.\(^4\) Criminal enforcement is random and the consequences often harsh. In this regard, the mere presentment of an indictment “will often have a devastating personnel and professional impact that a later dismissal or acquittal can never undo.”\(^5\) Accordingly, a critical problem for members of the regulated community is influencing the broad, and almost unfettered, discretionary authority vested in various government enforcement officials.

Although, minor and occasional excursions will not normally draw enforcement attention, there are several situations where even the relatively innocuous discharge will bring down the wrath of the enforcement community. Those situations may involve a continuing pattern of minor violations. Other enforcement catalysts include a “high profile” accident, or a

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\(^3\) Clean Water Act ("CWA") § 309(d), 33 U.S.C. 1319(d) provides that “[i]n determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, [the economic benefit (if any) resulting from the violation, any history of such violations,] any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.” Environmental Protection Agency (“EPA”) and state agencies have parroted these criteria in various penalty guidance documents. See also 40 C.F.R. § 19. On February 13, 2004, EPA issued a final rule making effective inflation adjustments for all violations occurring after March 15, 2004. Accordingly, any of the above violations taking place on or after March 15, 2004 are punishable by penalties of up to $32,500 per violation per day.

\(^4\) Arnold, Enforcement, BNA Daily Environmental, No. 67 (April 8, 2005). Recently, the Third Circuit held that an individual defendant who did not dispose of hazardous waste could be criminally liable as an aider and abetter. United States v. Wasserman, 418 F.3d 225, 2005 WL1792006 (3d Cir. July 29, 2005).

spill of a hazardous substance, or an inspector’s perception that facility personnel are not being cooperative, etc.\textsuperscript{6} Other enforcement efforts arise from disgruntled employee “whistle blowers”, or governmental initiatives that may have little to do with the daily operation of the facility. Moreover, citizen suit litigants often contribute to the attention that a facility will receive from a government agency as no agency wants to be perceived as not discharging its responsibilities. In short, draconian enforcement can be triggered by events that may not be normally anticipated during the operation of a facility.

3. \textbf{The Criminal Enforcement Scheme}

The criminal penalty provisions of the CWA\textsuperscript{7} provide misdemeanor penalties of up to one year of imprisonment and a per-day fine for the “negligent” violation of any of eight specific sections of the statute, or requirements imposed by permits issued under the Section 402 NPDES program or the Section 404 dredge and fill permit program or the contamination of sewer systems and publicly owned treatment works.\textsuperscript{8}

There should be no doubt that principles of common law notwithstanding, mere negligence is enough to support a criminal charge when it comes to Section 309(c)(1) of the

\begin{Verbatim}
\textsuperscript{6} Probably, the greatest incentive for enforcement action is the offense of “contempt a cop”.
\textsuperscript{7} CWA § 309(c); 33 U.S.C. § 1319(c).
\textsuperscript{8} CWA § 309(c)(1); 33 U.S.C. § 1319(c)(1), states:

“Any person who—
(A) negligently violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1341(a)(3) or 1342(b)(8) of this title or in a permit issued under section 1344 of this title by Secretary of the Army or by a State; or
(B) negligently introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in any permit issued to the treatment works under section 1342 of this title by Administrator or a State;
shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than 1 year, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment of not more than 2 years, or by both.”
\end{Verbatim}
Clean Water Act because the statute specifically states that it is. Any of the identified named in Section 309(c) of the Clean Water Act is a felony if it is committed “after a first conviction,” bringing a maximum $50,000 fine for each day of violation or up to two years in prison, or both.10

A party who is convicted of “knowingly” committing any of the same violations will face a penalty of “not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years, or by both.”11 For a subsequent conviction, there is no change in the base fine, but the maximum fine and prison sentence can be doubled to $100,000 a day and 6 years in prison.12

One of the CWA sections triggering heavy maximum penalties is for violation is Section 301 of the CWA,13 which deals with limitations on effluents that may be discharged. Section

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9 See e.g., United States v. Hanousek, 176 F.3d 1116 (9th Cir. 1999); United States v. Baytank (Houston), Inc., 934 F.2d 599, 618-619 (5th Cir. 1991). In addition to holding that “[t]he Clean Water Act expressly penalizes negligent as well as willful violations,” the court found “no constitutional infirmity in not requiring proof of specific intent where the statute establishes mere negligence as the basis for a criminal charge.

10 CWA § 309(c)(1); 33 U.S.C. § 1319(c)(1).

11 CWA § 309(c)(2); 33 U.S.C. § 1319(c)(2), states:

“Any person who—
(A) knowingly violates section 1311, 1312, 1316, 1317, 1318, 1321(B)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State; or
(B) knowingly introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements, or permits, which causes such treatment works to violate any effluent limitation or condition in a permit issued to the treatment works under section 1342 of this title by the Administrator or State; shall be punished by a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $100,000 per day of violation, or by imprisonment of not more than 6 years, or by both.”

12 Id.

301 is a lengthy and complex statute that reads more like an agency-promulgated regulatory scheme than statutory legislation, and incorporates many regulations by reference.\textsuperscript{14} Violation of Section 306\textsuperscript{15} of the CWA, covering national performance standards, also can result in heavy fines and imprisonment.\textsuperscript{16} The standards themselves are not specified in the statute; rather, the statute requires the EPA to promulgate regulations. In order to avoid inadvertently stepping on one of the statute’s criminal sanction-triggering trip wires, a regulated party must pay meticulous attention to the regulations promulgated by the agency.\textsuperscript{17} The other sections that are listed as triggering possible criminal liability re: Section 307, \textsuperscript{18} dealing with toxic and effluent pretreatment standards; Section 308, \textsuperscript{19} covering maintenance of records and monitoring equipment, entry for inspection, and access to information; Section 311(b)(3), \textsuperscript{20}...

\textsuperscript{14} United States v. Ellen, 961 F.2d 462 (4th Cir. 1992).
\textsuperscript{15} 33 U.S.C. § 1316.
\textsuperscript{16} See, e.g., United States v. Weitzenhoff, 35 F.3d 1275, 1283 (9th Cir. 1993) (“Section 1319(c)(2) makes it a felony offense to ‘knowingly violate[ ] section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345…, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342.’”); United States v. Curtis, 988 F.2d 946, 947 (9th Cir. 1993) (“33 U.S.C. § 1319(c)(2) provides in part: Any person who knowingly violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title, shall be punished by a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years, or by both…”).
\textsuperscript{17} The effluent guidelines and standards mandated by CWA § 306 are found at 40 C.F.R. Ch. I, Subch. N.
\textsuperscript{20} 33 U.S.C. § 1321(b)(3). Like many other sections of the CWA, compliance with this section is dependent upon a careful reading of the regulations promulgated pursuant to it. This section generally prohibits “[t]he discharge of oil or hazardous substances… into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone… in such quantities as may be harmful as determined by the President under paragraph 4 of this subsection…” The regulatory structure that has been built up pursuant to Section 311 of the CWA includes regulations covering the following: Civil penalties for violation of oil pollution prevention regulations, 40 C.F.R. §§ 114.1 \textit{et seq}; Designation of substances, reportable quantities, and notification requirements for release of substances, 40 C.F.R. §§ 302.1 \textit{et seq}; Designation of hazardous substances, 40 C.F.R.
dealing with discharge of oil or hazardous substances into navigable waters; Section 318, prohibiting unpermitted discharges from aquaculture projects, and Section 405, prohibiting unpermitted disposal or use of sewage sludge. It is especially important to note that Sections 309(c)(1) and (2) mandate federal criminal prosecutions for violations of discharge permits issued under Section 402, whether by the federal government or by a state. It is apparent that a party is subject to federal prosecution for violations of the conditions of a state-issued permit. It is clear, therefore, that the complicated overlay of federal statute and regulation, together with conditions of state-issued permits, constitute a dangerous mine field interlaced with trip wires that make it all too easy for the unwary party to incur serious criminal liability simply by not being sufficiently attentive.

An individual who is convicted of knowingly violating any of eight statutory sections or the conditions of a permit issued under either the NPDES or the dredge and fill program in a manner that he knows will place a person in imminent danger of death or serious bodily injury can be fined up to $250,000, imprisoned for as long as fifteen years, or both. An organization

\[\text{\S \S 116.1 et seq.; Determination of reportable quantities of hazardous substances, 40 C.F.R. \S\S 117.1 et seq.; and Limitations on discharge of oil, 40 C.F.R. \S\S 110.1 et seq.}\]

\[\text{33 U.S.C. \S 1328.}\]

\[\text{33 U.S.C. \S 1345.}\]

\[\text{33 U.S.C. \S 1342. This is the statute that establishes the National Pollutant Discharge Elimination System (NPDES) and all its state analogs. Regulations that have been promulgated pursuant to this section are found as follows: Criteria and standards for the NPDES 40 C.F.R. \S\S 125.1 et seq.; EPA-administered permit programs under the NPDES, 40 C.F.R. \S\S 122.1 et seq.; General pretreatment regulations for existing and new sources of pollution, 40 C.F.R. \S\S 403.1 et seq.; and State program requirements, 40 C.F.R. \S\S 123.1 et seq.}\]

\[\text{CWA \S 309(c)(3)(A), 33 U.S.C. \S 1319(c)(3)(A), states:}\]

“Any person who knowingly violates Section 1311, 1312, 1313, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State, and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall upon conviction, be subject to a fine of not more than $250,000 or imprisonment of not more than 15 years, or both. A person which is an organization shall, upon conviction of violating this subparagraph, be subject to a fine of not more than $1,000,000. If a conviction of a person is for a violation
Initial Phase of Government Enforcement Effects

Discharges from point sources must be in accordance with permit parameters and are subject to stringent self monitoring and reporting requirements. Defenses are far and few between. However, there has been some litigation over what constitutes point sources, and the Supreme Court recently examined this issue in the context of water being conveyed from a canal to a reservoir holding that a permit is not required if the conveyance is not believed “meaningfully distinct water bodies.” The narrow defenses of “bypass” and “upset” continue to be available. Last year a litigant had some success with a laboratory error defense. In *United States v. Alleghany Ludlum Corporation*, the Third Circuit held that laboratory errors could be a defense to claims of CWA violations where the laboratory error is a “false positive.” Nevertheless, CWA permit excursions and spills are really the “low hanging fruit” in the environmental enforcement scheme.

However, prosecutors have a higher burden in criminal proceedings despite the relatively low threshold of proving a “knowing” violation. Moreover, the actual knowledge of the individual, as opposed to the corporate entity, must be proved to obtain the individual’s conviction. Accordingly, a government investigation may go far beyond a perusal of committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both fine and imprisonment.”

This provision picks up the language of a similar provision contained in RCRA § 3008(e), 42 U.S.C. § 6928(e).

25 Parker v. Scrap Metal Processing, Inc., 386 F.3d 993 (11th Cir. 2004) (earthmoving equipment deemed to be point services); United States v. Plaza Health Laboratories Inc., 3 F.3d 643 (2d Cir. 1993).


27 “Bypass means the intentional diversion of waste streams for any portion of treatment you facilitate.” 40 C.F.R. §122.41 (m)(1)(i).

28 “Upset means an exceptional incident in which there is an unintentional and temporary noncompliance with technology based permit limits limitations because of factors beyond the reasonable control of the permittee. An upset does not include noncompliance to the extent caused by operational error and improperly designed treatment facilities, lack of preventive maintenance, more careless or improper operation.” 40 C.F.S. §122.41(n).


the DMRs. Indeed, it is this search for some indication of independence, negligence and knowing conduct that often involves the respondent in further allegations of wrongdoing.

Often an institution’s enforcement problems are compounded when the government inspector or auditor arrives at the facility door. Routine facility inspections are required under most permits, and the failure to admit an inspector may be an independent ground for a violation. The on-site inspection by regulatory personnel is a critical point because most government personnel will respond favorably to candor, cooperation, and a demonstration that the facility is vigorously attempting to solve the problem that caused the excursion. On the other hand, perceived deviousness and an apparent disinclination to deal with the problem will usually provoke enforcement tough efforts. Moreover, obstructing an inspection is often of itself a violation of the SPDES permit. Similarly, Federal and State law punish false statements made to government inspectors. Indeed, under Federal law, an intentionally false oral statement made to a government official with respect to a matter within the official’s jurisdiction is a felony.31 If an actual investigation is underway, obstruction or overly ambitious coaching of witnesses push government officials to think of Obstruction of Justice indictments.32

32 18 U.S.C. § 1512(b), states:

Whoever knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to —
(1) influence, delay, or prevent the testimony of any person in an official proceeding;
(2) cause or induce any person to —
   (A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;
   (B) alter, destroy, mutilate, or conceal an object with intent to impair the object’s integrity or availability for use in an official proceeding;
   (C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or
   (D) be absent from an official proceeding to which such person has been summoned by legal process;
(3) hinder, delay, or prevent the communication to a law enforcement office or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;
Accordingly, the inspecting force should not only be accorded the utmost professional
courtesy by knowledgably facility personnel, but careful attention should be given to what the
inspectors see and do. Inspectors must be accompanied and their actions mimicked. For
example, photographs should be duplicated, sampling methodology should be duplicated and
careful attention should be paid to employee responses. Moreover, careful attention should be
given to assuring prompt and full responses to requests for additional information. A word of
cautions: every investigation should be reviewed for its criminal prosecution potential. If there is
such a potential a decision may be made by the individual targets to enjoy the bliss of
constitutionally protected silence. However, criminal investigations are often kicked off by
agents armed with judicial warrants which eliminate most faculty’s options, except the
declination to provide oral statements.

Often, the government investigation will not stop at a review of filed reports or an onsite
inspection. Government enforcers will often attempt to develop evidence the incident’s
relationship to overall environmental noncompliance. A relatively isolated spill or excursion can
trigger a government inquiry into not only the criminal culpability surrounding the excursion or
spill, but the entire environmental compliance posture of the facility. Thus, even an isolated
excursion or spill can lead to a much wider investigation into the facilities environmental overall
compliance. The results of the government inquiry will determine such issues as (i) the number
of violations alleged, (ii) the amount of proposed fines per violation, (iii) the request for
injunctive relief\(^{33}\), (iv) the institution civil or criminal proceeding, and (v) whether individuals

\(^{33}\) Injunctive relief can include the imposition of an environmental monitor.
will be prosecuted criminally. In other words, the isolated event puts into play the government’s discretion.

5. **Long Range Response to Government Enforcement**

An environmental management system that includes environmental compliance monitoring is a means to control government discretion. Not only do such well run programs deter criminal prosecution but they tend to lessen penalties. The essence of any effective Environmental Management Plan consists of a five step plan including: (1) frequent auditing independent of line managers, (2) continuous on-site monitoring, (3) internal reporting with no fear of retribution, (4) tracking the status of responses, and (5) redundant checks on compliance efforts.\(^\text{34}\)

(i) **Frequent Auditing.** A self-auditing program should require frequent auditing independent of line management, as well as random and surprise audits and inspections. All principal operations and pollution control facilities should be subject to such audits and inspections, along with internal policies, standards and procedures. Internal investigations should be followed up to make certain that any significant incident of noncompliance is corrected.

(ii) **Continuous On-Site Monitoring.** Specifically trained compliance personnel should conduct continuous on-site monitoring of key operations and pollution control facilities that are subject to environmental regulation, or where the nature or history of such operations suggests a significant potential for non-compliance.

(iii) **Internal Reporting.** Internal reporting of all compliance problems should be a way of day-to-day life for employees at all levels, with a well understood and well observed policy of no retribution for making such internal reports. Consideration should be given to

\(^{34}\) See Riesel Environmental Enforcement at §§ 8.06[1]-[2]
special hot line numbers, so that employees may easily report problems to those responsible for investigating and correcting them without feeling that they face barriers or unwarranted consequences for making such reports.

(iv) Tracking Response Status. Responses to reported problems should be tracked and documented to make certain that the reports are not simply filed and forgotten. There should be expeditious and effective resolution of compliance issues by line managers in response to reported problems.

(v) Redundant Checks. There should be redundant and independent checks on the status of compliance, particularly in those operations, facilities or processes where the organization knows, or has reason to believe, that employees or agents may have, in the past, concealed noncompliance through falsification or other means, and in those operations, facilities or processes where the organization reasonably believes such potential exists.

Obviously, the CWA compliance audit will involve checking the Discharge Monitoring Reports (“DMRs”) to insure that all parameters are being complied with on a regular basis, that all reports are being filed on time, and that sampling appears to be carried in accordance with prescribed procedures. However, effective compliance auditing goes beyond checking DMRs. The diligent auditor will interview the treatment plant operators to insure that there is a redundancy of personnel and that they are working reasonable hours under good conditions. Equipment should be reviewed to insure that contingencies are in place to remedy the usual malfunctions of plant equipment. In addition, requisitions for new equipment must be reviewed to see if they have been fulfilled or that a rational explanation exists for the failure or delay in meeting the requisition.
A fair amount of written material has been generated on environmental compliance audits that range from checklists to lengthy treatises. Nevertheless, it is probably time to reexamine certain features of the environmental audit process. Many such audits are still carried out by facility personnel and are primarily structured to insure the audit results remain confidential. Thus, audit notes often disappear into the general counsel’s office for indeterminate periods. Confidentiality of certain of the audit’s conclusions are often sensitive and deserve to be treated confidentially. However, the effective audit must have its conclusions communicated and implemented.

The use of in-house personnel as environmental auditors is commonplace and justified for reasons of costs and ease of execution. There are merits to these arguments; however, those arguments cannot outweigh the need to overcome conflicts and to pierce the paper trails that are often generated by contemporary managers. Conflicts are inherent in institutional structures, and it is doubtful that middle managers are ever truly free of conflict, which is inherent in a hierarchical corporate structure. Similarly, the use of outside consultants that are familiar with the audited facilities because they do other business with that facility is fraught with potential conflict. Indeed, these outside consultants acting in their audit capacity may be called upon to pass upon the adequacy of their earlier environmental advice. These conflict problems can be minimized by the inclusion of some “outside” members in the auditing team. The value of outside lawyers to an auditing team has received considerable attention. The argument against their use is that lawyers do not have the technical ability or the familiarity with the industrial process for meaningful participation. Nevertheless, lawyers are trained investigators, know how to interview, and know how to utilize the knowledge of “experts”. Whatever their value in

35 The author has contributed to this increasing amount of material. See Riesel Environmental Enforcement, Civil and Criminal, Law Journal Press at § 8.06[1] (1977)
routine audits may be, their role in a compliance audit once the facility has received government attention is essential. Amongst other functions is that their participation can cloak audit conclusions in one or both of the lawyer driven privileges of confidentiality.

Another aspect of the environmental compliance audit that deserves special consideration is the gathering of independent data and having that data analyzed by an outside laboratory. Normally, the auditor examines the DMRs and other records relating to pollution parameters maintained in the facilities office, but are often reluctant to verify this data by taking samples and having those samples analyzed by a laboratory different than the one used by the facility. One of the arguments advanced for this avoidance is that results of such sampling are required to be turned over to the relevant governmental agency, either due to specific permit requirements or a regulation. The requirements also state that violations are to be reported. However, sampling protocol can be devised that does not fall within the permit prescription, but is still indicative of the true state of waste water treatment. Without independent sampling the auditor has no direct evidence that verifies the adequacy of DMRs.

Vigorous environmental management and realistic environmental auditing are a means of coping with the broad discretion vested in environmental prosecutors. Initially, effective environmental compliance programs can be a factor influencing government enforcers not to institute criminal actions. However, a “paper” or ineffective program may only be further evidence of culpability. Although, the Supreme Court’s decision in United States v. Booker


\[37\] The Principles for Federal Prosecution cautions prosecutors:

should therefore attempt to determine whether a corporation’s compliance program is merely a “paper program” or whether it was designed and implemented in an effective manner. In addition, prosecutors should determine whether the corporation has provided for a staff sufficient to audit, document, analyze, and utilize the results of the corporation’s compliance efforts. In
reduces the Sentencing Guideline to an advisory status, they will continue to influence sentencing judges if criminal proceedings are instituted. The Guidelines provide that an effective compliance program is a significant mitigating factor.

Finally, the failure to discover an excursion or similar CWA violation, although the facility has been subject to meaningful environmental auditing, will go a long way to eliminating proof of the scienter requirement of a “knowing” violation.

6. Conclusion

Fundamental fairness dictates that the government should not have unfettered discretion to institute draconian enforcement such as criminal prosecution of individuals for minor infractions. Unfortunately, the CWA vests federal and state prosecutors with broad discretion. Vigorous environmental management and realistic auditing provide some limitations on the exercise of this discretion.

II. Responding to Citizen’s Suits

1. Introduction

The major federal environmental statutes enacted between 1970 and 1980 all contain provisions allowing private citizens to bring suit against alleged violators of the statutes. All

addition, prosecutors should determine whether the corporation’s employees are adequately informed about the compliance program and are convinced of the corporation’s commitment to it. This will enable the prosecutor to make an informed decision as to whether the corporation has adopted and implemented a truly effective compliance program that, when consistent with other federal law enforcement policies, may result in a decision to charge only the corporation’s employees and agents.

Id., at 7.


of these Acts follow a similar statutory pattern, and the legislative history and decisions relating one statute can often be used for another. Citizen suits against alleged polluters, until recently, were primarily brought under the CWA because the permitting and self-reporting enforcement mechanisms provided easy pickings for citizen plaintiffs. Citizen suits also serve as vehicles to trigger district courts’ supplemental jurisdiction\(^{40}\), and are often accompanied by a panoply of common law claims sounding in tort.

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the major environmental statutes, only the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136 et seq. lacks a citizen suit provision.

The CWA, 33 U.S.C. § 1365 provides:

(a) Authorization; jurisdiction
Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf—

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

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

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

(b) Notice
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 1316 and 1317(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

\(^{40}\) 29 U.S.C. § 1367.
Citizen suits and the notices of intent to sue that precede them should be given prompt and vigorous attention because they have the potential to cause things to unravel for an unprepared defendant. In addition to the imposition of substantial penalties, injunctive relief and attorneys’ fees, the institution of such suits may bring unwanted attention from embarrassed governmental agencies and concomitant disclosure requirements. As citizen suits enter the 21st Century, a defendant in one of these actions will have access to a relatively well-established body of case law concerning potential defenses. These defenses include challenging a plaintiff’s standing to maintain the suit, examining whether the citizen-plaintiff has fulfilled the statutory prerequisites for notice and, for most citizen suit provisions, asserting that the alleged violations are not “ongoing”.

Other defenses, while also well established in case law, may be less intuitive. The Supreme Court has stated that the structure of the citizen suit provisions clearly indicates Congress’ intention for such provisions to “supplement rather than to supplant” the enforcement powers of governmental agencies. That Congressional intent is reflected in the statutory bar against bringing a citizen suit where an agency is “diligently prosecuting” a civil action, or, in more limited cases, an administrative proceeding, against the alleged violator. It is further reflected in the requirement that a potential plaintiff provide the alleged violator, as well as federal and state governmental officials, with detailed notice of any intended claims and wait a prescribed number of days before bringing an action, thus allowing government enforcement to preempt the need for litigation. Courts have additionally applied the “supplement but not supplant” dictate beyond strict application of the diligent prosecution bar and notice requirement defense through application of the mootness doctrine and the doctrine of res judicata/collateral estoppel. Thus, even once a citizen suit is commenced, courts often will dismiss it as moot when

the defendant can demonstrate that government enforcement has resulted in the cessation and remediation of the alleged violation. In essence, a court in such instances finds that it is unnecessary to provide relief beyond that already effected by a governmental agency.

This Section focuses on the defenses – diligent prosecution and mootness – that are tied to actions taken by the government or the alleged violator to remedy the condition or occurrence that forms the basis of the citizen suit. Experience has shown that the defendant who takes proactive measures upon learning of a violation is the defendant who will fare best in defending a citizen suit. Such measures can be taken at any point in the process: before receiving notice of a potential citizen suit, after receiving notice of the citizen suit but before litigation has been commenced, or even after the commencement of litigation. Of course, the earlier remedial measures are put in place the better are one’s chances of successfully defending the citizen suit. However, regardless of when such measures are implemented, if they are effective at remedying the violation, they may be equally effective at averting a citizen suit altogether, or at least result in short circuiting a citizen enforcement effort after it is commenced.

The proactive approaches suggested for heading off citizen suits do not only include unilateral measures by an alleged violator to remedy such violations. They also include working with governmental regulators in order to receive approvals for any suggested remedial measures. This is especially important when the remedy is not simply closing a plant, but requires measures that will be implemented over a longer period. In such cases having such an approach memorialized in an enforceable court degree may prove critical in fending off a citizen suit that is little more than a “me too action.” In that way, a defendant can lessen the possibility that other measures will be required, reduce litigation costs, and also eliminate or reduce an award of attorneys’ fees to citizen plaintiffs.
2. **Taking Immediate Action: The Investigation**

   The citizen suit requirement that the plaintiff provide prior notice before commencing litigation allows the potential defendant some time, albeit brief, to investigate the alleged violation in cases where the potential defendant is previously unaware of it. In other cases, the violation may be self-reported, such as in a CWA State Pollutant Discharge Elimination System ("SPDES") permit, or otherwise obvious even before the notice of the citizen suit is received in the mail.

   Whatever the case may be, a defendant should not squander the critical interval between the time of the violation and the actual commencement of a citizen suit. The actions taken during that time period very well could head off the citizen suit by sowing the seeds for a diligent prosecution or mootness defense.

   Most citizen suit provisions require notice to the alleged violator, to the EPA Administrator, and often to the environmental agency of the state in which the violation is alleged to have occurred, sixty days before an action can be commenced.\(^\text{42}\) Federal regulations under the CAA,\(^\text{43}\) the CWA,\(^\text{44}\) CERCLA,\(^\text{45}\) and RCRA,\(^\text{46}\) set forth the required contents of such notices. Essentially, a notice of intent to sue under these statutes must alert the alleged violator as to the specific standard, regulation, permit condition, or order violated; the activity constituting the violation; and the time and place of the alleged violation. If the notice is

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\(^{42}\) See, *e.g.*, 33 U.S.C. § 1365(b); 15 U.S.C. § 2619(b)(1)(A); 16 U.S.C. § 1540(g)(2); 42 U.S.C. § 9659(d)(1); 42 U.S.C. § 7604(b). Under RCRA § 7002(b)(2), 42 U.S.C. § 6972(b)(2), citizen suits brought alleging an “imminent and substantial endangerment” to health or the environment require 90 days advance notice; if the action alleges a violation of the statute’s hazardous waste management provisions, however, it may be brought immediately after notice is given.

\(^{43}\) 40 C.F.R. § 54.

\(^{44}\) 40 C.F.R. § 135.

\(^{45}\) 40 C.F.R. § 374.

\(^{46}\) 40 C.F.R. § 254.
adequate, it should allow the alleged violator to investigate whether, in fact, the potential claims have any merit.\footnote{Failure to follow the notice requirements will result in dismissal of the action, pursuant to the Supreme Court’s decision in \textit{Hallstrom v. Tillamook County},\textsuperscript{47} 493 U.S. 20 (1989) in which the Court upheld dismissal of claims for which the plaintiffs provided timely notice to the alleged violator, but not to the state or the EPA. Thus, if counsel believes the notice clearly does not meet applicable statutory and regulatory requirements, one option to consider is waiting until commencement of the action and moving to dismiss on that ground. However, Courts have treated the notice provision relatively leniently. \textit{cf. Waterkeepers Northern California v. AG Industrial Manufacturing, Inc.}, 375 F.3d 913 (9th Cir. 2004) \textit{cert. denied}, 2005 WL 35894 (January 10, 2005).}{47}

3. \textbf{The Type Of Alleged Violation}

As noted previously, in many cases the violation alleged in a notice of intent to sue is “self-reported” and thus practically impossible to impeach on a factual basis. Permits issued under the CAA and the CWA require permittees to monitor the emissions or effluent discharges covered by the permit, keep records, and make periodic reports to EPA or the state agency empowered to administer a state program.\footnote{See 40 C.F.R. § 122.41(j) (regulations under the CWA); 40 C.F.R. §§ 70.6(a)(3), 71.6(a)(3) (regulations under the CAA).}{48} The EPA or state agency has the obligation to make such reports available to the public.\footnote{33 U.S.C. § 1318(b); 42 U.S.C. § 7414(c).}{49} Permit holders must sign and certify the reports,\footnote{40 C.F.R. §§ 70.6(a)(3)(ii)(A), 71.6(a)(3)(ii)(a), 122.41(j)(3).}{50} and as a practical matter, liability will attach as soon as a court reaches the merits of the action, as arguing that one’s monitoring technique was flawed will rarely enjoy any success.\footnote{See \textit{Sierra Club v. Union Oil Co. of California}, 813 F.2d 1480, 1491-92 (9th Cir. 1987), \textit{vacated} 485 U.S. 931, \textit{reinstated and amended on other grounds}, 853 F.2d 667 (9th Cir. 1988) (holding that “when a permittee’s reports indicate that the permittee has exceeded permit limitations, the permittee may not impeach its own reports by showing sampling error”).}{51}

Thus, where the potential plaintiff’s information derives from a monitoring or release report admitting the exceedance of a permit emission or effluent limit, an attack on the substance of the allegation will be an uphill battle. The permittee, on notice of the violation from the time it submits the report, becomes a sitting duck for a citizen suit in cases where the government regulator fails to act, especially where the permit violations are chronic, rather than isolated circumstances. In such cases, it makes sense to open a line of communication with the
government regulator and negotiate a consent order that resolves claims for past violations and implements measures to avoid future violations.

If a citizen suit is not based on a permit violation, but rather on an unpermitted discharge or creation of an “imminent and substantial endangerment to the environment,” the alleged violator may not even be aware of the problem. Obviously, such cases present no opportunity to take action prior to the receipt of a citizen suit notice letter. Once put on notice of an alleged violation, however, the potential defendant should promptly investigate the accuracy of alleged non-self reported violations, because they may be based on inaccurate data. For example, environmental agency files will often contain reports reflecting discharges in excess of SPDES permit limits. However, those reports may be based on “grab” samples, as opposed to the composite sampling required by the permit. However, if after an investigation the violation is verified, quick action with a government regulator again may be more advantageous than waiting for commencement of a citizen suit, in which context negotiating a resolution may be more cumbersome and payment of attorneys’ fees will be likely.

4. Ongoing Or Wholly Past Violations?

When investigating potential claims set forth in a citizen suit notice letter, it is critical to determine when the violations are alleged to have occurred. The CWA and most of the other environmental statutes providing for citizen suits create causes of action against “any person who is alleged to be in violation” of the statute or a permit issued pursuant thereto. In Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc. (“Gwaltney”), a CWA case, the Supreme Court interpreted this language to cover only allegations of “a state of either continuous or intermittent violations – that is, a reasonable likelihood that a past polluter will continue to

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pollute in the future.” Thus, citizens cannot bring suit alleging only wholly past violations that are not likely to recur.

The Gwaltney defense is most likely to succeed where, among other scenarios, the facility from which violations are allegedly emanating has ceased operations. In Connecticut Coastal Fishermen’s Ass’n v. Remington Arms Co., Inc., for example, the plaintiff organization brought claims under the CWA against a shooting club for illegal discharges of target debris and lead and steel shot. Because the target shooting components of the club had been closed before commencement of the action, and the plaintiff failed to produce any evidence indicating that they might reopen, the Second Circuit dismissed the claims under Gwaltney. A defendant can also achieve success on a summary judgment motion where an operating facility has been in compliance for a substantial amount of time after incorporating measures to prevent further violations. As the violator will typically undertake such measures in the context of a consent order entered into with an administrative agency, the potential availability of this defense reflects the importance of quick engagement with enforcers upon receipt of a notice of intent to sue, as discussed in detail, infra.

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53 Id. at 57.
54 As a result of statutory amendments in 1990, the CAA now provides for citizen suits against a person “who is alleged to have violated ... or be in violation of” an emission standard or limitation. 42 U.S.C. § 7604(a)(1). Courts have interpreted this amendment to supercede the Gwaltney holding and to allow citizen suits under the CAA for wholly past permit violations. See, e.g., United States v. American Electric Power Service Corp., 137 F.Supp.2d 1060, 1066 (S.D. Ohio 2001). However, in certain circumstances, for example where the facility has ceased operations altogether, the defendant may still be able to invoke a mootness defense, as discussed further in Section II.C., infra. Citizen suits brought under RCRA’s “imminent and substantial endangerment” provision, 42 U.S.C. § 6972(a)(1)(B), also do not require the allegation of ongoing conduct, though the endangerment itself must be ongoing. Gwaltney, 484 U.S. at 57 n.2.
55 989 F.2d 1305 (2d Cir. 1993).
56 Id. at 1311-13.
5. The Plaintiff’s Basis for Standing

An investigation of the potential plaintiffs and their basis for standing to bring suit is also worthwhile, and may even result in a successful motion to dismiss in some cases. The Supreme Court’s decision in Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc. ("Laidlaw")\(^{58}\) established a broad avenue for potential plaintiffs, in particular environmental organizations, in holding that in order to establish the actual injury required for Article III standing, no actual harm to the environment must be alleged, as long as one or more of the organization’s members have used an area allegedly “affected” by the defendants’ violations, and their aesthetic or recreational enjoyment of the area has been diminished thereby.\(^{59}\)

In applying Laidlaw, the Courts of Appeals have generally found citizen standing when the plaintiff (or, if the plaintiff is an organization, at least one of its members) has curtailed his or her recreational use of an area because of a belief that it is contaminated.\(^{60}\) However, Laidlaw and its progeny have not done away with the standing inquiry in environmental citizen suits altogether. Even the Supreme Court’s opinion in Laidlaw examined the affidavits of the plaintiff organization’s members for evidence that they had actually curtailed use of the area where the illegal discharge had allegedly occurred.\(^{61}\) In applying Laidlaw’s principles, courts have denied standing in cases where the plaintiffs’ factual averments reveal only a tenuous or hypothetical relationship with the “affected area.” For example, in Mancuso v. Consolidated Edison Co. of New York, Inc.,\(^{62}\) the Second Circuit denied standing to plaintiffs who had only traveled to the area of concern in order to obtain evidence to support their lawsuit.

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\(^{58}\) 528 U.S. 167 (2000).

\(^{59}\) Id. at 180-85.

\(^{60}\) See Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149, 154-57 (4th Cir. 2000); Ecological Rights Foundation v. Pacific Lumber Co., 230 F.3d 1141, 1148-53 (9th Cir. 2000).

\(^{61}\) 528 U.S. at 181-84.

Association v. Puerto Rico Aqueduct and Sewer Authority, the court found insufficient to establish actual injury affidavits stating that the members of the plaintiff organization recreated on beaches which lay “near,” but not directly on, the body of water into which the discharge occurred. The court noted that the plaintiff had failed to provide any evidence of the path pollutants would take to reach the area its members frequented.

Thus, initial investigation of a claim should include some analysis of where the plaintiff or its members live and the likelihood that they (or anyone, for that matter) use areas proximate to the client’s facility for recreational or aesthetic purposes. For example, if the plant is situated within a large stretch of industrial uses isolated from recreational areas, standing may be a viable defense against an environmental organization seeking to bring a citizen suit. However, the cases reflect that the viability of a standing defense can often turn on the sophistication of the plaintiff in drawing connections between its members, a geographic area, and the defendant’s operation, a factor which will not come into play until an action is commenced.

6. Heading Off The Potential Citizen Suit

In addition to arming oneself with any other legal and factual defenses that can be marshaled in defense of a citizen enforcement action, defense counsel faced with a notice of intent to sue letter should also consider the structure and “gap-filling” purpose of citizen suit provisions in taking action prior to the commencement of litigation. As noted previously, in the event that a thorough investigation makes clear that a violation has occurred, one principal avenue of averting a potentially very costly litigation may be to cooperate with the governmental agency responsible for enforcing the violated permit or law. If undertaken properly, this route can offer the advantage of providing the defendant with a “diligent prosecution” defense, or, if

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64 Id. at 212-13.
65 Id. at 213.
the resolution with the government regulator occurs after commencement of the citizen suit, of providing a mootness defense or defense premised on collateral estoppel.

7. **Settling With The Citizen Plaintiff**

While inviting a governmental enforcement action will of course not absolve the violator of liability, it has many advantages over defending a citizen suit when there is little question that a violation has occurred. On the other hand, it does not preclude settling the threatened or pending citizen suit. Such settlement will likely require that the regulator and citizen plaintiffs agree on an appropriate remedy.

Moreover, as a practical matter, it is unlikely that a citizen suit will resolve itself without the involvement of the government regulator. Accordingly, it makes sense to begin that negotiation earlier in the process, rather than attempting to resolve the matter with the citizen suit plaintiff and then presenting a remediation plan to the government regulator. Spurring the government enforcement also may have other benefits, as the defendant will be dealing with an entity that is familiar with approving remediation and mitigation measures suitable for settlement of complex environmental issues. If a resolution is quickly reached, it can also pressure the citizen plaintiffs to resolve their lawsuit, thereby eliminating a drawn out litigation after which the defendant could end being responsible for paying the legal fees of both sides.

8. **The Diligent Prosecution Bar and the Importance of a Judicial Decree**

Where the goal is to limit exposure to a citizen suit, the preferred mechanism for memorializing a settlement between a violator and the government regulator should always be a judicial, rather than administrative, consent order/decree. If the resolution is memorialized in a judicial consent decree before the citizen suit notice period is over, and the settlement is found sufficient to resolve the violations, it will likely preclude a citizen action altogether under the
“diligent prosecution” bar. However, even when an agreement on penalties and abatement measures is not reached before the commencement of a citizen suit, such settlement is still worth pursuing because of the possibility of mooting a citizen suit even after commencement of the action. Both of these possible outcomes, as well as their ramifications with respect to demands for attorneys’ fees, are discussed in the following sections.

The CWA bars a citizen suit if a governmental enforcement authority “has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State” for the same violation that is the subject of the citizen action. Once an agency commences a judicial action, even if it is subsequent to a citizen’s notice of intent to sue, citizen suits are barred absent a showing that the prosecution has not been “diligent.” A consent order signed by a judge that addresses all violations in terms of penalties as well as abatement measures should unequivocally satisfy the diligence standard, thus protecting the violator from independent citizen actions.

Administrative consent orders, on the other hand, carry much less preclusive weight. Significantly, most federal courts have determined that EPA or state administrative actions and resulting administrative consent orders (not entered in a court proceeding) do not preclude citizen suits because of the limiting language “in any court.” In the CWA amendments of 1987,

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68 See Texans United for a Safe Economy Education Fund v. Crown Central Petroleum Corp., 207 F.3d 789 (5th Cir. 2000); Jones v. City of Lakeland, Tennessee, 224 F.3d 518 (6th Cir. 2000); Sierra Club v. Chevron U.S.A., Inc., 834 F.2d 1517, 1525 (9th Cir. 1987); Friends of the Earth v. Consol. Rail Corp., 768 F.2d 57, 62 (2d Cir. 1985). The Third Circuit, in contrast, has held that administrative actions can bar citizen suits under the “in any court” provision where the regulator has the power to accord the type of relief imposed by a court and the “substantial equivalent” of a diligently prosecuted action in a court. Student Public Interest Research Group v. Fritzche, Dodge & Olcott, 759 F.2d 1131, 1136-38 (3d Cir. 1985); Baughman v. Bradford Coal Co., 592 F.2d 215, 219 (3d Cir. 1985). The relevance of the latter two cases is questionable after the 1987 amendments to the CWA added a separate “diligent prosecution” bar for certain administrative enforcement proceedings, as discussed infra. See L.E.A.D. v. Exide Corp., 1999 WL 124473, *32, n.28 (E.D. Pa.).
Congress added Section 309(g)(6)(A), which provides limited protection against citizen suits based on the same violations that are the subject of an administrative prosecution commenced by EPA or a state agency. This provision both empowers EPA to impose administrative penalties for violations of the Act, and bars citizen suits alleging violations either subjected to administrative enforcement by the EPA under the section, or “with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to” the section.

Unfortunately, the requirement that state enforcement proceedings be “comparable” to EPA proceedings brought under the CWA has severely limited successful application of the administrative due diligence defense. Different courts have taken vastly different approaches in assessing the degree of “comparability” required in order to make use of the defense. The contrasting interpretations of the statute adopted by different courts are epitomized in the cases North & South Rivers Watershed Ass’n v. Scituate (“North and South Rivers”) and Citizens For A Better Environment-California v. Union Oil Co. (“Union Oil”).

In North & South Rivers, which involved unpermitted discharges from a town’s sewage treatment plant, the town had agreed to upgrade its plant pursuant to an administrative order issued by the Massachusetts Department of Environmental Protection. Two years later, but before the agency had accepted final plans for the upgrade, a citizens’ group brought suit seeking injunctive relief and civil penalties based on the same violations. They argued that the state’s administrative prosecution was not comparable to section 309(g) because the state action did not assess civil penalties against the defendant. The First Circuit Court of Appeals rejected this reading of the statute, holding that “[w]hile the specific statutory section under which the State issued its Order does not, itself, contain a penalty provision ... another section of the same statute

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70 949 F.2d 552 (1st Cir. 1991).
71 83 F.3d 1111 (9th Cir. 1996).
does contain penalty provisions,” and thus the state statutory scheme as a whole was “comparable to” the federal scheme.⁷²

The Ninth Circuit rejected this reasoning in the Union Oil case. In that case, the defendants, in settlement of some permit violations, had received a cease-and-desist letter from the California Regional Water Quality Control Board allowing additional time to comply with certain obligations and requiring payment of $2 million in penalties. Thereafter, the plaintiff filed a citizen suit, which the defendants challenged as barred under Section 309(g). Rather than examining the statutory scheme as a whole, the Ninth Circuit held that its comparability assessment was limited to the particular enforcement provision at issue.⁷³ The court opined that “the holding of [North & South Rivers] leads to the anomalous conclusion that state administrative enforcement actions would more broadly preclude citizen suits than the administrative enforcement actions of the EPA.”⁷⁴

More recently, in, Lockett v. EPA (“Lockett”)⁷⁵ the Fifth Circuit adopted the standard first articulated by the Eighth Circuit in Arkansas Wildlife Federation v. ICI Americas, Inc.,⁷⁶ which also closely resembles the broader construction of North and South Rivers, that in order to be “comparable” with regard to public notice and opportunity to comment, the state provision must afford “significant citizen participation” and provide interested citizens “a meaningful opportunity to participate at significant stages of the decision-making process.”

In the Lockett case, the court held that the state statute under which the Louisiana Department of Environmental Quality (DEQ) had brought an administrative penalty action against the defendant was comparable to Section 309(g) because persons aggrieved by a DEQ

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⁷² 949 F.2d at 556.
⁷³ See 83 F.3d at 1118.
⁷⁴ Id.
⁷⁵ 319 F.3d 678 (5th Cir. 2003).
⁷⁶ 29 F.3d 376 (8th Cir. 1994).
order could intervene in an adjudicatory hearing requested by the violator, or petition for a hearing if none was held; proposed settlements were also subject to public notice and comment. The court rejected the citizen plaintiff’s argument that the discretion granted DEQ in determining whether to permit an intervention or hold a hearing reduced the public’s opportunity to participate, holding that this discretion was circumscribed as well as subject to judicial review, and did not exceed the discretion granted to EPA as to whether or not to grant a petition for a hearing with respect to an administrative order issued under Section 309(g).

The *Lockett* court also held that the Louisiana scheme provided for comparable public notice, although, unlike under the CWA, notice of civil penalties, notices of violation, and compliance orders was only sent on a periodic basis to persons who requested to be put on a mailing list. (EPA must publish notice of a proposed order prior to the assessment of any penalty). Dissimilarly, in a decision issued only one day prior to *Lockett*, the Eleventh Circuit held that an Alabama statute failed the comparability test because it did not require pre-penalty public notice. The court also found objectionable the fact that the Alabama statute imposed a 15-day deadline for aggrieved parties to petition for a public hearing, after notice was published.

Other cases have turned on the public notice requirements provided in the state law under which an enforcement action has proceeded. In *Saboe v. Oregon*, the district court rejected the plaintiff’s argument that Oregon law was not comparable to Section 309(g) because the state statute at issue did not provide for mandatory prior public notice of regulatory enforcement orders in the same manner as set forth in Subsection 309(g)(4). The court stated that

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78 McAbee v. City of Fort Payne, 318 F.3d 1248, 1257 (11th Cir. 2003).
79 Id.
“[c]omparable state law, as used in Section 1319(g)(6), does not mean that the state’s regulatory authority or processes must be identical to the federal provisions.” 81 A narrower view on comparability is exemplified by L.E.A.D. v. Exide Corp. 82 which held that a state enforcement action was not “comparable” to Section 309(g) where the state scheme provided for public comment on permit conditions at the time permits were issued, but contained no public participation provisions with respect to issuance of civil penalties for actual violations of those conditions. 83 The Eleventh Circuit has directly tied comparability in terms of public participation to when an administrative action is construed to have “commenced,” holding that “for purposes of § 1319(g), an administrative action ‘commences’ at the point when notice and public participation protections become available to the public and interested parties.” 84

Considering the important role of the states in issuing and enforcing many environmental permits, the uncertain effect of settling a violation administratively makes this a dubious protection against citizen suits under the CWA, regardless of the longevity of governmental activity in the matter. Most significantly, for a potential defendant in receipt of a notice of intent to sue where governmental enforcers have not taken action with regard to the violation, Section 309(g) will offer no protection whatsoever. The bar specifically does not apply when notice of the citizen suit has been filed “prior to the commencement of an action under this subsection,” and the citizen suit is commenced before the 120th day after the date notice is effected. 85

Moreover, even where a governmental enforcement entity has taken action prior to notice of an impending citizen suit, the case law is inconsistent with respect to when an administrative enforcement action will be considered to have “commenced” under Section 309(g). In Public

81 Id. at 917 (citations omitted).
82 1999 WL 124473 (E.D. Pa.).
83 Id. at *31.
Interest Research Group of New Jersey v. ELF Atochem North America, Inc., for example, the court held that Section 309(g) did not bar a citizen suit where the New Jersey Department of Environmental Protection and Energy had served the defendant a “Compliance Evaluation Inspection Report” ordering corrective actions before the citizen plaintiff sent its notice of intent to sue, but did not issue its “Administrative Order and Notice of Civil Administrative Penalty Assessment” until after notice was served. The court held that the administrative action “commenced” with issuance of the administrative order, because only that document provided formal notice of the violations alleged, the amount of the penalty to be imposed, and the right to a hearing (the elements required to commence a civil penalty under the New Jersey Water Pollution Control Act). In contrast, in Sierra Club v. Colorado Refining Co., the court held that a compliance order similar to the one issued prior to notice in ELF Atochem constituted commencement of the state enforcement action, triggering the Section 309(g) bar.

The above cases illustrate the unsettled nature of the administrative diligent prosecution defense makes it a minefield for the defendant relying upon it in defense of a CWA citizen suit. Again, by acting cooperatively with a government enforcement agency, a CWA defendant may be able to avoid the uncertainties of that defense altogether by seeking a judicially-endorsed resolution of the matter. Of course, that assumes that the government enforcement agency will oblige by transforming their administrative enforcement action into a judicial enforcement action.

87 Id. at 1172.
89 Id. at 1485; See also Friends of Milwaukee’s Rivers v. Milwaukee Metropolitan Sewage District, 382 F.3d 743 (7th Cir. 2004) Petitions for cert. filed, No. 04-899 (December 28, 2004)
9. **Rendering The Citizen Suit Moot Or Otherwise Precluded After It Is Commenced**

Even if the defendant fails to negotiate a judicial consent decree with the enforcement agency prior to commencement of a citizen suit, or if the agency decides to pursue enforcement solely through an administrative process, the possibility remains of rendering the pending action moot through ultimate resolution of the violations with the governmental body. Again, in this context, the finality of a court order setting forth the penalties and injunctive relief will likely provide a more viable source of protection than an administrative settlement, and therefore is the recommended approach.

The reason for seeking a judicial order in this context is that courts have held that a court order, even if issued after the commencement of a citizen suit, can have a collateral estoppel effect on claims based on the same violations for which the court order grants relief. For example, in [U.S. Environmental Protection Agency v. City of Green Forest, Arkansas](#), the Eighth Circuit held that a citizen suit was precluded under the doctrine of *res judicata* by a consent decree agreed upon in a later-filed action brought by the EPA alleging the same CWA violations. The court held that the EPA’s action was a *parens patriae* action (i.e., brought in the name of all citizens), noting that “[s]ince citizens suing under the CWA are cast in the role of private attorneys general, as a practical matter there was little left to be done after the EPA stepped in and negotiated a consent decree.”

Resolution of a judicial enforcement action commenced after filing of a citizen suit can also render the citizen suit moot. In [Chesapeake Bay Foundation v. American Recovery Company, Inc.](#), a citizen group and EPA filed actions on the same day regarding the same

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91 Id. at 1404. See also [Old Timer, Inc. v. Blackhawk-Central City Sanitation District](#), 51 F.Supp.2d 1109, 1117-19 (D. Colo. 1999).
92 769 F.2d 207 (8th Cir. 1985).
CWA violations, the government filing a few hours after the organization. The trial court dismissed the citizen suit without opinion. Thereafter, EPA and the defendant settled the government’s suit in a consent order assessing penalties. The Eighth Circuit held that the district court had erred because, as the EPA action was filed after the citizen suit, it could had no preclusive effect under 33 U.S.C. § 1365(b)(1)(B). However, the court held that the subsequent consent order and the fact that the defendant planned to cease operations in the near future mooted the citizen suit.

A defendant asserting that its voluntary action has led to the cessation of violations must meet the difficult burden of proving that “subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.” However, in the context of a settlement agreement with a government agency that requires the defendant to implement measures to abate the violations, courts often defer to the agency’s determination that the terms of the settlement provide a sufficient guaranty that the violations will cease.

For example, in Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co., (“Eastman Kodak”) the New York State Department of Environmental Conservation (“DEC”) reached a settlement with a CWA violator subsequent to the commencement of a citizen suit. Holding that “[a] citizen suing pursuant to Section 505 of the Act thus may not revisit the terms of a settlement reached by state authorities without regard to the probability of a continuation of the violation alleged in the complaint,” the Second Circuit remanded the case to the district court for a determination of whether the “violations are in fact continuing, or giving some deference to the

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93 Id. at 208-09.
94 Id.
95 Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 189 (2000) (citation omitted). See also Puerto Rico Campers’ Ass’n v. Puerto Rico Aqueduct and Sewer Authority, 219 F.Supp.2d 201, 219-21 (D. P.R. 2002) (holding, in an action alleging unpermitted discharges into the Mameyes River, that “[t]he only possible basis for a finding of mootness” would be if the defendant “sealed off the [violating] plant in a manner which absolutely impairs, under all circumstances, discharging into the Mameyes River”).
96 933 F.2d 124 (2d Cir. 1991).
judgment of the state authorities, the terms of the settlement are such that a realistic prospect of continuing violations exists.” 97 If the district court found in the negative, the case would be dismissed as moot. 98 Following the reasoning of Eastman Kodak, the Eighth Circuit in Comfort Lake Ass’n, Inc. v. Dresel Contracting, Inc. (“Comfort Lake”) 99 held that in the context of compliance activities mandated by a settlement agreement with a government agency, the burden of proof switches to the citizen plaintiff to prove “there is a realistic prospect that the violations alleged in [its] complaint will continue notwithstanding” the terms of settlement, or claims for injunctive relief will be dismissed as moot. 100 The court further held that the enforcement agency’s determination as to the appropriate penalties to impose for violations of a National Pollutant Discharge Elimination System permit at a construction site for a Wal-mart store was “entitled to considerable deference,” and concluded that “an administrative enforcement agreement between [the agency] and the polluter will preclude a pending citizen suit claim for civil penalties if the agreement is the result of a diligently prosecuted enforcement process, however informal.” 101 Counsel negotiating a settlement agreement with an administrative agency may garner some valuable advice from this opinion, as the court noted language in the agreement which mooted the civil action to the effect that “‘there is no likelihood that ... permit violations will recur at the Wal-mart site.’” 102

97 Id. at 127-28.
98 Id. at 128.
99 138 F.3d 351 (8th Cir. 1998).
100 Id. at 355.
101 Id. at 357; Contrast Public Interest Research Group of New Jersey, Inc. v. Elf Atochem North America, Inc. (“Elf Atochem”), 817 F.Supp. 1164, 1171-72 (D.N.J. 1993). In Elf Atochem, the court specifically declined to follow Eastman Kodak’s deference to an environmental enforcement agency’s determination with regard to civil penalties. The court held that where abatement measures required by an administrative order render claims for injunctive relief moot, even where the order imposes penalties, claims for additional civil penalties can survive: “The possibility that substantial additional penalties may be imposed – just like the possibility of penalties where none have yet been paid – creates a sufficient case or controversy to avoid mootness.”
102 138 F.3d at 354. This fact was relatively self-evident in that case, as by the time of the agreement construction was completed at the permit had terminated.
Defense counsel should take note that the mootness issue with regard to claims for civil penalties is likely to turn on whether the consent order or agreement entered into with government enforcers disposes of all of the same violations alleged by the citizen plaintiffs. In Eastman Kodak, the consent order stated that it was "'(in full settlement of all civil and administrative claims and liabilities that might have been asserted by the [DEC] against Kodak ... for any violations ... that occurred at [the violating facility] prior to the effective date of this Order.'"\textsuperscript{103} The civil penalties imposed totaled more than $2 million.\textsuperscript{104} In Comfort Lake, the settlement agreement recited that "'(it covers all ... Permit violations that occurred at the Walmart construction site and that were known by [the state enforcement agency] as of the effective date of this Agreement.).'"\textsuperscript{105} In contrast, the Second Circuit in Atlantic States Legal Foundation, Inc. v. Pan American Tanning Corp.,\textsuperscript{106} distinguishing the case before it from Eastman Kodak, refused to dismiss the citizen plaintiff’s claims for civil penalties under the CWA where the settlement agreement between the defendant and a municipal authority "did not cover all of the violations plaintiffs allege and assessed small fines of only $6,600."\textsuperscript{107} (The court also noted that "the Act accords the enforcement actions of local agencies less deference than it does those of state and federal agencies.")\textsuperscript{108} Thus, in negotiating a settlement, counsel should make sure that the agreement contains specific language announcing that it disposes of all possible violations that could be raised in a citizen suit complaint.

\textsuperscript{103} 933 F.2d at 126.
\textsuperscript{104} Id.
\textsuperscript{105} 138 F.3d at 354.
\textsuperscript{106} 993 F.2d 1017 (2d Cir. 1993).
\textsuperscript{107} Id. at 1022.
\textsuperscript{108} Id.
Precluding The Award Of Attorneys’ Fees

Even if it has successfully defeated a citizen’s claim for injunctive relief and civil penalties through a mootness or res judicata defense, a defendant may still find itself in the frustrating position of paying the plaintiff’s attorneys’ fees. The federal environmental statutes generally provide for the discretionary award of attorneys’ fees and costs to any prevailing party or substantially prevailing party. A plaintiff can be considered “substantially prevailing” “if its citizen suit was the catalyst for agency enforcement action that resulted in the cessation of ... violations.” This determination will generally turn on the timing of the citizen suit relative to the agency enforcement action; if the citizen suit is brought before the agency takes an apparent interest, courts are more likely to view the citizen plaintiff as the “catalyst” of enforcement.

Thus, in Eastman Kodak, the Second Circuit held that even should the district court dismiss the citizen suit as moot on remand based on the administrative consent order entered into after commencement of the action, the plaintiff could still seek attorneys’ fees. The court found, “[w]e believe that when the polluter’s settlement with state authorities follows the proper

109 The successful use of the diligent prosecution defense, on the other hand, should bar an award of attorneys’ fees. The statutes generally provide for awards of attorneys’ fees to plaintiffs in actions “brought pursuant to” citizen suit provisions. See e.g., CWA, 33 U.S.C. § 1365(d). As a citizen cannot properly commence an action if a government enforcer is diligently prosecuting the same violations, it thus cannot obtain attorneys’ fees when the action is dismissed. See United States v. Stone Container Corp., 196 F.3d 1066 (9th Cir. 1999); United States v. National Steel Corp., 782 F. 2d 62 (6th Cir. 1986).

110 See e.g., CWA, 33 U.S.C. § 1365(d); RCRA, 42 U.S.C. § 6972(e); TSCA, 15 U.S.C. § 2619(c)(2); CERCLA, 42 U.S.C. § 9659(f); Endangered Species Act, 16 U.S.C. § 1540(g)(4). The CAA allows discretionary awards to “any party.” 42 U.S.C. § 7604(d), providing:

The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

111 Comfort Lake Ass’n Inc. v. Dresel Contracting, Inc., 138 F.3d 351, 357 (8th Cir. 1998)
commencement of a citizen suit, one can, absent contrary evidence, infer that the existence of the
citizen suit was a motive for the polluter’s settlement and that the citizen suit plaintiff is a
prevailing party.” In Comfort Lake, on the other hand, the court upheld the district court’s
denial of attorneys’ fees where the state enforcement action began (though was not concluded)
before the plaintiff issued its notice of intent to sue, and where the plaintiff had “actually
impeded” the execution of the settlement agreement between the state agency and the violator.113
Thus, the threat of attorneys’ fees creates an additional incentive for the defendant to engage
earliest with government enforcers, where it discovers a violation before a citizen suit is threatened.

If a court does find that a citizen suit, dismissed as superfluous of government
enforcement, did act as a catalyst to the ultimate resolution of the violations, it is left with the
question of how much of an award is “reasonable in relation to the results obtained.”114 In
Armstrong v. ASARCO, Inc., the citizen plaintiffs filed a motion for a preliminary injunction,
which was dismissed upon the court’s acceptance of a consent decree between EPA and the
defendant. The Eighth Circuit held that it was proper to award the litigation costs related to the
hearing on the preliminary injunction motion, because the hearing “created a judicial record of
ASARCO’s history of non-compliance and presumably also assisted the district court’s
evaluation of the proposed consent decree.”115 However, the court found that costs related to the
motion accruing after the hearing should not have been awarded.116 Similarly, the court held that
the plaintiff’s litigation costs associated with opposing an earlier, less punitive, version of the
consent decree were properly awarded, but that costs associated with opposing the version

112 933 F.3d at 128; See also Armstrong v. ASARCO, Inc., 138 F.3d 382, 387 (8th Cir. 1998).
113 138 F.3d at 357-58.
114 Id. at 388.
115 Id.
116 Id.
ultimately accepted by the court were properly denied.\textsuperscript{117} This case illustrates that the sooner a consent decree is negotiated between the agency and the defendant, the less time the citizen plaintiff has to accumulate litigation costs that a court will find “related to” the ultimate resolution of the case.

11. Conclusion

There is no question that a citizen suit can be a powerful enforcement weapon. However, courts take the gap filling nature of citizen suits and the admonition by the United States Supreme Court that citizen suits “supplement but not supplant” government enforcement action seriously. Thus, in cases where the fact of the violation is relatively clear, the best defense to a citizen suit will often be to quickly remedy the problem and, in certain circumstances, turn oneself in to the government regulator even before the regulator attempts to take action.

Of course, where the citizen suit provision requires proof of an ongoing violation, a quick remedy -- such as permanent plant closure -- may head off a citizen suit even without the presence of a government regulator. However, in many cases such a quick and permanent remedy may not be possible. In those situations, case law has shown that a consent decree between a government regulator and the defendant -- entered by a court -- can often be successful in preempting a citizen suit challenge.

\textsuperscript{117} Id. at 388-89.