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Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws†

BARRY BOYER* and ERROL MEIDINGER**

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† This Article is a revised version of a report prepared for the Administrative Conference of the United States, which has made recommendations to improve the coordination of public and private enforcement activities. See 1 C.F.R. § 305.85-3 (1986). The opinions expressed in this Article are not necessarily those of the Administrative Conference, and the authors are solely responsible for any errors or omissions.

The analysis in this Article is based on both documentary sources (judicial opinions, written agency policies and litigation papers) and non-documentary sources (in-depth interviews and participant observation). References to documentary sources conform to the customary practices of American law reviews, while those to non-documentary sources conform to customary practices of social science journals. Because it was apparent that interviewees involved in ongoing relationships and proceedings would feel freer to offer their frank observations under conditions of anonymity, quotations and descriptions of particular events are presented without attribution. For the most part, quotations have been used to convey typical perspectives or positions. Where statements are presented as factually accurate, we have made every effort to check them with other informed individuals and with other forms of information available to us. All quotations are verbatim transcriptions of interview tapes. Where possible, we have indicated the type of role the quoted party played in the regulatory process. Finally, we asked numerous interviewees and other knowledgeable individuals to review an earlier draft of this Article. A relatively large proportion of them did so, and, although some would have liked to see additional information on questions we have not yet been able to study, all seem to have found the information presented here to be accurate.

This would have been a much less satisfactory study without the cooperation and assistance of our interviewees and reviewers. We thank them for their generous help, and we are grateful to the Administrative Conference of the United States for the financial support necessary to carry out this project.

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I. INTRODUCTION: THE RISE OF PRIVATE ENFORCEMENT

IN the early 1980's, a new phenomenon emerged in federal regulatory practice: private environmental organizations mounted a large-scale litigation campaign to seize the initiative for enforcing several major regulatory statutes against polluters. The statutory authorities that enabled them to step into the shoes of government enforcement staffs, commonly described as "citizen suit" provisions, had been written into most of the major environmental laws during the 1970's, but had remained relatively dormant until they were discovered by the private enforcers. By 1985, more than 350 private enforcement actions had been initiated,¹ and the leaders of the plaintiff organizations were devising plans to extend their activities to additional violators, other parts of the country and different statutes. Some of them believed, or hoped, that this first wave of litigation would lead to a permanent realignment of regulatory law enforcement in the environmental field—and perhaps in other fields as well. This Article is a preliminary attempt to assess some of the potential effects of this privatization of regulatory enforcement, and to speculate on what such a realignment might portend for the regulatory process.

Few legal phenomena are totally new, and the citizen suit is no exception. It has a variety of contemporary and historical antecedents. Statutes giving private parties the right to seek judicial sanctions for violations of health and safety standards have been used for at least 600 years in Anglo-American law,² and at times private actions have provided virtually the only form of regulatory enforcement.³ Modern regulatory statutes also try to harness private litigiousness in pursuit of the public good, through devices such as the treble damage action,⁴ the express or implied right of private action⁵ and the provision of attorneys' fees for successful litigants in judicial review actions.⁶ What distinguishes the current

1. See *infra* text accompanying notes 86-90.

2. See *infra* text accompanying notes 278-80.

3. See *infra* text accompanying notes 292-301.

4. See, e.g., Wheeler, *Antitrust Treble-Damage Actions: Do They Work?*, 61 CALIF. L. REV. 1319 (1973).

5. See generally Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193 (1982).

6. E.g., Percival & Miller, *The Role of Attorney Fee Shifting in Public Interest Litigation*, 47 LAW & CONTEMP. PROBS. 233 (1984); Zemans, *Fee Shifting and the Implementation of Public Policy*, *id.* at 187.

citizen environmental suit, however, is the way in which it is being used, and the timing of its emergence as a significant force in the regulatory system.

Certain forms of private action under regulatory statutes, such as antitrust treble damages or tort suits based on regulatory standards, are relatively minor extensions of traditional damage actions between private disputants. The existence of the regulatory program may increase the incentive to sue, and prospects for recovery may be enhanced, but the basis for judicial action is still a single dispute among particular parties. Typically, the goal of these actions is to make damaged parties whole; any resulting change of incentives for future action is generally a by-product of this primary quest for corrective justice. The citizen suit, by contrast, inverts these priorities. Deterrence and determining the effective content of enforcement policy are the primary purposes of the current citizen suits; in many instances, there is no attempt to define or remedy private wrongs.

In this respect, citizen suits resemble familiar forms of judicial review of administrative action. Especially in the situation where the private litigant has an ongoing relationship with a regulatory agency, as many trade associations and national conservation organizations do in the environmental field, judicial review can be viewed as part of a continuing dialogue between the agency and its constituencies over the content of regulatory policy. Judicial review, by defining the substantive and procedural boundaries of an agency's discretion, can determine whose vision of public policy will prevail in a particular field of regulation. In the traditional judicial review action, however, the private litigants do not hope or expect to take over administration of the regulatory program.

In the private enforcement suit, by contrast, some of the private litigants hope to step into the shoes of government in a rather literal sense. As they see it, government agencies are often unable or unwilling to enforce regulatory laws as they should be enforced. Private parties, armed with citizen suit authority, are fully capable of taking over routine enforcement cases. They are also free of some of the bureaucratic and political constraints that hobble government enforcers. Thus, the citizen suit is not a mere occasional prod used to goad reluctant agencies into action, nor is

it an extraordinary remedy for unusual administrative failures. Rather, it is the means of seeking a major—perhaps permanent—realignment of roles and powers in important areas of regulation: the creation of “private attorneys general” with responsibilities comparable to those of the public attorney general.

In an era when disenchantment with the effectiveness of government agencies is widespread, it is not surprising that proposals to deregulate enforcement are taken seriously.⁷ The conventional wisdom casts doubt on both the quantity and quality of regulatory action. Regulatory agencies rarely seem able to act quickly and comprehensively enough to resolve the social problems committed to them. Hobbled by inadequate staff and information, agencies may be trapped in a losing race to catch up with changing circumstances. When they do act, agencies often appear to be neither neutral nor expert; they seem to be captured by constituent groups, preoccupied with trivia, or perpetually ensnared in procedural red tape. As the perception spreads that the quality of agency decision making is unacceptable, it is natural to consider whether decision making power should be shifted from the public to the private sector. Complete deregulation, the outright abolition of regulatory programs and agencies, dominates current discussions of privatization. In areas such as environmental protection, however, full deregulation seems intellectually indefensible and politically unacceptable. In such settings partial deregulation of particular functions may emerge as a promising compromise solution.

The attractiveness of privatizing regulatory functions is enhanced in fields such as environmental regulation where the quantitative gap between resources and mandates is large and probably growing. During the “environmental decade” of the 1970’s, legislatures were more adept at giving new responsibilities to overburdened agencies than they were at finding the resources

7. The perception of ineffectiveness underlying moves to deregulate is based on differing visions of the regulatory state. At one extreme, agencies are faulted for overregulation; critics emphasize the ways in which government’s regulatory initiatives create more problems than they solve. At the other extreme, agencies are faulted for achieving too little because they address only a limited range of social problems, and because they lack the will or the capacity to regulate vigorously. *See, e.g.,* G. EADS & M. FIX, *RELIEF OR REFORM? REAGAN’S REGULATORY DILEMMA* 87-105 (1984). Regardless of the underlying vision, a perception that regulatory agencies have been and are likely to remain ineffective makes alternatives to regulation more attractive.

necessary to enable administrators to discharge those responsibilities effectively. The resulting gap between promise and performance was an obvious source of tension, even when agency budgets were growing steadily. Moreover, the federal budget deficits of the 1980's have made it clear that the gap between promise and performance is not a temporary phenomenon. The prospect for environmental agencies in the foreseeable future is shrinking resources and declining regulatory capacity. If the agencies remain unable to carry out all of their responsibilities, then it will be important for supportive constituencies to find structural alternatives that will accomplish the statutory objectives without dependence on agency resources. The citizen suit, which can be self-supporting through fee recoveries from violators, thus emerges as a partial solution to the resource gap.

While the citizen suit is thus theoretically attractive, it nonetheless will have to surmount some formidable obstacles if it is to become an accepted and effective part of regulatory enforcement. This study, which looks primarily at the first wave of suits brought by environmental organizations under the federal Clean Air Act⁸ and Clean Water Act⁹, has identified four problems that can undermine the citizen suit as a device for regulatory enforcement. At this early stage in the evolution of private enforcement, it is not clear whether these problems will be solved; however, as we suggest later in this Article, there is some reason to believe that they can be, if the legal and political systems respond appropriately.

At the threshold, citizen suits must surmount a series of doctrinal barriers that could make it difficult or impossible to mount an effective private enforcement campaign. These issues of statutory interpretation and judicial law making are the familiar ones that arise whenever a novel regulatory enactment becomes the subject of frequent litigation: the precise meaning of vague and untested statutory terms must be worked out, and the citizen suit must be fitted into a complex framework of existing private remedies and judicial review provisions. There has been a substantial volume of litigation under citizen suit provisions during the fif-

8. Clean Air Act, ch. 360, 69 Stat. 322 (1955) (codified as amended at 42 U.S.C. §§ 7401-7642 (1982 & Supp. I 1983)).

9. Clean Water (Federal Water Pollution Control) Act, ch. 758, 62 Stat. 1155 (codified as amended at 33 U.S.C. §§ 1251-1345, 1361-1376 (1982 & Supp. I 1983)).

teen years that they have been in existence, first as a supplement to the traditional judicial review proceeding to force administrators to take or refrain from particular actions, and then more recently as a means of imposing penalties on violators. With few exceptions, this transitional litigation has reinforced the power of the citizen suit. Courts have generally been able to control inventive litigants' attempts to use citizen suits for purposes not intended by Congress, and they have upheld private enforcers' arguments that citizen suits should be easy to bring and to prove. Issues remain to be resolved, particularly in the area of remedies, but a reasonably consistent and workable body of law has developed to govern the bringing of private enforcement actions.

A second problem area, one which involves both legal and managerial issues, is the coordination of public and private enforcement. With both public and private enforcers active in a regulatory field, there is a very real possibility that they will be working at cross purposes. If regulated parties who are similarly situated receive different treatment depending on whether public or private enforcers win the race to the courthouse, then the fairness of the regulatory program is open to question. Moreover, if public and private enforcers follow radically different priorities or interpretations of law, confusion and resentment are likely to result in the regulated community. It may also encourage undesirable behavior by enforcers, such as bringing collusive suits or accepting inadequate settlements. These coordination problems could undermine the rationality and acceptability of the regulatory program if carried to extremes; but most of the problems seem relatively easy to solve. The Administrative Conference of the United States has recommended several measures to achieve better coordination of environmental enforcement,¹⁰ and additional coordinating devices may be developed as agencies and courts become familiar with dual systems of enforcement.

A third basic problem is whether citizen suit provisions are creating the proper incentives for the regulators, the regulated, and the groups bringing enforcement actions. The incentive problem is somewhat different for each of the three primary actors involved in the enforcement process. The statutes provide financial incentives for plaintiffs to bring private enforcement actions,

10. 50 Fed. Reg. 28,363 (1985) (to be codified at 1 C.F.R. §§ 305.85-1 to .85-3).

by authorizing the recovery of attorneys' fees and costs for successful litigants. If a case is settled, the defendant may agree to provide another form of financial incentive, an "environmental fund" dedicated to particular conservation uses. In addition, plaintiff groups may have principled incentives arising from their commitment to environmental values, as well as organizational incentives to bring suits for the purpose of attracting or retaining members. The strength of these incentives remains unclear, and as a result it is uncertain whether private enforcement will evolve in fact and in perception as an ethical enterprise motivated by a widely shared vision of the public good, or whether it will be dominated by bounty hunters who will discredit the idea of citizen suits. Thus far, principled motivations are predominant, but it is possible that plaintiff incentives will shift if the courts continue to remove barriers to citizen suits and make fee recovery easier.

Among the regulated, the incentive issues center around the questions of how well and in what circumstances deterrence works. Many plaintiff organizations feel that enhanced deterrence is both necessary and sufficient. That is, many of them believe environmental enforcement has become so lax that most of its deterrence value has been lost. They also believe, however, that this collapse in compliance can be reversed if they can win a high proportion of their citizen suits and obtain substantial penalties.

This may be a plausible projection of industry response to incentives created by the citizen suit, but it is definitely not the only possible reaction. Punitive measures that are regarded as unreasonable can provoke massive resistance, not only in the courtroom, but also in the political arena and in everyday life. Prohibition and the civil rights struggle provide historic examples of the difficulties that the legal system can have in trying to force significant behavioral change on a resistant portion of the population. Antipollution enforcement may not have the broad, immediate impact on the citizenry that laws governing racial discrimination and consumption of alcohol did; but it seems clear that environmental regulation affects major sectors of American industry, and that private enforcement has provoked considerable resentment among target firms. Moreover, environmental enforcers, like most other regulators, operate in a relationship of mutual dependence with the regulated industry, at least to the extent that the industry controls some of the data needed to make the regulatory program

function effectively. Consequently, the possibility of industry backlash and protracted conflict should not be ruled out.

Citizen suits also may affect the incentives of the government regulators who are caught between the private enforcers and their industry targets. In principle, and to some extent in practice, agency responses to citizen enforcement may vary considerably. At one extreme, affected agencies may welcome citizen enforcers as a supplement to their own resources. At the other, they may resist private enforcement in the belief that the plaintiff groups are intruding on bureaucratic turf or interfering with established policies. Agencies may exercise their discretion in a variety of ways to help or hinder the bringing of citizen suits. Regardless of how they react to private enforcement, agencies are likely to find that their relationships with the regulated industry and other constituencies are significantly altered. What those changed relationships will be, and whether they should be regarded as a cost or a benefit of private enforcement, is not yet clear. As the citizen enforcement action emerges from its current transitional stage and becomes a more familiar feature of the regulatory landscape, the patterns of changed relationships should become clearer. For the present, the effects of citizen suits on relationships and incentives remain largely speculative.

Even if it were possible to trace out the changes in incentive structures resulting from the rise of private enforcement, there still would remain a fourth problem in defining the true value of citizen suits. This question concerns the fundamental legitimacy of private regulatory enforcement. As used here,¹¹ the legitimacy of citizen suits is a function not only of their pragmatic effectiveness, but also of their relationship to established visions of public order, which sharply conflict over the appropriate boundaries between public and private fields of action. When assessing the practical effects of citizen suits, even observers who are working from a

11. The major theorist on the role of legitimacy in compliance with legal directives is Max Weber. His discussion of the issues still merits study. See, e.g., M. WEBER, *ECONOMY AND SOCIETY* 21 (1968). Recent noteworthy studies which give the legitimacy-producing aspects of law a central role include Freeman, *Antidiscrimination Law: A Critical Review* in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 96 (D. Kairys ed. 1982) and Hay, *Property Authority, and Criminal Law* in *ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH CENTURY ENGLAND* 17 (D. Hay, P. Linebaugh, J. Rule, E. Thompson & K. Winslow, eds. 1975). But see Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 *WIS. L. REV.* 379 (criticism of legitimacy theory).

common data base and a common set of inferences about the effects of citizen suits on compliance may differ sharply with respect to the desirability of the reported outcomes. These differences concern both the substantive efficacy of the regulatory program and the means by which it is implemented.

In the environmental area, there seems to be little consensus among constituency groups and commentators on the underlying value of regulatory programs. Without such a consensus, it is not possible to develop a generally accepted set of measures to assess the desirability of different levels of enforcement. Those who believe that the relevant laws and rules are wrong-headed or ineffective will think that any additional enforcement is likely to make matters worse, while those who have faith in the purposes and methods of the laws will tend to favor any and all additional enforcement. In the short run, at least, these kinds of beliefs do not seem very responsive to empirical data. Instead, they function as ideologies of regulatory enforcement. The question of which ideology will gain dominance seems open.

In addition to the conflicting ideologies that color attitudes toward the pragmatic effectiveness of private enforcement, there is an equally strong division in beliefs about the appropriate dividing lines between private and public spheres of conduct. From the regulated industry's point of view, private enforcement of regulatory laws is an anomalous, if not dangerous, deviation from established divisions of responsibility and power. Private delegations of enforcement power may be as suspect as private delegations of rulemaking authority because they bypass the existing structure of limited authority and political accountability that confines the powers of the regulatory state. In this vision of public regulation, administrative agencies should have defined spheres of authority, carefully detailed mandates from the political branches, and multiple structures of accountability and oversight to assure that their powers are exercised in accord with the dictates of elected officials. When regulatory powers break these confining bounds—especially when they are turned over to private parties—they may lose their legitimacy, for it is only by acting in accordance with accepted norms of accountability and control that regulation can become legitimate.

Plaintiff organizations and their lawyers typically come from a different tradition which holds as its preeminent value that gov-

ernment enforcement of social regulation should be responsive to the needs and desires of those whom the regulatory program is supposed to protect. To the extent that regulation serves "the people" rather than "the industry" or "the bureaucrats," it gains legitimacy. Conversely, it forfeits that legitimacy when it becomes captive to the will of the industries or bureaucrats. From this perspective, private enforcement may be viewed as the ultimate legitimating device, since it gives the effective power to initiate regulation back to the people themselves. Neither of these views, presented here in oversimplified form, is wholly satisfactory, and neither has been totally dominant in the past. Historically, the legitimate boundary between public and private activity has been shifting and contingent. The power of private parties to invoke regulatory sanctions has been highly variable over time, waxing and waning periodically as different social problems have arisen and found solutions.

The modern citizen suit provisions were first enacted at a time when "capture" theories dominated scholarly and popular thought about regulation.¹² Agencies were regarded as unduly sympathetic to the interests of the regulated industries for a variety of reasons,¹³ including the belief that there was often a serious imbalance of the interests represented in agency decision making. Regulated industries dominated the process because they had the resources to hire the lawyers, experts and lobbyists to make their voices heard. Other interests, lacking resources, remained mute. As a result, they typically lost out in the adversarial struggles that constitute the regulatory process. The general answer to this imbalance of representation was the creation of greater rights and opportunities for public participation in administrative decisions, backed by funding devices to close the resource gap between in-

12. See, e.g., M. BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* (1955); G. MCCONNELL, *PRIVATE POWER AND AMERICAN DEMOCRACY* (1966); Huntington, *The Marasmus of the I.C.C.: The Commission, the Railroads, and the Public Interest*, 61 *YALE L.J.* 467 (1952).

13. Other causes frequently cited as reasons for capture included the "revolving door" that brought a succession of industry people into positions of power in the regulatory agencies, then back to the industry where they could use their inside knowledge to advantage. Another common diagnosis of the cause of agency capture was the "iron triangle" of industry groups, agencies, and congressional committee chairmen who cooperatively rebuffed demands for regulatory change. See generally S. LAZARUS, *THE GENTEEL POPULISTS* (1974).

dustry and public interest groups.¹⁴ The citizen suit, which gives the public a right to be heard in enforcement decisions and provides for expense reimbursement, is a logical outgrowth of this public participation movement.

Today, capture theories of regulation still have a strong following, but they no longer dominate the field. A variety of economic and behavioral analyses of regulatory enforcement have emerged to challenge the assumptions on which the citizen suit was originally based. These alternative views of regulation provide different ways of asking the question, what are the strengths and weaknesses of the citizen suit? And, as might be expected, they imply somewhat different answers.

II. OVERVIEW OF CITIZEN SUIT PROVISIONS

The two citizen suit provisions most frequently used today were both enacted during the environmental awakening of the early 1970's, in response to a history of perceived failures in government enforcement. The first private enforcement provision, section 304 of the Clean Air Act of 1970, was passed a few months after the first Earth Day was organized¹⁵ and the Nader report *Vanishing Air* was published.¹⁶ Nader's introduction to that

14. See, e.g., Boyer, *Funding Public Participation in Agency Proceedings: The Federal Trade Commission Experience*, 70 GEO. L.J. 51, 52-55 (1981).

15. On April 22, 1970, the first Earth Day was observed across the nation. Parades, demonstrations, and rallies were organized for the purpose of fostering "increased environmental awareness" to help combat the growing threat of pollution. N.Y. Times, April 22, 1970 at 1, col. 1.

16. J. ESPOSITO, *VANISHING AIR* (1970). Professor Richard Tobin notes that the Clean Air Act of 1970 was heavily influenced by political maneuvering between President Nixon and Senator Edmund Muskie, who then appeared to be the leading candidate for the Democratic presidential nomination in 1972. Both had proposed clean air legislation, but Muskie's original bill would have made only minor changes in the existing regulatory structure by comparison to the more substantial changes in the administration proposal. According to Tobin, the Nader report "clobbered" Muskie:

This scathing critique . . . blamed Muskie for nearly every problem that existed. The senator was accused of providing inadequate support for NAPCA [the federal agency then responsible for air pollution], of ignoring the deficiencies of the Air Quality Act, and of failing to hold oversight hearings of NAPCA's activities. The Nader Report even suggested that Muskie resign his subcommittee chairmanship because of his alleged incapacity to operate in favor of the environment.

These events pressured Muskie to recoup his reputation. A dramatic move was in order, and such a move came in mid-August when the Subcommittee on Air and Water Pollution reported its proposal for a new clean air law to the full

report reflects the militant atmosphere in which the private enforcement suit was born:

Air pollution (and its fallout on soil and water) is a form of domestic chemical and biological warfare. . . . This damage, perpetuated increasingly in direct violation of local, state, and federal law, shatters people's health and safety but still escapes inclusion in the crime statistics. . . . In testament to the power of corporations and their retained attorneys, enforcement scarcely exists. Violators are openly flouting the laws, and an Administration allegedly dedicated to law and order sits on its duties.¹⁷

Although not always as forcefully stated, the belief was widespread that neither the federal government nor the states had done an effective job of enforcing antipollution laws. The Senate Report on the Clean Air Act of 1970 euphemistically described prior federal enforcement efforts as "restrained," and expressed the hope that citizen suits would "motivate governmental agencies charged with the responsibility to bring enforcement and abatement proceedings."¹⁸ Two years later, the Senate Report on the Federal Water Pollution Control Act Amendments was more ex-

Committee on Public Works.

R. TOBIN, *THE SOCIAL GAMBLE* 78-79 (1979). See also Elliott, Ackerman & Millian, *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J. L. ECON. & ORG. 313, 326-28 (1985).

17. Nader, *Introduction* to J. ESPOSITO, *supra* note 16, at vii. The body of the Nader report did not, however, provide a very explicit blueprint for citizen enforcement. As an exception to its general criticism of the Muskie bill, see *supra* note 16, the report grudgingly acknowledged that "[a]mong the bill's better features is a provision allowing both federal government and private citizens to enforce state-established emission standards in federal court." *Id.* at 306. The Nader group also argued that the responsible federal agency should actively encourage citizen groups to exercise this authority:

Nothing will be achieved in air pollution control until citizens can move past their generalized concerns with the problem, and exert action against specific sources. . . . NAPCA's Office of Education and Information (OEI) should be permitted, if not indeed required, to go public. An inconsequential budget . . . does not begin to match the needs that OEI should be serving: to establish citizen action groups around the country, to render professional guidance and technical expertise to such groups, to gather and publish detailed information about specific sources of pollution, to supply expert witnesses for testimony at state and local hearings and in lawsuits against polluters. This would be creative federal leadership.

Id. at 307-08. During the early implementation of the Clean Air Act, the EPA did take some steps in this direction; see Ayres & Miller, *Citizen Suits Under the Clean Air Act of 1970* (undated pamphlet published by USEPA; SUNYAB library accession stamp dated June 1974) (available in the Charles B. Sears Law Library, State University of New York at Buffalo).

18. S. REP. NO. 1196, 91st Cong., 2d Sess. 36-37 (1970).

plicit, noting that "[t]he record shows an almost total lack of enforcement."¹⁹ Despite repeated amendments to the original 1948 federal water pollution statute,²⁰ the law required multiple conferences and hearings before any coercive action could be taken. This process was so slow and cumbersome, the Senate report noted, that "only one case has reached the courts in more than two decades."²¹

Thus, the legislative histories of the Clean Air and Clean Water Acts reflect considerable skepticism, if not despair, over the prospect of effective government enforcement. Nevertheless, the legislative histories also indicate some congressional caution about giving private parties the power to enforce regulatory statutes. Proposals for broader forms of citizen suit legislation were under consideration in the early 1970's, and in many respects the private enforcement provisions of the Clean Air and Clean Water Acts can be viewed as a less radical alternative.²² Several types of constraints are mentioned in the legislative reports and incorporated into the legislation establishing these private enforcement actions. Private parties may sue only to enforce precise limits established by the responsible agencies; they may not ask courts to create standards under common law principles or ambiguous statutory delegations.²³ Suits against the Environmental Protection Agency

19. S. REP. NO. 414, 92d Cong., 2d Sess. 5, reprinted in 1972 U.S. CODE CONG. & AD. NEWS 3668, 3672. The primary federal statute governing water pollution has undergone a number of popular name changes during its nearly four decades of existence. Through most of the early years it was known as the Federal Water Pollution Control Act (FWPCA). After the 1965 amendment, it was sometimes referred to as the Water Quality Improvements Act; but in 1972 it reverted to the Federal Water Pollution Control Act. The 1977 amendments brought the popular name Clean Water Act, but the FWPCA label is still found frequently in later usage. In the interest of clarity, this article will generally use the name Clean Water Act.

20. See generally Barry, *The Evolution of the Enforcement Provisions of the Federal Water Pollution Control Act: A Study of the Difficulty in Developing Effective Legislation*, 68 MICH. L. REV. 1103 (1970).

21. S. REP. NO. 414, 92d Cong., 2d Sess. 5, reprinted in 1972 U.S. CODE CONG. & AD. NEWS 3668, 3672.

22. See, e.g., Cramton & Boyer, *Citizen Suits in the Environmental Field: Peril or Promise?*, 2 ECOLOGY L.Q. 407 (1972).

23. The Senate Report on the Clean Air Act notes that the citizen suit provision "would not substitute a 'common law' or court-developed definition of air quality" for administrative standards, but would, instead, establish "an objective evidentiary standard [that] would have to be met by the citizen who brings an action under this section." S. REP. NO. 1196, *supra* note 18, at 36. Similarly, the Senate Report on the Clean Water Act states that the citizen suit provision would not give courts common-law power to define unaccept-

(EPA) Administrator are allowed only when s/he has failed to perform a nondiscretionary duty.²⁴ Even when a private enforcement action meets these requirements, the party bringing it must give the agency sixty days' notice prior to filing the complaint. The agency may then elect to take control of the controversy and bar the citizen suit by bringing its own action.²⁵ Finally, Congress rejected the possibility of class actions to recover damages for pollution incidents, and included language in the legislative history reflecting that intent.²⁶

The resulting provisions have a few significant differences, but the major features are substantially the same. Since virtually all clauses of these principal citizen suit provisions have been the subject of litigation, they should be briefly described at this point.

A. *Parties*

The Clean Air Act citizen suit provision, like most other private enforcement statutes,²⁷ authorizes "any person" to bring a suit against "any person"—including the United States and other government instrumentalities to the extent allowed by the eleventh amendment—alleged to be violating an emission standard, limit or order.²⁸ The Clean Water Act is somewhat more detailed. Its citizen suit provision, section 505, defines the citizen eligible to bring suit as "a person or persons having an interest which is or may be adversely affected."²⁹ Its legislative history makes clear

able levels of pollution, but would, instead, limit citizen initiatives to the enforcement of precise rules. S. REP. NO. 414, 92d Cong., 2d Sess. 79, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 3668, 3745. The only significant exception is the citizen suit provision of the Resource Conservation and Recovery Act of 1972, which allows suits against persons whose actions regarding solid or hazardous wastes "may present an imminent or substantial endangerment to health or the environment," 42 U.S.C. § 6972(a)(1)(B), regardless of whether such actions violate an explicit permit standard or regulation, 42 U.S.C. § 6972(a)(1)(A).

24. *E.g.*, CONF. REP. NO. 1783, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 5374, 5388.

25. *See infra* text accompanying notes 45-174.

26. *E.g.*, S. REP. NO. 414, 92d Cong., 2d Sess. 81, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 3668, 3746-47.

27. *See infra* statutes cited at note 31.

28. Clean Air Act § 304(a), 42 U.S.C. § 7604(a) (1976 & Supp. IV 1980).

29. 33 U.S.C. § 1365 (1982). The Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270 (1982), and the Outer Continental Shelf Lands Act, 42 U.S.C. §§ 1331-1356 (1982), have similar provisions authorizing suit by any person having an interest actually or potentially adversely affected.

that the Act's drafters were incorporating the liberal test for standing articulated by the Supreme Court in its then-recent *Sierra Club v. Morton* decision;³⁰ but as noted below, this greater precision has not prevented a considerable amount of litigation over plaintiffs' standing.

B. *Types of Actions*

The Clean Air and Clean Water Act citizen suit provisions explicitly authorize two types of court actions: a suit for penalty or injunction against an entity violating some kind of antipollution requirement (described here as a *private enforcement action*); and an action against the EPA for failure to perform some nondiscretionary duty (hereafter referred to as an *action-forcing suit*).³¹ The statutes do not, however, preclude other types of actions. On the contrary, they contain a savings clause stating the legislative intent to preserve other common law and statutory rights to enforce emissions limits and to seek other forms of relief against polluters or agencies. Thus, there is some potential for overlap and confusion among different forms of action to abate pollution.

C. *Jurisdiction*

Citizen suit provisions uniformly provide that both action-forcing and private enforcement actions are to be brought in the federal district courts. Major environmental laws such as the Clean Air and Clean Water Acts also provide for limited statutory review of major agency decisions in the federal courts of appeals, often under strict time constraints. Beyond these primary forms of court action, there are also possibilities for nonstatutory review in the federal courts, and various forms of judicial review and pri-

30. 405 U.S. 727 (1972). See CONF. REP. NO. 1236, 92d Cong., 2d Sess., reprinted in 1972 U.S. CODE CONG. & AD. NEWS 3776, 3823.

31. Some citizen suit provisions significantly vary in this respect. For example, the Marine Protection, Research and Sanctuaries Act (MPRSA), 33 U.S.C. § 1415 (1982), and the Outer Continental Shelf Lands Act (OCSLA), 42 U.S.C. § 1349(a) (1982), do not authorize action-forcing suits by private parties. On the other hand, citizen suit statutes such as the Clean Air Act, 42 U.S.C. § 7604 (Supp. V 1981), the Noise Control Act, 42 U.S.C. § 4911 (1982), and the Toxic Substances Control Act, 15 U.S.C. § 2619 (1982), exclude various aspects of information production, record keeping, and reporting from citizen enforcement. Finally, the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6972(a) (1982), allows citizens to enforce the entire Act, while the EPA is limited to enforcing some but not all of its requirements.

vate remedies in the state courts. Thus, in many environmental disputes there may be honest confusion as to whether the citizen suit is the appropriate avenue for invoking federal jurisdiction. In addition, the difficulty of defining nondiscretionary duties creates some opportunity for forum shopping or similar strategic behavior.

D. *Notice*

As previously noted, citizen suit provisions generally require that a private enforcer give sixty days' notice before bringing an action in court. This grace period is designed to give the EPA a chance to assess and respond to the allegations. If it concludes that the proposed action is meritorious, the EPA may bring its own suit against the polluter, and thereby bar the citizen action.³² If the suit is a private enforcement action, notice generally must be given to the EPA, the responsible state agency, and the alleged violator. For suits seeking to force the Administrator to perform some action, notice need only be given to the EPA.³³ While the statutes are quite explicit in defining these requirements, they do not address the consequences of a failure to give the proper notice. Depending upon how one reads the statutes, notice problems can be regarded as jurisdictional defects mandating dismissal of the action or as pleading technicalities which can be waived or excused.

E. *Diligent Prosecution Exemption*

The Clean Air and Clean Water Act citizen suit provisions bar private enforcement and action-forcing suits when the responsible government agency is "diligently prosecuting a civil action [relating to the alleged violation] in a court of the United States or a State."³⁴ These clauses were evidently drafted to assure that citizen plaintiffs would serve as a supplement to, rather than a substitute for, government enforcers; but the language of these

32. If the EPA brings such an enforcement action in Federal Court, the citizen suit provisions generally give private enforcers the right to intervene. *See, e.g.*, 33 U.S.C. § 1365(b)(1)(B) (1982) (Clean Water Act).

33. Clean Air Act § 304(b)(2), 42 U.S.C. § 7604(b)(2) (1976 & Supp. V 1981).

34. Clean Air Act § 304(b)(1)(B), 42 U.S.C. § 7604(b)(1)(B) (1982 & Supp. II 1983); Clean Water Act § 505(b)(1)(B), 33 U.S.C. § 1365(b)(1)(B) (1982 & Supp. II 1983).

sections poses at least two problems of interpretation. The most apparent is the definition of "diligence." There are few statutory time requirements on the management of an enforcement case. Without any workable standards, how can a court tell whether prosecution of a given case is sufficiently diligent? Moreover, in many instances of apparent violation, the EPA or the responsible state agency will have the option of trying to secure compliance through a variety of methods short of court litigation, ranging from telephone calls to formal administrative hearings for the imposition of civil penalties. May some or all of these administrative actions be considered the equivalent of a "court action" for purposes of the diligent prosecution exemption?

F. *Intervention*

The citizen suit provisions of the Clean Water and Clean Air Acts provide for two kinds of intervention. The citizen plaintiff may intervene when the citizen suit is barred by the agency's diligent prosecution of the violator. Conversely, the Administrator may intervene in citizen suits if not already joined as a party.

G. *Remedies*

The two major citizen enforcement provisions differ substantially in the remedies they make available to private plaintiffs. Section 304 of the Clean Air Act sets the pattern for the great majority of citizen suit provisions by authorizing only injunctive relief. It directs the court either to enforce emissions standards, limits and orders, or to order the Administrator to perform mandatory duties. The Clean Water Act's citizen suit section has a similar remedial provision, but it also stipulates that the court has power "to apply any appropriate civil penalties" available under the Act.³⁵ Thus, a private enforcer can seek civil penalties of up to

35. 33 U.S.C. § 1365(a) (1982). The 1984 amendments to The Resource Conservation and Recovery Act include a comparable authorization for the court in a civil penalty action to "apply any appropriate civil penalties." Pub. L. No. 98-616, § 401, 98 Stat. 3269 (1984) (amending 42 U.S.C. § 6972). H. REP. No. 1133, 98th Cong., 2d Sess. 52 (1984).

Defining what constitutes a "violation" can also be a problem. Because the Clean Water Act, for example, provides for private enforcement "against any person . . . who is alleged to be in violation of (A) an effluent standard or limitation," 33 U.S.C. § 1365(a)(1) (1982), some polluters who have violated in the past but who are in compliance at the time suit is filed have claimed that they are not liable for past violations. Also, polluters have argued

\$10,000 per day for each water pollution violation. Furthermore, the Clean Water Act differs from the Clean Air Act and other environmental statutes by failing to give the EPA the power to impose civil penalties itself. If a discharger refuses to comply with legal requirements, the agency can either issue an administrative order, which carries no automatic penalties if the violator ignores it, or it can go to court to seek the statutory penalties. As a practical matter, this makes it more difficult for the agency to assert the diligent prosecution exemption and bar a citizen suit. Thus, the private enforcer under the Clean Water Act stands more in the shoes of the government enforcer than a plaintiff under the other citizen suit provisions, and, correspondingly, has more leverage over the target of the enforcement action.

H. *Fees and Costs*

The citizen suit provisions of the Clean Air Act and Clean Water Act encourage citizen plaintiffs to bring actions by authorizing the courts to award litigation costs, including reasonable attorneys' and expert witnesses' fees, "whenever the court determines such award is appropriate."³⁶ The statutes provide little guidance, however, for determining what fee levels are "reasonable," and when it is "appropriate" to award them.

In sum, citizen suit provisions, first written into environmental regulatory statutes in the 1970's, left many of these issues open for subsequent litigation. Over the intervening period of slightly more than a decade, the two most frequently used statutes, the Clean Air and Clean Water Acts, have provided enough experience to support some generalizations about the patterns of claims and defenses asserted, the courts' reactions to them, and the emerging role of the citizen suit in environmental regulation.

that the \$10,000 per day limitation covers all violations of particular permit parameters occurring in a given day, while private enforcers have argued that each permit parameter defines a separate violation and that more than \$10,000 in fines may accrue in any given day. *See, e.g., Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd.*, 611 F. Supp. 1542 (E.D. Va. 1985).

36. *E.g.*, 33 U.S.C. § 1365(d) (1982) (Clean Water Act); 42 U.S.C. § 7604(d) (1982) (Clean Air Act).

III. PATTERNS OF USAGE

Citizen suit litigation under the Clean Air and Clean Water Acts can be divided into two distinct time periods. Before 1982, these statutes were only rarely used for their express purpose of seeking penalties or injunctions against violators. They were occasionally used during this initial period for the other primary purpose defined by the statute: forcing the Administrator of the EPA to take regulatory action. Most frequently, however, the citizen suit provisions were used as a supplement to other forms of action for judicial review or damages. After 1982, when national environmental organizations began to mount private enforcement campaigns, the focus shifted dramatically, and private enforcement actions quickly came to dominate the reported decisions. This section summarizes the litigation patterns of all the reported cases involving the citizen suit provisions of the Clean Air and Clean Water Acts. The classification system used to analyze patterns of citizen suit litigation divides the reported cases into six broad categories, depending upon the primary purpose of the action:³⁷ (a) *jurisdictional maneuvering* cases in which the parties are attempting to use citizen suit provisions to expand or contract opportunities for federal court review; (b) *dispute resolution* actions

37. The catalogue of cases summarized here was developed from several sources. First, all cases listed in American Law Reports and United States Code Annotated annotations to the Clean Air and Clean Water Act citizen suit provisions were compiled. Second, exhaustive searches of the Lexis and Westlaw data bases were performed. Search criteria included all common references to the citizen suit provisions. Finally, case lists were exchanged with researchers at the Environmental Law Institute who were involved in a similar research effort at that time. The compiled cases were then examined to determine if, in fact, they involved any claims potentially relying on citizen suit jurisdiction. Those that did not were removed from the data base, and the rest were analyzed in terms of goals and effects. The case list was current as of January 31, 1986. In all, the data base includes 106 cases based on the Clean Air Act and 163 based on the Clean Water Act. These totals include a few cases based on both statutes.

Like any system of classification, the categories used here admittedly have some arbitrary dividing lines and debatable assumptions. Sorting the cases into these categories required a number of judgment calls, since the regulatory programs are quite complex and counsel were frequently creative in trying to apply the citizen suit provisions to their claims and defenses. Moreover, the decisions themselves were occasionally opaque, because courts deciding complex environmental cases frequently omit from their opinions a detailed description of the jurisdictional basis for the litigation. As a result, it is sometimes impossible to determine what bearing—if any—a citizen suit provision has on the various claims and defenses. Notwithstanding these limitations, the picture that emerges from the tabulations described in the text still seems reasonably accurate, and useful in understanding the impact of the citizen suit.

where parties are invoking private enforcement powers in an effort to resolve a two-party dispute over essentially private rights; (c) *impact litigation* in which a plaintiff is trying to compel a policy decision or stop a development project; (d) *enforcement actions* in which the plaintiff seeks to abate pollution; and (e) *fee litigation* over the recovery of costs and attorneys' fees provided in the statutes. As described below, most of these general categories have distinguishable subcategories as well. Decisions in which citizen suit provisions were merely cited in passing or used by analogy in a different context were excluded from the data base. For the most part, opinions were categorized into the one classification in which they best fit, but in a few instances the same decision will appear in two categories. For example, if an environmental organization filed a citizen suit complaint with two counts, one seeking sanctions against a discharger and the other trying to compel the Administrator to act, the case would be recorded as both a private enforcement and an action-forcing case.

A. *Jurisdictional Maneuvering*

When a new form of action such as the citizen suit is injected into a complex system of statutory and nonstatutory review, parties will often test the limits of the new grant of jurisdiction. The jurisdictional cases that arose under the Clean Air and Clean Water Acts were subdivided into three categories: alternative judicial review, citizen suit as a defense and intergovernmental conflict. Each of these topics requires separate explanation.

An alternative judicial review claim arises primarily from limitations in the special statutory review provisions of the environmental laws, and also from the system of "cooperative federalism" used to implement the Clean Air and Clean Water Acts. Section 509 of the Clean Water Act³⁸ provides for federal appeals court review of EPA decisions granting discharge permits, issuing regulations, and taking other major actions; but the petition must be filed within ninety days of the decision. Review after that time is precluded unless the application "is based solely on grounds which arose after such ninetieth day."³⁹ A party who misses the ninety-

38. 33 U.S.C. § 1369(b)(1) (1982).

39. *Id.* § 1369(b)(1) - (2). The comparable limit for judicial review under the Clean Air Act is 60 days. 42 U.S.C. § 7607(b)(1) (1982).

day limit for challenging a discharge permit, or who prefers to have the case considered by a district judge, might well invoke the citizen suit provision, claiming that the Administrator failed to perform some nondiscretionary duty in granting the permit.⁴⁰ Since both the Clean Air and Clean Water Acts give state governments a major role to play in implementing the statutes, parties dissatisfied with state actions may also try to use the citizen suit to bring the controversy into federal court by claiming that the Administrator of the EPA violated nondiscretionary duties to oversee state enforcement.⁴¹

On the whole, there have been relatively few alternative judicial review actions litigated under these statutes, and even fewer in which the plaintiffs have prevailed. Only eight reported decisions were found under the Clean Water Act, and two pairs of those involved different stages of the same controversy. The courts rebuffed plaintiffs' claims in all but two cases, and the most significant of these was decided on other grounds.⁴² There was somewhat more litigation of this nature under the Clean Air Act, with twenty-six reported decisions tabulated. Fourteen of these involved attempts by industry plaintiffs to compel approval of variances or to challenge regulations. As in the Clean Water Act cases, plaintiffs usually were not successful in using this route to the federal courts; the defendant (which was typically a federal or state agency) prevailed in nineteen of the twenty-six decisions reviewed.

Citizen suit provisions can also be used as a jurisdictional defense. For example, a defendant involved in some other form of action may claim that the action is precluded because the plain-

40. See, e.g., *Sun Enters., Ltd. v. Train*, 394 F. Supp. 211 (S.D.N.Y. 1975), *aff'd*, 532 F.2d 280 (2d Cir. 1976).

41. E.g., *District of Columbia v. Schramm*, 631 F.2d 854 (D.C. Cir. 1980) (EPA failure to veto a state discharge permit under CWA not reviewable by citizen suit); *Council of Commuter Orgs. v. Metropolitan Transit Auth.*, 524 F. Supp. 90 (S.D.N.Y. 1981), *aff'd*, 683 F.2d 663 (2d Cir. 1982) (seeking to compel implementation and enforcement of a transportation control plan); *New England Legal Found. v. Costle*, 475 F. Supp. 425 (D. Conn. 1979), *modified*, 632 F.2d 936 (2d Cir. 1980), *modified*, 666 F.2d 30 (2d Cir. 1981).

42. In *Natural Resources Defense Council, Inc. v. Train*, 519 F.2d 287 (D.C. Cir. 1975), a coalition of environmental groups challenged the EPA's failure to list certain substances as toxic pollutants under the Clean Water Act. The court avoided decision on the applicability of the citizen suit provision, holding that the Administrative Procedure Act and other statutes pleaded by the groups provided an adequate basis for jurisdiction. *Id.* at 291.

tiff's only route to federal court on this type of claim is under the citizen suit provision. This defense has been raised with some frequency under the Clean Water Act, generating twelve reported decisions. No comparable cases have been found under the Clean Air Act.⁴³ Typically, a federal official such as the Administrator of the EPA or an officer in the Army Corps of Engineers raises the defense, perhaps in the hope that the citizen suit limitation to enforcement of nondiscretionary duties will result in a narrower scope of review than the form of action chosen by plaintiff.⁴⁴

The outcomes in this subcategory of cases have been mixed. Plaintiffs have withstood the citizen suit defense in eight out of the twelve cases, and in two others the decision has turned more on the discretionary nature of the administrator's substantive duty than on the route of review chosen by the plaintiff.⁴⁵

The third group of jurisdictional cases is also small, totaling ten decisions under both statutes, some involving different stages of the same controversy. Though few in number, these decisions are relatively important in the implementation of the Clean Air and Clean Water Acts. They involve jurisdictional conflicts between the states and the federal government, typically centering on whether the state environmental agencies may assert regulatory jurisdiction over federal instrumentalities within their bor-

43. The case of *District of Columbia v. Train*, 533 F.2d 1250 (D.C. Cir. 1976), in which the District sued to prevent the EPA from entering into and approving a consent decree with the General Services Administration imposing an air pollution compliance schedule for a federal heating plant, may have involved the use of a citizen suit provision as a defense; the opinion is not clear on this point.

44. In some instances, the challenged action was even brought in the district court rather than the court of appeals, just as a citizen suit would have been, and it relied on a similar claim of nondiscretionary duty. In *Natural Resources Defense Council, Inc. v. Train*, 510 F.2d 692 (D.C. Cir. 1974), *modified*, 519 F.2d 287 (D.C. Cir. 1975), a coalition of environmental groups sought a judicial declaration that the EPA Administrator had violated the Act by failing to list certain substances as toxic pollutants within the time periods prescribed in the statute. The EPA countered with the argument that such a claim to compel performance of a nondiscretionary duty could only be brought under the citizen suit provision, and since the plaintiffs had failed to comply with the 60-day notice requirement, their action should be dismissed. On appeal, the court relied upon the savings clause in the citizen suit provision to hold that the action could still be maintained under the general federal question statute and the Administrative Procedure Act, reasoning that Congress had intended to facilitate rather than limit public access to the courts in water pollution matters.

45. *Save the Bay, Inc. v. Administrator, EPA*, 556 F.2d 1282 (5th Cir. 1977); *Good-year v. LeCraw*, 15 Env't Rep. Cas. (BNA) 1189 (S.D. Ga. 1980).

ders.⁴⁶ After some initial skirmishing in the lower courts, this issue reached the Supreme Court in 1976. In a pair of cases arising under the Clean Air and Clean Water Acts, the Court ruled that federal entities did not have to comply with state procedural requirements.⁴⁷ Congress responded by enacting clarifying amendments specifying its intent to subject federal entities to state regulation in the same manner as private dischargers.⁴⁸ Thus, the citizen suit played a minor role in helping to resolve this significant issue of statutory construction.

B. *Dispute Resolution*

Citizen suits have often been invoked in support of plaintiffs' attempts to recover money, property or other valuable rights, similar to the way in which a common law action for tort or contract is used to resolve disputes between private parties. Once again, the cases within this general category can usefully be divided into three subgroups. The first of the component groups includes eight cases in which the plaintiff was trying to recover compensation for damages to persons or property suffered as a result of the defendant's pollution. These claims relied primarily on a theory that the regulatory statute gives the plaintiff an implied right of private action. This type of damage claim was effectively foreclosed by the Supreme Court in 1981 when it ruled in *National Sea Clammers*⁴⁹ that there was no such cause of action for private damages under the Clean Water Act. At about the same time, the

46. The cases arose in several different ways. In *Massachusetts v. United States Veterans Admin.*, 541 F.2d 119 (1st Cir. 1976), the state brought a citizen suit against a federal entity alleged to be polluting a stream in violation of applicable effluent limitations. *California ex rel. State Water Resources Control Bd. v. EPA*, 426 U.S. 578 (1976), the case that brought the Clean Water Act issue to the Supreme Court, raised the citizen suit provision in a more convoluted context. The State plaintiffs had brought statutory review actions challenging the Administrator's limited approval of their proposed permit programs on the ground that his exemption of federal dischargers from the permit programs violated the Act. The EPA responded that this procedural exemption did not impair the states' interest in pollution prevention, because the states could still enforce substantive requirements by bringing citizen suits against federal violators.

47. *California ex rel. State Water Resources Control Bd. v. EPA*, 426 U.S. 578 (1976) (Clean Water Act); *Hancock v. Train*, 426 U.S. 167 (1976) (Clean Air Act).

48. See, e.g., 33 U.S.C. § 1323(a) (1982) (specifying that federal entities are subject to "any requirement whether substantive or procedural," including "any requirement respecting permits," in the Clean Water Act).

49. *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981).

Court blocked another possible route to damage recovery by holding that the federal common law of nuisance applicable to water pollution had been preempted by the statutory enactments of the 1970's.⁵⁰ As a result of these two decisions, federal damage actions for private pollution injuries have been largely eliminated.⁵¹

A second category of dispute resolution cases involves claims arising out of grants and contracts, particularly the planning and construction grants for sewage treatment works provided by the Clean Water Act. Disappointed bidders have used the citizen suit to try to obtain a judicial reversal of contracts awarded to someone else. Local governments and sewer authorities have also used the citizen suit to contest what they believe are wrongful denials of their grant applications.⁵² Of the seven separate disputes⁵³ that

50. *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981). Less than a decade before, the Court had concluded that federal common law nuisance actions for water pollution could be brought by private parties. *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972). For an example of a citizen suit damage action incorporating a common law nuisance claim, see *City of Evansville v. Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008 (7th Cir. 1979), *cert. denied sub nom. Louisville & Jefferson Cty. Metropolitan Sewer Dist. v. City of Evansville*, 444 U.S. 1025 (1980). State common law nuisance claims have, for the most part, survived preemption challenges based on the federal regulatory statutes. See Glicksman, *Federal Preemption and Private Legal Remedies for Pollution*, 134 U. PA. L. REV. 121 (1985).

51. A possible exception is the action for response costs under the federal "Superfund" legislation. Parties who incur cleanup costs "consistent with the national contingency plan" may sue potentially responsible parties under 42 U.S.C. § 9607 (1982) to recover those costs; however, it is not clear whether they must obtain government approval before incurring the response costs. For an example of a case combining Superfund cost recovery with a Clean Water Act citizen suit, see *Bulk Distrib. Centers, Inc. v. Monsanto Co.*, 589 F. Supp. 1437 (S.D. Fla. 1984) (government must approve cleanup plan before cost-recovery action can be commenced; no showing of violation under Clean Water Act citizen suit provision).

Another basis for a federal claim that a private party may assert in an attempt to recover damages for water pollution is the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680 (1982), which may apply when the government caused the pollution. In *Davis v. United States*, 722 F.2d 1157 (4th Cir. 1983), *cert. denied*, 466 U.S. 950 (1984), the plaintiff had brought a citizen suit relating to the same pollution and obtained a minimal settlement. He then brought suit under the Federal Tort Claims Act to recover damages to his clamming business caused by the pollution. The court held that his claim was essentially an implied right of private action, which was precluded by *National Sea Clammers*.

52. Local authorities must avoid a variety of jurisdictional problems when they bring such actions. When a local authority sues the EPA for violation of a nondiscretionary duty in denying its sewer funding application, it may be met with the defense that the action is essentially a claim for money damages against the federal government which must be brought in the Court of Claims under the exclusive jurisdiction provisions of the Tucker Act, 28 U.S.C. § 1491 (1982). See, e.g., *Fairview Township v. EPA*, 593 F. Supp. 1311 (M.D. Pa. 1984), *modified*, 773 F.2d 517 (3rd Cir. 1985). The plaintiffs in *Fairview* won reversal of the Tucker Act dismissal on appeal, but had their citizen suit claim dismissed

fell within this category, plaintiffs managed to survive motions to dismiss or decisions on the merits in only two.⁵⁴ One example of a successful suit is an unusual case in which a private contractor apparently catalyzed a solution to a longstanding environmental controversy. In *Michigan v. Allen Park*,⁵⁵ municipal authorities had agreed in a consent settlement with the EPA and the state environmental agency to build a sewage treatment system that would abate a serious water pollution problem. When the bids on the project came in higher than expected, the municipal authorities reneged, and two disappointed contractors brought a citizen suit. The state environmental agency and the EPA, initially joined as defendants, were realigned as plaintiffs by the trial court, and the original agreement was enforced under court order. In the district court's opinion, the contractors' citizen suit had provided a long-overdue spur to action: "[T]he system of justice has already let these people down [who live in the affected drainage basin]. A known health hazard has been permitted to exist for over 13 years while various administrative and judicial proceedings interminably ground along their way. Now we have at hand a solution to the problem"⁵⁶

The third subcategory, local disputes, includes cases that are formally similar to the other kinds of citizen suits, but involve matters of such triviality or purely local concern that they seem inappropriate for the federal courts. Only four cases were placed in this category, three based on the Clean Water Act and one

because they were unable to show that the EPA Administrator had violated a nondiscretionary duty in denying their application. *Fairview*, 773 F.2d at 517; see also *Atlantic City Mun. Util. Auth. v. Regional Adm'r, EPA*, 616 F. Supp. 722 (D.N.J. 1985). If the error in processing the grant application was made by state officials, the municipality's claim may also be rejected on the ground that the federal citizen suit provision does not create a federal cause of action against state officials who may have violated nondiscretionary duties under state law. *Allegheny Cty. Sanitary Auth. v. EPA*, 732 F.2d 1167 (3d Cir. 1984).

53. One of the disputes, the *Allen Park* litigation, generated two opinions by the district court. See *infra* notes 55-56 and accompanying text.

54. Cases were dismissed for failure to provide the 60 days notice required by statute, *Concerned Citizens of Bushkill Township v. Costle*, 468 F. Supp. 21 (E.D. Pa. 1978); *Ventnor v. Fri*, 6 Env't Rep. Cas. (BNA) 2104 (D.N.J. 1974); failure to allege violation of a nondiscretionary duty, *J.E. Brenneman Co. v. Schramm*, 473 F. Supp. 1316 (E.D. Pa. 1979); *Concerned Citizens of Bushkill Township*, 468 F. Supp. at 21; and lack of standing, *J.E. Brenneman Co.*, 473 F. Supp. 1316.

55. 501 F. Supp. 1007 (E.D. Mich. 1980), *application for modification denied*, 573 F. Supp. 1481 (E.D. Mich. 1983).

56. 573 F. Supp. at 1486.

based on both the Clean Air and Clean Water Acts. They involved such weighty matters of national interest as a fight between two lakefront property owners in Wisconsin over a leaky septic tank,⁵⁷ a landlord-tenant dispute in rural Arkansas which somehow got mixed up with alleged water pollution from a hog farm,⁵⁸ and neighborhood opposition to a zoning decision in suburban Long Island that would permit cluster housing developments to be built among single-family residences.⁵⁹ Even if one strongly favors easy citizen access to the federal judicial system, it is difficult to avoid the conclusion that these disputes would be more appropriately heard by the local small claims court or zoning appeals board than by the United States District Courts. The judges deciding these cases evidently shared that view, since all of the plaintiffs' claims were summarily rejected.

Although local dispute cases do not pose a serious threat of clogging the federal courts with inappropriate litigation,⁶⁰ they may produce bad precedents because important issues may be resolved in unimportant cases, without any apparent awareness by the court of the breadth and significance of its ruling. *Hamker v. Diamond Shamrock Chemical Co.*⁶¹ illustrates this risk. The plaintiffs in *Hamker* were riparian owners who sought recovery of damages to their property caused by defendant's oil spill. The citizen suit count was apparently included in the complaint as a way to bring

57. *Biederman v. Scharbarth*, 483 F. Supp. 809 (E.D. Wisc. 1980).

58. *Higbee v. Starr*, 698 F.2d 945 (8th Cir. 1983) (denial of preliminary injunction affirmed where tenant alleged landlords were attempting to evict her in retaliation for filing FWPCA complaint); *Higbee v. Starr*, 598 F. Supp. 323 (E.D. Ark. 1984) (action alleging violations of FWPCA dismissed).

59. *Town of North Hempstead v. Village of North Hills*, 482 F. Supp. 900 (E.D.N.Y. 1979).

60. The citizen suit is not the only jurisdictional "handle" that aggressive plaintiffs can use to make a federal case out of their local dispute. In *Biederman v. Scharbarth*, 483 F. Supp. 809 (E.D. Wisc. 1980), plaintiffs claimed that the noxious seepage from their neighbors' septic tank infringed their rights under the fifth and fourteenth amendments and thereby violated 42 U.S.C. § 1983 (1982). The plaintiff in *Higbee v. Starr*, 698 F.2d 945 (8th Cir. 1983), likewise saw a section 1983 violation in her allegedly retaliatory eviction. In *Town of North Hempstead v. Village of North Hills*, 482 F. Supp. 900 (E.D.N.Y. 1979), plaintiffs relied on a variety of federal environmental laws, including the Coastal Zone Management Act, 16 U.S.C. § 1451 (1982); the Protection of Navigable Waters and of Harbor and River Improvements Act (Refuse Act of 1899), 33 U.S.C. § 407 (1982); the Safe Drinking Water Act, 42 U.S.C. § 300f - 300j (1982); and the National Environmental Policy Act, 42 U.S.C. § 4321 (1982). As might be expected, the courts were no more impressed with these claims than they had been with the citizen suit counts.

61. 756 F.2d 392 (5th Cir. 1985).

state damage claims into federal court through pendent jurisdiction. The Fifth Circuit, noting that the alleged discharges had been confined to a two-week period two years earlier,⁶² dismissed on the ground that the Clean Water Act's citizen suit provision requires the plaintiff to show that the defendant is in violation of an applicable standard or limitation at the time the suit is brought; past violations cannot be penalized or enjoined in a citizen suit.

The reasoning employed by the court in reaching this conclusion is superficial in several respects. Starting from the dubious proposition that the legislative history need not be consulted because the statutory language is clear, the court asserts that its interpretation is correct because Congress gave the Administrator of the EPA "the central role in the enforcement of the Act."⁶³ This is by no means as self-evident as the court suggests. On the contrary, both the states and private parties are given a major role in securing compliance. Indeed, it would be more accurate to characterize the Clean Water Act as a system of shared responsibility for enforcement.

Moreover, the *Hamker* opinion may serve to undermine the EPA's enforcement program in at least two respects. By leaving open the issue of whether the EPA itself can bring an enforcement action solely for past violations, the decision invites polluters to challenge that agency's efforts to impose penalties. In addition, it ignores the fact that the EPA was openly encouraging citizen suits at the time this case was decided.⁶⁴ With a single exception,⁶⁵ courts in other circuits that have considered this issue have rejected the argument that a continuing violation must be shown in order to maintain a citizen suit.⁶⁶ Nevertheless, the continuing vi-

62. *Id.* at 394. Later in its opinion, the court notes:

If Section 1365 were interpreted as permitting citizen suits for civil penalties for past violations, all state damage claims which could be brought under pendent jurisdiction could be litigated in a federal forum, thus undermining congressional intent to limit the burden on the district courts. Since the Act provides for awards of attorney's fees and expenses, there would be a substantial incentive to bring suit under the Act rather than in state court.

Id. at 396.

63. *Hamker*, 756 F.2d at 395.

64. *See infra* text accompanying notes 209-10.

65. *Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp.*, 21 Env't Rep. Cas. (BNA) 1393 (D.R.I. 1984).

66. *See Student Pub. Interest Research Group v. American Cyanamid*, No. 84-1784,

olation argument has now become a standard part of the defense repertoire, and it will continue to take up the time of courts and litigants until this conflict in statutory construction is authoritatively resolved.

C. *Impact Litigation*

At the opposite end of the spectrum from local disputes are the environmental impact cases, which are important in several respects. They commonly involve multiple parties (such as major national environmental organizations and industry trade associations), multiple claims and defenses, and high stakes for all concerned. They can be subdivided into two categories: the negative *stop development* suits that have been a mainstay of environmental litigation since the passage of the National Environmental Policy Act (NEPA)⁶⁷ in 1969 and the positive *action-forcing* claims that can compel the Administrator to make some decision such as issuing a rule or bringing a penalty action against a violator.

As the name implies, stop development actions involve efforts by private parties to block proposed projects that require federal support or approval. Public works construction projects such as dams and highways are the most visible targets of stop development actions, but any facility that requires a federal permit is fair game. Often these controversies become wars of attrition, with opponents struggling to delay action until the proposal becomes unattractive, uneconomical or politically unpopular.

Slip op. (D.N.J. Nov. 6, 1985); Student Pub. Interest Research Group v. National Starch & Chemical, No. 84-1119, Slip op. (D.N.J. Oct. 15, 1985); Sierra Club v. Simkins Indus., 617 F. Supp. 1120 (D. Md. 1985); Student Pub. Interest Research Group v. AT&T Bell Laboratories, 617 F. Supp. 1190 (D.N.J. 1985); Student Pub. Interest Research Group v. Georgia-Pacific Corp., 615 F. Supp. 1419 (D.N.J. 1985); Student Pub. Interest Research Group v. Monsanto Co., 600 F. Supp. 1479 (D.N.J. 1985); Fishel v. Westinghouse Elec. Corp., 617 F. Supp. 1531 (M.D. Pa. 1985); Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd., 611 F. Supp. 1542 (E.D. Va. 1985) Sierra Club v. Raytheon Co., 22 Env't Rep. Cas. (BNA) 1050 (D. Mass. 1984); Student Pub. Interest Group v. Anchor Thread Co., 22 Env't Rep. Cas. (BNA) 1150 (D.N.J. 1984). The court in *AT&T Bell Laboratories*, 617 F. Supp. at 1198-99, found the *Hamker* court's interpretation of the violation requirement "rather odd" because "[p]enalties are necessarily imposed on past violations." Moreover, since the statute made separate provision for injunctive relief, the court found that the *Hamker* requirement of a continuing violation would make the statutory provision of penalties in citizen suits "superfluous." *Id.*

67. National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (codified as amended at 42 U.S.C. §§ 4321, 4331-4335, 4341-4347 (1976)).

Citizen suits were used fairly frequently to challenge development.⁶⁸ Nineteen reported cases were found under the Clean Water Act and twenty-four were found under the Clean Air Act, with a few falling into both categories because the plaintiffs claimed that the proposed development would pollute both air and water. Cases with a half dozen or more claims for relief were not uncommon, and in some of these the air or water claims were peripheral causes of action in complaints that were really grounded on NEPA or state law objections. On the other hand, a few of the stop development cases touched upon important issues of air and water resource policy, such as the South Carolina Wildlife Federation's claim that dams should be regulated under the Clean Water Act as point sources because of their effects on the temperature and oxygen content of downstream waters.⁶⁹

While stop development cases were fairly common, successful suits—at least in the legal sense—were rare. Only one of the twenty-three Clean Air Act cases resulted in an injunction against the developer.⁷⁰ In the Clean Water Act citizen suits, only about one-third of the reported case rulings on motions to dismiss or on the merits were resolved in favor of the plaintiff. Of course, the

68. Since development projects have their greatest impact on local residents, it is not surprising to find that local environmental and sportsmen's organizations are the most frequent plaintiffs in these cases: six of the fifteen water cases, and ten of twenty-three air suits, featured such groups as the "lead" or named plaintiff. Another three cases (two air, one water) had local citizen groups or property owners as plaintiffs, and individuals brought another half-dozen of the stop development actions. National environmental organizations brought only three of the air cases and two of the water actions, with the remainder (six air, two water) having state, regional, or local government plaintiffs. The defendants in these cases were usually a combination of government agencies and developers.

Many of the cases have multiple plaintiffs, and so these counts of "lead" organizations may not give a completely accurate picture of the scope of participation by different groups. However, trying to count all organizations involved would also introduce some distortions, because court opinions do not always identify all of the parties in a complex action. Moreover, it seems clear that many of these parties are purely nominal plaintiffs or defendants, who take no significant part in the management of the litigation; yet it is not possible to make this kind of distinction from the case reports. Counts of lead plaintiffs therefore appear to be the most useful (albeit rough) means of calculating participation by different kinds of organizations.

69. *South Carolina Wildlife Fed'n v. Alexander*, 457 F. Supp. 118 (D.S.C. 1978). This issue was ultimately resolved adversely to the environmental plaintiffs in an action-forcing citizen suit, *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982) (the EPA does not have a nondiscretionary duty to regulate dams as point sources).

70. *California Tahoe Regional Planning Agency v. Harrah's Corp.*, 509 F. Supp. 753 (D. Nev. 1981).

judicial forum is not the only arena for these controversies, and even within it the reported decisions do not reveal how often the objectors were able to wrest design modifications from the developers, or force abandonment of projects altogether, as a result of their litigation.

The other category of impact litigation, action forcing, presents a more confused picture.⁷¹ The Clean Air Act produced more citizen suits and more successful outcomes for the plaintiffs than did the Clean Water Act. Ten of seventeen cases resulted in total or partial victories for the plaintiffs. Some of these involved important regional air quality issues, such as the New York City transportation plan⁷² and the Pennsylvania auto inspection and maintenance program.⁷³ Others spurred the EPA to undertake standard-setting proceedings as mandated by statute, including rulemaking on national ambient air quality standards for lead and emissions limits for toxic pollutants such as arsenic and radionuclides.⁷⁴ Interviews with EPA officials confirmed that action-forcing suits can sometimes serve a useful function in breaking bureaucratic logjams and forcing the agency to make hard decisions. As one official described the process:

[I]t is very hard to get [the program office] to move on a regulation unless there is a court deadline. . . . [And] it is not just the program offices. There are some other players in the whole regulatory game [that] these deadlines affect. One, obviously, is the Office of Management and Budget. Frequently they don't want to come out with certain types of regulations; they like to sit on them and fiddle around with them. . . . [W]ithin the agency . . . we have our own little . . . OMB here, the Office of Policy, Planning and Evaluation.

71. As the name suggests, action-forcing cases tend to be brought by private organizations against government defendants. National environmental organizations were plaintiffs in three of five Clean Water Act cases, and eight of seventeen Clean Air Act suits. Local environmental or citizen groups accounted for the remaining two Clean Air Act cases, and another five Clean Water Act citizen suits. In addition, three state or local government entities brought action-forcing cases under the Clean Air Act. All of the defendants in the Clean Water Act cases were EPA administrators. In the Clean Air Act cases, there were nine federal defendants, six state defendants, and two combinations of federal and state defendants.

72. *Friends of the Earth v. EPA*, 499 F.2d 1118 (2d Cir. 1974); *Friends of the Earth v. Carey*, 552 F.2d 25 (2d Cir. 1977), *cert. denied*, 434 U.S. 902 (1977).

73. *Delaware Valley Citizens' Council for Clean Air v. Pennsylvania*, 533 F. Supp. 869 (E.D. Pa. 1982), *aff'd*, 678 F.2d 470 (3d Cir. 1982), *cert. denied*, 459 U.S. 969 (1982).

74. *NRDC v. Train*, 545 F.2d 320 (2d Cir. 1976) (lead standard NAAQS); *New York v. Gorsuch*, 554 F. Supp. 1060 (S.D.N.Y. 1983) (organic arsenic); *Sierra Club v. Gorsuch*, 551 F. Supp. 785 (N.D. Cal. 1982) (radionuclides).

And they review regulations for cost impacts and things like that, and often serve to slow things down. They want more study. They want more basis for a regulation, they want you to consider all these options to cut the cost of the regulation. . . . [I]t is very hard to get anybody to move on a particular regulation and get it done. Everything is just sort of moving at a snail's pace. It will all get done eventually, but we don't seem to be prioritizing. . . . I have seen regulations just sit for no apparent reason. . . .

Q: Just because there are too many things to do?

A: Too many things to do, you run into a bottleneck at the management level sometimes. You have all these little workers down at [the operational] level who are working on regulations, and the number of people they have to go through gets smaller and smaller and smaller as you get to the top, and the [high-level] people just don't have enough time

Of course, the citizen suit would be a rather mixed blessing if it speeded up the administrative process at the expense of reduced quality in the decisions made. However, this study did not uncover any serious concerns that action-forcing suits have had this effect. Rather, the suits seem to function as a partial antidote to the familiar bureaucratic inertia summarized in the maxim quoted above: "It will all get done eventually."

Action forcing was less frequent under the Clean Water Act, with twelve reported decisions in seven separate controversies. Three of the controversies resulted in unequivocal losses for the environmental plaintiffs. In the others, the plaintiffs' claims survived in whole or in part. Even when the plaintiffs did not prevail, they raised significant issues relating to the EPA's authority to regulate radioactive effluents⁷⁵ and discharges from dams,⁷⁶ and to the Administrator's duty to issue an abatement order when s/he has reason to believe that a discharger is violating its permit.⁷⁷

D. *Enforcement Actions*

Suits to enforce environmental requirements against non-complying dischargers theoretically are the heart of the citizen suit provisions. This category comprises a substantial and growing

75. *Train v. Colorado Pub. Interest Research Group*, 426 U.S. 1 (1976) (Nuclear Regulatory Commission has primary authority over radioactive effluents).

76. *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982) (EPA does not have nondiscretionary duty to regulate dams as a point source under the CWA).

77. *Sierra Club v. Train*, 557 F.2d 485 (5th Cir. 1977) (Administrator does not have mandatory duty to issue an administrative order against violator, since this would be an exercise in futility if the EPA does not plan to bring suit).

body of cases. It is useful to distinguish among three subgroups of enforcement actions: pollution abatement suits, private enforcement actions and intervention cases. The first two are very similar, in that they generally feature a private party or nonfederal official seeking relief against a regulated discharger. The distinction is that pollution abatement claims incorporate multiple counts under diverse statutes—and typically have multiple parties as well—while private enforcement actions are based solely on citizen suit provisions. The intervention cases involve attempts by outside parties to intervene in ongoing enforcement actions brought by other parties.

Like the stop development cases, pollution abatement suits⁷⁸ have featured a number of major environmental battles, including decontamination of the damaged Three Mile Island nuclear reactor,⁷⁹ discharge of naval weapons in the waters of Puerto Rico,⁸⁰ ocean dumping of sewage sludge in the New York Bight,⁸¹ and the continuing controversies provoked by inadequate sewage treatment capacity in metropolitan Washington, D.C.⁸² These suits have mostly been brought under the Clean Water Act,⁸³ perhaps because there is more statutory overlap in the field of water quality regulation than there is in air quality controls. The total number of major pollution abatement cases is rather small, although the volume of litigation seems to have picked up in recent years. There is no clear trend in the outcome of the decisions.

The growing volume of litigation is more dramatic in the sub-

78. The difference between them is that the stop development case is an attack on a *proposed* project, while the pollution abatement action is an attempt to terminate *ongoing* pollution.

79. *Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor*, 619 F.2d 231 (3d Cir. 1980), *cert. denied sub nom. General Pub. Util. Corp. v. Susquehanna Valley Alliance*, 449 U.S. 1096 (1981).

80. *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982).

81. *Township of Long Beach v. City of New York*, 445 F. Supp. 1203 (D.N.J. 1978).

82. *Montgomery Evt'l Coalition v. Washington Suburban Sanitary Comm'n*, 607 F.2d 378 (D.C. Cir. 1979); *Montgomery Evt'l Coalition v. Fri*, 366 F. Supp. 261 (D.D.C. 1973); *see also Montgomery Evt'l Coalition v. Costle*, 646 F.2d 595 (D.C. Cir. 1981); *Montgomery Evt'l Coalition v. Costle*, 646 F.2d 568 (D.C. Cir. 1980); *District of Columbia v. Schramm*, 631 F.2d 854 (D.C. Cir. 1980).

83. Nineteen reported decisions under the Clean Water Act were classified as pollution abatement actions; however, five of those opinions were rendered at different stages of continuing controversies. Thus, the actual number of controversies represented is 14. Only three cases were found under the Clean Air Act, and one of them also appeared on the water list.

category of private enforcement actions, at least under the Clean Water Act.⁸⁴ Only two reported private enforcement decisions were found for the period from 1972 to 1979. Since that time, however, at least twenty-eight decisions have been published, and many more are working their way through the courts. Almost all of these are suits by national or local environmental groups against industrial dischargers. The more recent cases are dominated by rulings on a variety of motions to dismiss, which have usually gone in the plaintiffs' favor.

Cases involving the citizen's right to intervene in a government enforcement action have mostly arisen under the Clean Water Act, with seventeen decisions found under that statute as opposed to only two under the Clean Air Act. As with private enforcement cases, there has been a dramatic increase recently in reported decisions—only four of the seventeen Clean Water Act opinions were written before 1980. State and local government entities were frequently involved in intervention cases, as the following table indicates:

TABLE A
PARTIES IN CLEAN AIR AND CLEAN WATER ACT
INTERVENTION DECISIONS
(excludes multiple decisions in same case)

	Plaintiff	Defendant	Intervenor
Federal Government	7	3	0
Federal & State Government	3	1	0
State/Provincial Government	2	1	7
Municipal Government	1	1	0
Industry	0	10	2
National Environmental Group	3	0	1
Local Environmental Group	0	0	5
Local Citizen Group	0	0	3
Individual	0	0	1

This table suggests that resources can be significant in determining who will bring cases, and who will intervene. The relatively

84. The number of reported private enforcement cases was comparable under the Clean Air Act—14 in all—but the patterns were less clear. The number of decisions did not dramatically increase over time as with the Clean Water Act cases, and the types of plaintiffs and defendants were more mixed, with a scattering of state and federal agencies appearing as both plaintiffs and defendants. Plaintiffs were successful in eight of the 14 cases, including some instances where they succeeded only in surviving a motion to dismiss.

well funded entities—the federal government, some state agencies and the national environmental organizations—usually litigate as plaintiffs and defendants. Local groups and individuals, on the other hand, often intervene. Perhaps the possibility of recovering attorneys' fees is not a sufficient financial inducement for many local interests to bring citizen suits on their own behalf.

In light of the statute's explicit grant of the right to intervene, it is surprising to find that putative intervenors had a relatively dismal success rate. In twelve out of the seventeen reported decisions, the intervention petition was either rejected on some technical ground or denied on the merits. In several of the cases in which the government and the alleged violator had reached a consent settlement, the courts seemed extremely reluctant to allow any third party to upset that agreement and force the matter to trial.⁸⁵ Intervention, therefore, has played an insignificant part in the enforcement of these statutes.

E. *Fee Cases*

There has been a smattering of litigation under the fee award sections of the citizen suit provisions: a total of twelve cases under the Clean Air Act and seven under the Clean Water Act. There is nothing remarkable in either the pattern or the content of these decisions; they seem very similar to cases arising under other fee award statutes. In the few instances when parties have tried to stretch the citizen suit fee provision to cover other types of claims and defenses, the courts have generally been unsympathetic.

On the whole, then, the reported decisions reveal few

85. *E.g.*, *United States v. Ketchikan Pulp Co.*, 430 F. Supp. 83 (D. Alaska 1977); *United States v. Hooker Chem. & Plastics*, 540 F. Supp. 1067 (W.D.N.Y. 1982). In *United States v. Hooker Chem. & Plastics*, 749 F.2d 968 (2d Cir. 1986), the court described the burden on an intervenor to show inadequate government representation in an enforcement case:

It is not enough that the applicant would insist on more elaborate pre-trial or pre-settlement procedures or press for more drastic relief, particularly where the sovereign's interest is in securing preventive relief of the same general sort as the applicant. While it would be going too far to require an applicant to demonstrate collusion, there must be, at least in cases where the applicant has no right to sue, . . . a strong affirmative showing that the sovereign is not fairly representing the interests of the applicant.

Id. at 985.

problems with the citizen suit. The total number of cases reported under these two statutes is modest, especially when viewed against the aggregate volume of federal court litigation. Some of these cases raise significant issues of law and policy. Others are less significant but probably could have been brought under other federal statutes if there were no citizen suit provisions. In any event, the courts seem to have little difficulty in disposing of inappropriate cases. With the possible exception of intervention, the Clean Air and Clean Water Acts' citizen suit provisions generally seem to be working the way Congress intended. It must be remembered, however, that the reported decisions are only the tip of a large and growing iceberg of private enforcement actions.

IV. PRIVATE ENFORCEMENT IN PRACTICE AND IN THEORY

A. *The Scope and Objectives of the Private Enforcement Campaign*

Behind the reported cases looms a large body of private enforcement activity. The precise dimensions of environmental groups' enforcement campaigns remain obscure, however, because there is no comprehensive official source of descriptive data.⁸⁶ The best data source available was compiled by the Environmental Law Institute (ELI) in 1984.⁸⁷ It shows that more than 100 notices of violation were sent under the Clean Water Act from January 1983 through April 1984, and that nearly ninety private court actions were filed during that same period.⁸⁸

86. The EPA's water program office in Washington maintains files on the notices it receives. This data system is probably incomplete, however, due to the fact that regional offices and other units at headquarters may receive the notice of citizen suit and fail to forward it to the central data collection point. In addition, the EPA would not necessarily receive notice of settlements in private enforcement actions, especially if the settlement was not embodied in a court decree.

87. ENVIRONMENTAL LAW INSTITUTE, *CITIZEN SUITS: AN ANALYSIS OF CITIZEN ENFORCEMENT ACTIONS UNDER EPA-ADMINISTERED STATUTES* (1984) (hereinafter cited as "ELI REPORT"). For other general discussions of citizen suits under environmental statutes, see Fadil, *Citizen Suits Against Polluters: Picking up the Pace*, 9 HARV. ENVTL. L. REV. 23 (1985); Feller, *Private Enforcement of Federal Anti-Pollution Laws Through Citizen Suits: A Model*, 60 DEN. L.J. 553 (1983); Miller, *Private Enforcement of Federal Pollution Control Laws*, Parts I-III, 13 ENVTL. L. REP. 10309 (1983), 14 ENVTL. L. REP. 10063, 10407 (1984); Schwartz & Hakett, *Citizen Suits Against Private Industry Under the Clean Water Act*, 17 NAT. RESOURCES L. 327 (1984).

88. ELI's data base begins before the current wave of citizen suits began. The following table, taken from ELI's data, ELI REPORT, *supra* note 87, at III-D, Fig. D, shows the

ELI also developed data summarizing the outcomes of citizen suits.⁸⁹ The most significant suits are those brought by national and regional environmental groups under the Clean Water Act. These comprise a majority of all citizen suits in the ELI data base. Of 349 citizen suits tabulated by ELI, 214 were brought under the Clean Water Act, and nearly ninety percent of these were generated during the environmental groups' current enforcement campaign.⁹⁰ The status of those cases at the end of April 1984 was as follows:

pattern of activity under the Clean Air and Clean Water Acts:

	CLEAN WATER ACT		CLEAN AIR ACT	
	Notices	Suits	Notices	Suits
1978	0	1	0	4
1979	1	8	4	11
1980	2	4	13	7
1981	0	6	4	5
1982	3	16	1	4
1983	46	62	3	0
1984 (1st 4 mos.)	61	26	1	0

These figures may slightly overstate the increase in citizen suits, since anecdotal reports suggest that plaintiff organizations are having difficulty finding sufficient resources to sustain the 1983-84 rate of case generation.

89. For present purposes, a "suit" is any controversy that has progressed to the mailing of a 60-day notice letter, which, as previously indicated, is a legal prerequisite to filing an action in court.

90. ELI REPORT, *supra* note 87, at vi, III-5. There is a slight discrepancy between these two references: at vi, the report indicates that 162 Clean Water Act cases were brought by national and regional environmental groups, while the table at III-5 indicates 179 Clean Water Act notice letters from these organizations. For purposes of the figures given in the text here, the latter table was used.

TABLE B
OUTCOMES OF CLEAN WATER ACT CAMPAIGN CASES

Out of 179 total cases opened by sending notice letters to alleged violators —

- * 27 (15%) were dropped without filing a complaint
 - 8 were preempted by government enforcement
 - 1 was settled
 - the remainder were dropped for "other" reasons
- * 67 (48%) were pending with no complaint yet filed
 - almost all of these (63) were in negotiation
- * 85 (37%) had progressed to the stage of filing a complaint in court
 - 10 had been settled
 - 74 were pending before the court
 - 1 had closed for other reasons

These percentages can be expected to change significantly over time. For example, the percentage of cases in which complaints are filed will almost certainly increase even if more parties are willing to settle, because most plaintiff and defendant organizations will want to embody their agreements in enforceable court decrees. Similarly, the percentage of cases pending will probably decline, and the percentage of cases settled will probably increase, as judicial decisions emerge which provide a framework for resolving various matters currently in contention. Overall, however, these figures and our interviews suggest that both plaintiffs and defendants regard private enforcement as a long-term phenomenon. To understand why this is so, it is necessary to consider the purposes of the plaintiff organizations that are bringing these actions, as well as the background of EPA enforcement that gave rise to the current wave of citizen suits.

In part, the current wave of private enforcement suits grew out of the perception among many environmental groups that the first Reagan Administration was rapidly undermining compliance with environmental laws. This perception was fed not only by the managerial turmoil at the EPA, where demoralizing reorganizations were frequent and scandals forced high-level officials to resign in disgrace,⁹¹ but also by declines in the numerical indicators used to measure compliance and enforcement. Case referrals from

91. See generally J. LASH, *A SEASON OF SPOILS* (1984).

the EPA to the Department of Justice for prosecution dropped dramatically from the baseline of the Carter Administration.⁹² Commerce Department figures showed that investment in new pollution control equipment, which probably should have been increasing in response to new regulatory requirements, was actually declining.⁹³ The General Accounting Office, surveying a sample of industrial dischargers subject to permits under the Clean Water Act, found that more than eighty percent of them had violated their permits at least once during an eighteen-month period.⁹⁴ As statistics like these began to emerge from regulatory programs administered by the EPA, critics concluded that there had been a "collapse in compliance with the nation's toxics laws."⁹⁵ The citi-

92. The following figures are taken from the ELI REPORT, *supra* note 87, at III-27:

CASE REFERRALS FROM EPA TO DEPARTMENT OF JUSTICE
BY PROGRAM AND FISCAL YEAR

Fiscal Year	Water	Air (Stationary)	Air (Mobile)	Hazardous Waste	Totals
1977	93	12	38	0	143
1978	137	68	55	2	262
1979	81	103	46	9	239
1980	55	77	20	52	204
1981	36	51	14	14	115
1982	46	31	4	27	108
1983	56	61	7	31	155

Referrals within the agency from regional offices to headquarters experienced a comparable decline. *See id.* at III-24. As noted below, the figures returned to pre-Gorsuch levels under the Ruckelshaus Administration, which put a high premium on raising them.

93. *E.g.*, W. DRAYTON AND ENVIRONMENTAL SAFETY'S FACTS COMMITTEE, AMERICA'S TOXIC PROTECTION GAP 6 (1984):

After remaining between 4.64 to 5.16 billion (constant 1972) dollars from 1972 through 1980, business's planned expenditures for 1983 dropped to between 3.27 and 3.40 billion dollars, according to the Commerce Department's *Annual Survey of Current Business*. This sharp drop in control equipment investment implies a sharper fall in operating compliance because (1) it is much easier to determine whether control equipment is present than it is to ensure that it is operated and maintained properly and (2) it generally costs much more to operate than to purchase. Moreover, if America were in fact beginning to control toxics in the early 1980s as the laws require, expenditures should have been increasing sharply during this period.

94. *Wastewater Dischargers Are Not Complying with EPA Pollution Control Permits* GAO REPORT TO THE CONGRESS, R.C.E.D. 84-53 (Dec. 2, 1983).

95. This was the subtitle of the report by W. Drayton and Environmental Safety's Facts Committee, *supra* note 93. The report further noted:

In the long run the massive loss of voluntary compliance is the most harmful effect of this failure to implement the law in the 1980s. Once firms lose confi-

zen suit, then, might be viewed as a stop-gap measure—a way for environmentalist constituencies to put their fingers in the dike until the agency recovers from its time of trouble and resumes its responsibility for enforcement.

In reality, the story is more complicated than this. Although the shifts in enforcement policy and practice inaugurated by the Reagan appointees to the EPA may have precipitated the private enforcement movement, there were forces already at work that made large-scale private enforcement possible—forces that could well have brought this movement into existence even if there had not been such visible turmoil at the EPA. These forces include the people who are organizing and staffing the citizen suit movement, the learning process that had taken place in the field of environmental enforcement, and the changes in beliefs relating to regulatory compliance and enforcement that were occurring in the early 1980's.

By the time that the Reagan Administration took office in 1981, the Environmental Protection Agency had been in existence for more than a decade. A generation of lawyers and technicians had reached their professional maturity along with the agency.⁹⁶ Regardless of whether they had worked inside the EPA, or in one of the outside constituencies that dealt frequently with it, these professionals had steadily developed their skills and contacts. They understood how the various programs and offices at the EPA worked — or failed to work — and how to influence the process. At the same time, many of them still had the idealism and commitment to environmental values that had originally attracted them to this field of regulation. As they moved out—or were forced out—into private-sector roles in law firms, environmental groups and research organizations, they provided the foundation

dence that their competitors are complying, they too will stop. Regaining the confidence of hundreds of thousands of business operators is an enormously difficult, very expensive, and painfully slow undertaking. The nation's small force of environmental safety officers, armed with the key fairness argument that everyone should do their share, could deal effectively with a handful of noncompliers. Asking them to deal with almost everyone, especially with the fairness argument turned against them, is to ask the impossible and thereby insure failure.

Id. at 6.

96. At this time, the data to support the analysis in this paragraph is more impressionistic than systematic. The authors are engaged in ongoing research designed to explore these issues more fully.

of expertise and commitment needed to build the citizen suit movement.

Like the EPA itself, many of these environmental professionals had learned a lot about regulatory enforcement during the 1970's. When it was created by Executive Order in 1970, the EPA inherited a legacy of failed enforcement in federal antipollution law, and a militant environmental constituency that wanted an immediate turn around. Thus, the EPA's initial challenge was to establish its credibility as a tough enforcer. As John Quarles, the EPA Assistant Administrator for Enforcement in its first years, put it: "EPA responded to the pressures of the grassroots political protest. The response was reflected most clearly in [Administrator William Ruckelshaus'] approach to enforcement."⁹⁷ That approach was to bring a series of highly publicized court actions against polluters, using the old Refuse Act and whatever other statutes could be pressed into service.⁹⁸

Serious pollution problems were widespread at that time, and many violators were obvious, well-known targets for agency enforcement.⁹⁹ Implementing enforcement policy was a relatively simple matter of selecting the most deserving from a large number of potential defendants and making an example of them. Even during this initial period of active enforcement, however, it became clear that merely bringing a series of highly publicized cases was not enough. The cases had to be pushed and prodded through the judicial system to a successful conclusion,¹⁰⁰ and then the resulting decision had to be translated into the polluter's actual abatement of his discharge.¹⁰¹ Furthermore, an effective ad-

97. J. QUARLES, *CLEANING UP AMERICA* 36 (1976).

98. *Id.* at 36-57.

99. See generally J. QUARLES, *supra* note 97, at 37-57. See also COUNCIL ON ENVIRONMENTAL QUALITY, *ENVIRONMENTAL QUALITY* 119 (1972), noting that the Refuse Act "has been increasingly used for water pollution control enforcement," with 81 criminal actions and 52 civil suits filed during the first six months of fiscal year 1972.

100. For example, the EPA was criticized during its early years for the "thirty-five polluter episode" in which the agency held a press conference to announce that it was referring 35 cases against major industries to the Justice Department for criminal prosecution. Justice eventually concluded that only three of these cases were worthy of criminal prosecution. Gellhorn, *Adverse Publicity by Administrative Agencies*, 3 A.C.U.S. 67, 87-89 (1973).

101. Quarles observes:

There was one curious feature of the early EPA enforcement program: almost the entire emphasis was placed on beginning the actions. . . . It was almost as though the mere fact of filing suit would end the problem once and for all, and

ministrative infrastructure had to be built that could generate detailed, readily enforceable standards,¹⁰² and the regulatory bureaucracy had to be given incentives to produce the appropriate number and mix of enforcement actions.¹⁰³ As one participant in the EPA's early enforcement efforts put it: "[t]he public demand for assertive action against polluters had made its first impact through individual decisions by leaders in the top political positions. Now the response to that public demand was being institutionalized."¹⁰⁴

By the mid-1970's, the EPA was ready to embark on a system-

if only we could sue all the polluters . . . our environmental problems would be over. The difficulties of pursuing an action through completion—achieving an actual cleanup program—seemed scarcely to be noticed, especially at first.

J. QUARLES, *supra* note 97, at 50-51.

102.

The basic weakness of the early enforcement actions was that they were being initiated in areas where effective standards and pollution control requirements themselves had not yet been set. However aggressive the enforcement program, it could not be effective if it tried to establish these basic requirements by suing polluters one at a time.

Id. at 53. The passage in 1972 of the Federal Water Pollution Control Act compelled EPA to develop an elaborate infrastructure of permits, guidelines and standards as a predicate for enforcement actions. See COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY 66-68 (1975) (reporting numbers and types of water enforcement actions brought from 1967-75, and noting that the 1972 amendments "created an enforcement hiatus—no polluter who had applied for a permit under the FWPCA provisions could be prosecuted before December 31, 1974").

103. See *infra* text accompanying note 120. Because it is strikingly similar to William Ruckelshaus' description of his 1983 difficulties in arousing the EPA bureaucracy to more vigorous enforcement, John Quarles' account of bureaucratic reluctance to prosecute during the early days of the EPA is worth quoting at some length:

Three months after EPA was created, Ruckelshaus summoned the regional directors of the water pollution program to Washington and told them to push ahead aggressively with enforcement cases. When the months that followed produced little action, I was puzzled. Slowly I realized that the biggest factor in the delay was simply the ingrained attitude of most employees in the agency.

Prior to EPA's creation the federal pollution control programs had focused on research, planning, grants, and technical assistance, and few of the people doing that work had any taste or training for the rough and tumble of enforcement. They felt inhibited by the opposition of their state agency counterparts, who resented the intrusion of federal officials. . . . Because he knew the action would be attacked by the polluter and criticized by the state officials, he was tempted to forget the whole business

[U]ntil each regional office became experienced, the fear remained that political pressure would be used to block us and that the regional officer who had taken the initiative would be left out on a limb.

J. QUARLES, *supra* note 97, at 47-48.

104. *Id.* at 50.

atic program of relatively vigorous enforcement, using new management systems and economics-based enforcement policy. These changes are generally associated with the Carter Administration, but they actually began in 1975 with the creation of a separate enforcement office at EPA headquarters.¹⁰⁵ Regional enforcement personnel reported directly to that office, and the agency began to put emphasis on generating large numbers of penalty cases.¹⁰⁶ Eventually, the enforcement office became heavily involved in writing permits so that violations could be more easily prosecuted.¹⁰⁷

The major substantive policy development in enforcement during the Carter era was the systematic application of economic concepts to enforcement penalty policy. This was not the standard microeconomic approach of making overinclusive rules more efficient by applying a cost-benefit calculus at the enforcement stage. Rather, it was an attempt to use economic means for environmental ends by adjusting penalty levels to recapture the presumed economic benefits of noncompliance. This concept was first applied on a large scale in the Connecticut Department of Environmental Protection (DEP) in the early 1970's, and it was brought to the EPA during the Carter Administration by William Drayton, Douglas Costle, and other alumni of the Connecticut DEP.¹⁰⁸ Complex rules and computer programs were generated to calculate the expenditures saved and competitive advantages gained in instances of noncompliance.¹⁰⁹

While the late 1970's appear in retrospect to be the most activist enforcement period in the EPA's history, there were still some nagging problems. In 1978, the General Accounting Office issued a report sharply criticizing EPA's enforcement of the Water program—probably the agency's most fully developed enforcement effort.¹¹⁰ For some environmental organizations, this

105. Brown, *EPA Enforcement—Past, Present, and Future*, ENVTL. F., May 1984, at 12, 13.

106. *Id.*

107. *Id.* at 15.

108. See generally Drayton, *Economic Law Enforcement*, 4 HARV. ENVTL. L. REV. 1 (1980).

109. Assessment and Collection of Noncompliance Penalties by EPA, 40 C.F.R. Pt. 66, 45 Fed. Reg. 50110 (July 28, 1980); EPA Approval of State Noncompliance Penalty Program, 40 C.F.R. Pt. 67, 45 Fed. Reg. 50,117 (July 28, 1980).

110. *More Effective Action by the Environmental Protection Agency Needed to Enforce Industrial Compliance With Water Pollution Control Discharge Permits*, GAO REPORT TO THE CON-

report marked the beginning of a serious loss of faith in the EPA's enforcement capability. A few, like the New Jersey Public Interest Research Group, began taking a skeptical look at what was actually happening at the EPA enforcement offices in their areas. The closer they looked, the more concerned and disenchanted they became.

The 1981 appointment of Anne Gorsuch Burford as Administrator of the EPA brought a dramatic change in the agency's enforcement philosophy, and accelerated the loss of faith in government enforcement. Voluntary compliance negotiations became the dominant method of dealing with pollution violations. EPA officials were told to pursue "every opportunity for settlement," and referrals of cases for prosecution were regarded as "black marks" against the officials recommending penal action.¹¹¹ Amid multiple reorganizations of the agency, the separate enforcement offices were abolished and their personnel reassigned to the program offices or the General Counsel's Office.¹¹²

Agency morale, especially among personnel engaged in enforcement, reportedly declined as rapidly as the case referral statistics. The environmental community, which had not been wholly satisfied with EPA enforcement during the Carter Administration, when many of its own people were running the agency, was now engaged in open political warfare against the EPA leadership. By the time William Ruckelshaus was brought back as Administrator in 1983, words like "chaos" and "shambles" were being used to describe the EPA enforcement program. The basic task that Ruckelshaus faced was very much like the one he had taken on more than a decade before as the agency's first Administrator: establishing the EPA's credibility as a tough enforcer. This time, however, success would prove somewhat more elusive.

Perhaps because budgetary and political constraints foreclosed major policy initiatives, the second Ruckelshaus administration devoted much of its attention to rehabilitating the EPA's

GRESS, R.C.E.D. 78-182 (Oct. 12, 1978). Two years later, GAO issued some equally stinging criticism of the EPA's management of the construction grant program that was intended to clean up the effluents of municipal sewage treatment plants. *Costly Wastewater Treatment Plants Fail to Perform as Expected*, GAO REPORT TO THE CONGRESS, R.C.E.D. 81-89 (Nov. 14, 1980).

111. J. LASH, *supra* note 91, at 46-47.

112. Brown, *supra* note 105, at 16. See also Mintz, *EPA Enforcement: Critical Assessment Yields Mixed Review*, ENVTL. F., Nov. 1984, at 13.

management systems. In rapid succession, numerous procedural and substantive changes were put in place to revamp the enforcement process. The Gorsuch reorganization of enforcement was partially reversed, and a new Office of Enforcement and Compliance Monitoring was created to oversee and coordinate the EPA's enforcement efforts.¹¹³ Working groups were directed to systematize and codify the definition of significant noncompliance to assure some consistency across regulatory programs,¹¹⁴ and also to review statutory penalty procedures and amounts with a view toward unifying the formal legal structure of enforcement.¹¹⁵ Case tracking systems were upgraded so that enforcement officers could follow the performance of significant violators until they reached compliance, and also make sure that cases did not get lost.¹¹⁶ Attempts were made to clarify the allocation of authority between the EPA and the state environmental agencies, and to establish management oversight systems that would measure the states' performance in their areas of responsibility.¹¹⁷

Finally, the Ruckelshaus Administration tried to increase the number of enforcement actions by setting quantitative targets for the regional offices, and by exhorting the staff to get tough on violators. In January 1984, Ruckelshaus gave a speech to agency enforcement personnel that became known as "the gorilla speech" because of the metaphor he used in urging his people to crack down on lackadaisical state enforcement: "Our responsibility is not to get along with the states, it is to insure compliance. . . . Unless [the states] have a gorilla in the closet, they can't do the job. And the gorilla is EPA."¹¹⁸ While the gorilla quote set the tone for most press coverage of the speech,¹¹⁹ even more interesting is the sense of frustration and impotence that Ruckelshaus conveyed in describing his attempts to revitalize federal

113. ENVTL. REP. (BNA) 644 (Aug. 19, 1983).

114. Alm, *EPA's Management Approach to Enforcement*, ENVTL. F., Sept. 1984, at 7. See *infra* notes 181-96 and accompanying text.

115. *Changes in EPA Statutory Authorities Recommended in Draft Report on Enforcement*, ENVTL. REP. (BNA) 794-95 (Sept. 21, 1984); see also *id.* at 809-23.

116. Alm, *supra* note 114, at 10.

117. See *infra* text accompanying notes 179-202.

118. *Transcript of William D. Ruckelshaus' Remarks, EPA National Compliance and Enforcement Conference*, ENVTL. F., Apr. 1984, at 16 col.2, 17 col.1 [hereinafter cited as *Transcript*].

119. See, e.g., Stanfield, *Ruckelshaus Casts EPA as "Gorilla" in States' Enforcement Closet*, NAT'L J., May 26, 1984, at 1034.

enforcement:

What I was concerned about, frankly, in coming back here was that we had a bunch of tigers in the tank, and the minute we took the lid off . . . and said "Go get them!" the problem might well be an overreaction—that we might start treating people unfairly, just to show everybody how tough we were.

Well, I think we opened the tank all right, but on the basis of what I see here the last few months, there may be more pussy cats than tigers. . . .

. . . I sent a memo on October 7 to all the Assistant Administrators and Regional Administrators. I repeated what I said in my confirmation hearings, and I indicated in as clear a language as I could that in order to achieve compliance with the laws and regulations, EPA must have an enforcement program that is credible and effective. . . .

Now these statistics [on case referrals] are terrible. . . .

. . . We can find 100 reasons *not* to do something in terms of organizational structure, guidance, you name it. There ought to be 100 reasons *to* do something. We have to develop a certain controlled sense of outrage in this agency if we are going to get these laws enforced. And some place along the way, we have lost that.¹²⁰

While the second Ruckelshaus administration at the EPA achieved some improvement in the numerical indicators of enforcement activity, the rapid shifts in agency policy left a legacy of skepticism among knowledgeable observers inside and outside of the agency. Structurally, the Ruckelshaus reforms had only partly undone the Gorsuch reorganizations: the operational people in the enforcement process still reported to the program offices and the General Counsel's Office rather than to the new Office of Enforcement and Compliance Monitoring. In this realignment, enforcement duties are likely to have lower priority. As one agency staffer described it:

Our biggest problem right now is that none of the old compliance people are left. They all got moved out . . . to other jobs, or moved out to field offices, pushed over to the Environmental Services Division. . . . There's whole regions where there isn't one person left from compliance three years ago. It's all construction grants people [now]. . . . When you've been giving out construction grants for ten years, you've basically been wearing a white hat, and you're a good guy. . . . And while you're still a good guy on the one hand, to turn around and put on the black hat and slap somebody [with a penalty] [T]hese people just aren't going to do anything.

More fundamentally, the representatives of groups bringing citizen suits had come to believe that improved management of the

120. *Transcript, supra* note 137, at 15 col.2, 16 col.1, 17 col.1 (emphasis in original).

enforcement process was necessary, but not sufficient. Even good management of inadequate resources would not produce compliance, and the resources seemed likely to remain inadequate for the foreseeable future. A citizen suit plaintiff's lawyer explained:

The weakest link in the entire federal regulatory scheme always has been and always will be enforcement. Because you're just never going to have the resources. No matter what the law is . . . the country is never going to be able to put the resources into these [programs] to do what the law intended.

. . .

If this is true, it suggests that the EPA and its supportive constituencies should move toward a specialized division of labor in which the regulatory agency essentially cedes control over routine penalty actions to private enforcers, and concentrates its efforts on the novel, difficult and expensive areas of enforcement.

Another plaintiff's lawyer commented:

[O]f all the different cases around, these are the cases we [in the private sector] do the best and it's [least necessary] for them to do it. [At] the meeting we had with Ruckelshaus, he kept coming back: "Well, if you're doing this, we must not be doing something we're supposed to." And I was trying to say to him, "I don't want you to start spending your resources here. Go after those damned [toxic waste] dumps. I mean, they're *hard*. They take money, they take a million experts. Go do that, don't go taking your scarce manpower and coming in with these middle-level water cases. . . . [W]e'll do a *good* job with this. . . . I don't think you've done a good job on the things that really were important, much more important than this. So don't go diverting your resources into this" . . . They're not going to get a five hundred percent increase in their enforcement personnel, and there are lots of other things that are not being enforced.

In this vision of the citizen suit, private enforcers would essentially enter a long-term partnership with their government counterparts,¹²¹ pooling their resources to achieve the common goal of increased compliance. If this goal is to be realized, private enforcers will have to overcome a series of obstacles. Perhaps the most fundamental of these is altering the behavior of regulated industries. Contemporary deterrence theory raises several questions

121. Interview subjects varied in their estimations of how long private enforcers would have to play this kind of role. One suggested that the program might be terminated in ten years or so if the groups succeeded in altering the behavior of polluting industries, while others saw a continuing process of permit revisions and subsequent enforcement actions for the indefinite future. All seemed to agree, however, that a long-term presence of citizen enforcers was desirable, if not essential.

about the likely responses of regulated firms, and the efficacy of different enforcement strategies.

B. *Three Contemporary Views of Regulatory Enforcement*

In recent years, commentators from a wide variety of disciplinary perspectives have produced a substantial body of literature on regulatory enforcement. These analyses are primarily concerned with the effects of different enforcement strategies, but they also imply divergent views regarding the legitimate use of authority in the regulatory state.

1. *An Economic View: Over-Inclusive Rules, Inefficient Enforcement.* The economic perspective, which is probably the most widely used approach to analyzing regulatory enforcement, is based on the premise that all regulation should be efficient. This perspective holds that: (1) the benefits of regulation should always exceed its costs; (2) the least costly means of achieving a given set of benefits should be utilized; and (3) the benefits achieved by a regulatory program should ideally approximate those that consumers would purchase if a market in regulatory benefits existed.

Economists differ in the way that they apply efficiency analyses to social regulation, but for the most part they begin with a deep suspicion of rule-based "command-and-control" regulation like that found in the major federal environmental statutes. Rules are suspect because they may be addressed to phenomena that are not, strictly speaking, market failures justifying regulatory intervention;¹²² or they may create inadequate or perverse incentives among the regulated.¹²³ Even if the agency is willing and able (le-

122. The seminal article is Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960). See also S. CHEUNG, *THE MYTH OF SOCIAL COST* (1980); Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1980-81). By "command-and-control regulation" we mean regulation based on uniform rules applied to categories of sources. In the environmental area, the key assumption is that all sources in a given category must apply the same pollution control technology, even if the costs or benefits of doing so vary significantly among sources. For a discussion of the background of command-and-control regulation and efforts to change it, see Meidinger, *On Explaining the Development of "Emissions Trading" in U.S. Air Pollution Regulation*, 7 LAW & POL'Y 447 (1985).

123. Economists generally favor taxes on harmful activities like pollution instead of command-and-control regulation on the ground that taxes target the incentive structure of regulated firms more directly and efficiently than general regulations. See, e.g., A. KNEESE & C. SCHULTZE, *POLLUTION, PRICES, AND PUBLIC POLICY* (1975).

gally, politically, and otherwise)¹²⁴ to take account of these problems in its rule making, it will still face a difficult tradeoff among social costs, rulemaking costs,¹²⁵ and compliance costs that may compel it to issue broad, categorical rules:

In order for legal standards to be cost-effective, the standard-setting body must possess considerable information on the technological and economic conditions surrounding abatement and the degree of harm caused by hazards. The cost of collecting and processing this information will tend to limit the extent to which standards match the least-cost method of abatement. . . . In addition, the standard-setting body will be involved in consultation with . . . regulated and interested parties, . . . giving rise to another set of costs (negotiation and consultation costs) associated with the standard-setting process itself and delay in the enactment of regulation.¹²⁶

Finally, the costs of compliance may differ significantly among firms in any given regulatory category. Thus, command-and-control rules based on assumptions about average costs may impose requirements that are too stringent for some firms and too lax for others. For all of these reasons, the standards to be enforced are likely to be overinclusive in forcing some regulated firms to undertake compliance activities that are not cost justified.¹²⁷

Whatever the cause, if a rule is overinclusive, then full enforcement will be socially counterproductive. Rather than mechanically seeking to compel obedience to such rules, an economically rational enforcer attempts first to identify situations in which application of the rules serves the cause of efficiency and then to induce compliance among regulated firms. The efficient enforcer tries to cut back the scope of the rules at the enforcement stage, in order to maximize "the value of the social utility

124. For a summary of statutory constraints on administrative cost-benefit analysis in rule making, see L. LAVE, *THE STRATEGY OF SOCIAL REGULATION: DECISION FRAMEWORKS FOR POLICY* 8-28 (1981). Political constraints on the Environmental Protection Agency are discussed in J. LASH, *supra* note 91; Marcus, *Environmental Protection Agency*, in J. WILSON, *THE POLITICS OF REGULATION* 267 (1980).

125. As used here, "rulemaking costs" would include the information costs associated with developing and evaluating alternative regulatory actions.

126. Veljanovski, *The Economics of Regulatory Enforcement*, in K. HAWKINS & J. THOMAS, *ENFORCING REGULATION* (1984). For a more technical discussion, see Ehrlich & Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257 (1974).

127. For much the same reasons, the regulations may be underinclusive and fail to prohibit conduct that imposes inefficiently high social costs; see Veljanovski, *supra* note 126. However, few economists have devoted much consideration to this possibility in the recent writings on regulatory enforcement. Judging from the amount of attention given to it, overinclusiveness seems to be considered a more pressing threat to efficiency.

produced, as measured by the harm prevented, less the enforcement costs incurred."¹²⁸

The dominant assumption in the economic literature is that achieving the level of compliance thus defined is largely a matter of manipulating the costs and benefits of rule violation as perceived by the regulated.¹²⁹ Because they are rational actors, regulatory targets will respond according to the size of the potential penalty, discounted by the probability that they will escape liability. Hence, the regulators may generate the appropriate level of compliance by adjusting either the likelihood of detection and conviction or the size of the penalty.

There are major oversimplifications in this model of regulatory compliance, as most economists would be quick to admit. The indeterminacy of marginal calculations of social cost and benefit,¹³⁰ the variance among possible responses of regulated firms (even if one assumes economic rationality),¹³¹ and the manifest social and legal constraints on rational maximizing¹³² are all examples of problems that have been discussed in the regulatory en-

128. Diver, *A Theory of Regulatory Enforcement*, 28 PUB. POL'Y 257, 262 (1980). A slightly different formulation is used in Schwartz, *An Overview of the Economics of Antitrust Enforcement*, 68 GEO. L.J. 1075 (1980), paraphrasing Gary Becker: "In essence, three types of cost must be minimized: The costs resulting from the harmful conduct subject to regulation, the process costs associated with apprehending and determining the guilt of offenders, and the punishment costs associated with imposing a sanction upon the offender." *Id.* at 1076.

129. See, e.g., G. BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* 39-40 (1976); Diver, *supra* note 128.

130. E.g., Diver, *supra* note 128, at 264: "Both elements of that calculation—identifying the class of violators and measuring the social harm prevented—depend on highly unreliable estimates and fragile causal assumptions." Cf. Schuck, Book Review, 90 YALE L.J. 702, 711 (1981).

131. For example, Viscusi and Zeckhauser argue that raising regulatory standards will not necessarily raise quality (such as environmental quality) because firms confronted with a more stringent standard will have different cost-benefit relationships to the new standard: Standards influence the payoffs associated with different quality choices and consequently affect the behavior of the firms. The exact nature of the outcome in terms of the distribution of quality levels achieved hinges on the shape of these payoff curves, the level of the standard, and the distribution of enterprise characteristics. There is no general relationship between the stringency of the standard and the degree of improvement in quality provided; thus raising the standard may either raise or lower average quality.

Viscusi & Zeckhauser, *Optimal Standards With Incomplete Enforcement*, 27 PUB. POL'Y 437, 444 (1979).

132. See, e.g., Block & Sidak, *The Cost of Antitrust Deterrence: Why Not Hang a Price Fixer Now and Then?*, 68 GEO. L.J. 1131 (1980).

forcement literature. Still, the main thrust of the economic view of the regulatory process has attracted widespread support: regulation should be efficient in both its means and its ends. How, then, will private enforcement measure up against the standard of efficiency?

In his 1975 preliminary report to the Administrative Conference on Private Enforcement,¹³³ Professor Jerry Mashaw developed several interrelated hypotheses which support the conclusion that private enforcers are more efficient than regulatory agencies: citizen enforcement may be less costly than official enforcement, the private enforcer may sometimes be in a better position to judge the costs and benefits of a particular prosecution than government officials, the legislature has made a judgment that private enforcement is necessary to increase the total amount of resources available for prosecution, and the threat of competition will stimulate public enforcement efforts. These propositions find some support in the theoretical writings of economists like George Stigler,¹³⁴ but as Mashaw points out, they have not been empirically validated in the context of citizen enforcement of regulatory laws, and they seem suspect in several respects.

Later theoretical writings have concluded that, just as it is difficult to create incentives that will induce regulated firms to undertake the appropriate amount of abatement activity, so also is it difficult to provide the necessary incentives for private enforcers to undertake the optimal level of enforcement—or something close to it.¹³⁵ While government prosecutors are on the public payroll and are therefore expected to make some attempt to weigh the overall public costs and benefits of enforcement activity, private enforcers are—if one subscribes to the standard public goods analysis—much more likely to give weight to matters of purely private gains and losses, such as an estimation of whether the enforcement action will produce an adequate bounty for the enforcer. In a variety of ways, private enforcers may look to their

133. Mashaw, *Private Enforcement of Public Regulatory Provisions: The 'Citizens Suit,'* 4 Class Action Rep. 29 (1975) (Report to the Committee on Compliance and Enforcement Proceedings of the Administrative Conference of the United States).

134. *E.g., Regulation: The Confusion of Means and Ends*, in *THE CITIZEN AND THE STATE: ESSAYS ON REGULATION* (1975).

135. Landes & Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1 (1975); Polinsky, *Private Versus Public Enforcement of Fines*, 9 J. LEGAL STUD. 105 (1980).

own short-term benefits rather than to the aggregate, long-term effects of a particular penalty action. Thus, to answer the question whether private enforcement is desirable, one must address a difficult second-order incentive question: Does the statutory grant of powers and benefits to enforcers, plus whatever other incentives might exist to induce private enforcers to bring suit, generate a number and mix of prosecutions that (when added to the number of cases brought by public enforcement authorities) is closer to the social optimum than the number and selection of cases that would be brought by public prosecutors in the absence of such private enforcement authority?

Even in this relatively simple form, the economic analysis of private enforcement quickly becomes very complicated. Unfortunately, there is very little empirical information available to aid analysis. Consequently, analysts are likely to fill this gap by returning to their initial assumptions. If one's initial premise is that many regulatory rules are overinclusive and that some form of cost-benefit reasonableness is desirable at the enforcement stage, then one is likely to run the presumption against private enforcement and demand a showing that citizen prosecutors are more able to approach the social optimum for enforcement than their government counterparts. Prosecutorial discretion, in this view of the regulatory process, is an important safety valve against the inherent rigidities of command-and-control regulation. It should not be lightly abrogated by deputizing private parties to override a public prosecutor's considered decision to refrain from action.

2. *An Activist View: Underinclusive Rules, Negligible Enforcement.* Where economists (and, to some extent, representatives of the regulated industries) see the regulatory system caught up in rigid rules and inefficient enforcement policies, observers who are more sympathetic to the regulatory mission of the EPA instead see laxity, indecision and drift. One lawyer representing plaintiffs in citizen suits stated it forcefully:

The present system . . . [is] all mush. The company [subject to a permit under the Clean Water Act] violates, has a hundred violations. Now what does it do? It might do nothing. . . . [I]t might come down and talk to the agency a little bit and say, "I'm having a . . . problem." Maybe they're a little nervous so they say, "Well, we'll ask for a permit change [to authorize the discharges]." Well, the agency looks at it, and you know the agency has got a pile of permits around [awaiting action]. And nothing happen[s] for years. Nobody pays any attention, the permit runs out, nobody cares, [no-

body] is paying any attention.

In this view of the process, both the substantive standards embodied in permits and regulations and the enforcement practices of the responsible agencies fall far short of protecting society from unacceptable harm from pollution.

To understand the sources of this perception, it may be helpful to take a brief look at the statute most used in private enforcement, the Clean Water Act, as seen through the eyes of citizen plaintiffs and those who share their beliefs. Like many environmental laws, the Clean Water Act is a complex statute establishing multiple agency decision points, each of which presents opportunities for the decision maker to be either "tough" or "lenient." Since the 1972 legislative amendments,¹³⁶ the primary tool for pollution abatement under the Act is the discharge permit for point sources (industrial or municipal waste outfalls), and the primary means of giving content to the permits are "effluent limitation guidelines"—rules promulgated by the EPA defining the appropriate control technologies for each category of polluting industry.¹³⁷ Despite a legislatively imposed one-year deadline for the issuance of effluent guidelines, the EPA was unable to make rapid progress. As a result, the Natural Resources Defense Council won a judicial victory in 1975 compelling the agency to follow a set schedule for promulgating effluent guidelines.¹³⁸ Since that time the EPA has managed to issue a number of new guidelines,

136. The Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816 (current version at 33 U.S.C. §§ 1251-1345, 1361-1376 (1982 & Supp. I 1983)), replaced a 1948 federal statute which was widely regarded as ineffective. One of the principal shortcomings of the older statute was its primary reliance on stream quality standards rather than discharge limits (which made it necessary to show that a particular discharger's effluent was adversely affecting water quality); in addition, its enforcement system was generally cumbersome and ineffectual. See generally Barry, *supra* note 20.

137. 33 U.S.C. § 1314(b) (1982) directs the Administrator to promulgate effluent limitation guidelines. The guidelines are keyed to the Act's two-stage imposition of technological controls. From the effective date of the Act's permit requirement until 1977, the designated control technology was "best practicable control technology currently available," which is usually shortened to "BPT." § 301(b)(1)(A), 33 U.S.C. § 1311(b)(1)(A) (1982). For the second stage, which was to be achieved by 1984, dischargers were required to meet a somewhat higher standard—"best available technology economically achievable," which is variously abbreviated to "BATEA" or "BAT." § 301(b)(2)(A), 33 U.S.C. § 1311(b)(2)(A) (1982). As might be expected, there has been substantial slippage in this timetable over the years, and most of the permits discussed in this study would have been issued under the BPT guidelines—if indeed there were any guidelines applicable.

138. *Natural Resources Defense Council v. Train*, 510 F.2d 692 (D.C. Cir. 1974).

but the proceedings are usually controversial, protracted, and followed by multiple petitions for judicial review.¹³⁹

In the absence of effective effluent guidelines, the permitting authority (which may be either the EPA or a state agency implementing a control program approved by the Administrator) is forced to rely on its "best professional judgment" when drafting permit limits. "BPJ," as it is known in the trade, permits considerable administrative discretion. According to some of the knowledgeable observers interviewed in this study, that discretion is often tilted in the direction of leniency. One plaintiffs' lawyer reported:

I've seen permits, for example, that have ten, fifteen thousand pounds BOD [biological oxygen demand] limit, and fifteen thousand pounds COD [chemical oxygen demand] limit, together. And they still [violate their permits]. I mean, I can't begin to tell you some of the permits I've seen. . . . [W]e're talking Grand Canyon loopholes for some of these things.

An EPA official provided some corroboration:

You get some real good permits, and you get some trash. [One EPA Region] is famous for writing bubble permits It's supposed to be illegal but they average together all the outfalls. And then what are you going to do? . . . You get a company with ten different processes, and they get to average together everything for their organic loading, for some toxic organic, and they just don't run two or three of the lines on any given day. You get to average in the zeros . . . [I]t works out very well for the company's production management. He doesn't ever have to worry about his permit limits. . . . That gets rid of a lot of cases that might be good, but the permit's just written so loosely that there's not much you can do with it.

Even when effluent guidelines govern the permit-writing process, there may be some grounds to question their stringency. The

139. See, e.g., *CPC Int'l v. Train*, 515 F.2d 1032 (8th Cir. 1975), *cert. denied*, 430 U.S. 966 (1977) (corn wet milling); *American Iron and Steel Inst. v. EPA*, 526 F.2d 1027 (3d Cir. 1975), *cert. denied*, 435 U.S. 914 (1975) (iron and steel); *American Meat Inst. v. EPA*, 526 F.2d 442 (7th Cir. 1975) (meat products); *American Petroleum Inst. v. Train*, 526 F.2d 1343 (10th Cir. 1975) (jurisdiction); *E.I. duPont de Nemours & Co. v. Train*, 528 F.2d 1136 (4th Cir. 1975), *cert. granted*, 425 U.S. 933 (1977), *rev'd in part*, 430 U.S. 112 (1977) (jurisdiction); *E.I. duPont de Nemours & Co. v. Train*, 541 F.2d 1018 (1976), *rev'd in part*, 430 U.S. 112 (1977) (inorganic chemicals); *Tanners' Council of Am. v. Train*, 540 F.2d 1188 (4th Cir. 1976) (leather tanning); *FMC Corp. v. Train*, 539 F.2d 973 (4th Cir. 1976), *rev'd in part*, 430 U.S. 112 (1977) (plastic and synthetic material); *Hooker Chem. & Plastics v. Train*, 537 F.2d 620 (2d Cir. 1976) (phosphorous manufacturing); *Natural Resources Defense Council v. EPA*, 527 F.2d 642 (2d Cir. 1976) (American Frozen Food Inst. v. Train, 539 F.2d 107 (D.C. Cir. 1976) (frozen potato products); *Appalachian Power Co. v. Train*, 545 F.2d 1351 (4th Cir. 1976).

EPA generally has based the guidelines on a “ninety-nine percent confidence interval”—the level of pollution control that the best existing facilities have been capable of meeting ninety-nine percent of the time.¹⁴⁰ Therefore, the specified technology may even fall short of what could theoretically be accomplished with the latest available technology, if that technology has not yet been adopted by existing plants. The guidelines’ stringency may be further tempered by the economic considerations specified in the Act.¹⁴¹ Moreover, industries have succeeded in building into the system some slack for unexpected or unique situations. One important category of exceptions is upsets and bypasses. An “upset” is a malfunction of waste treatment equipment for reasons beyond the operator’s control. A “bypass” is a routine shutdown of control equipment for maintenance. Several cases have held that the EPA must make some allowance for upsets and bypasses, and its regulations now have standard provisions forgiving some of these violations of permit limits.¹⁴²

Variations are also available for plants whose production processes exhibit “fundamentally different factors” when compared to the facilities considered in developing the effluent guidelines.¹⁴³ As the EPA official who was previously quoted described the permit-writing process, application of the effluent guidelines can produce an “amazingly lenient” permit:

If the effluent guidelines . . . [provide that] you [as a regulated discharger] ought to be able to meet [a limit of] a hundred pounds [of a particular pollutant] per whatever [volume of] production you’ve got, by the time that they look at the variances in there, put in the ninety-nine percent, that limit may go up to two hundred or three hundred pounds because you can . . . statistically compute that maybe someday you’ll get up there. And they may even have two or three years of operating data at the facility [showing] that

140. *American Petroleum Inst. v. EPA*, 661 F.2d 340, 347 n.23 (5th Cir. 1981); *see also* *Marathon Oil Co. v. EPA*, 564 F.2d 1253, 1272-73 (9th Cir. 1977).

141. *See supra* note 137.

142. In *E.I. duPont de Nemours & Co. v. Train*, 430 U.S. 112 (1977), the Court held that the Clean Water Act empowered EPA to issue not only effluent limitation guidelines for officials writing individual discharge permits, but also binding regulations directly limiting discharges on a generic basis—“so long as some allowance is made for variations in individual plants, as EPA has done by including a variance clause in its 1977 limitations.” *Id.* at 128. *See also supra* note 140.

143. The EPA’s authority to issue “fundamentally different factor” variances was upheld in *Chemical Mfrs.’ Ass’n v. Natural Resources Defense Council, Inc.*, 105 S. Ct. 1102 (1985).

they've never gotten up there, so [the permit] is higher than the highest limit ever recorded; but yet statistically you can work it out where it says that one time in God knows how many you're going to go above that limit and therefore you have to write the [permit] limit to allow for that. . . . In a lot of cases, it's debatable whether you even have to put in the treatment technology.

In addition to any slack that might be built into the permit itself, there may be considerable slippage at the enforcement stage. As previously noted, the citizen suit plaintiffs and their lawyers typically view government enforcement as a process hobbled by inertia and frequently unable to take any action (much less any vigorous action) to compel compliance. Interview respondents assigned various reasons to this lack of agency enforcement under the Clean Water Act. One emphasized the inherent tendencies of bureaucracies to avoid hard decisions, and of regulators to avoid conflict with important constituency groups. Another felt that the EPA regional office staffs "would like to enforce," but are handicapped by lack of resources and internal agency regulations. Others pointed to the "enormous," "unbelievable" amount of paperwork required to process a referral for court action through the EPA hierarchy and the Justice Department. Whatever the reasons, they believed that government enforcement of the Act had deteriorated to the point where its deterrent value was negligible:

There has been some enforcement, but not a lot of enforcement. And understand, when you start going through these permits, it's the rare company that complies. It's not the other way around. The permits are regularly and generally violated, and the only question is, what's the degree of violation? . . . Most of these defendants will regularly say: "Well, we spent all of this money to try to comply, and we only had a little bit of violation, and why are you suing us . . . because we're trying to work it out?" Or: "Our violation's not really causing any harm, why are you bothering with us?" . . . There certainly is a sense in the corporate community that when they have a permit, they can violate that permit. . . . [T]hat's a truly felt, I think a sincerely felt, opinion. Unless the violation's very significant, there's no problem; the permits don't mean what the permits say.

Other plaintiffs' lawyers used analogies to define what they considered the proper enforcement approach to Clean Water Act violations. One cited the example of police enforcement of traffic speed limits, arguing:

People now know that if they get caught at over fifty-five miles per hour — if they get caught at fifty-seven-point-five — they've got to pay a penalty. . . . [In the Water Act,] we've got to get out of that in-the-ballpark, the-

permit-is-a-guideline concept. The permit is the law, and you will treat it like the law, or you will pay the legal penalties.

Another respondent advocated

the Internal Revenue Service model. They don't tell me on April 15, *try* to pay my taxes. They tell me I am to *pay* my tax bill. If I don't pay it, something bad happens to me. That's my model. That's what I think the Water Act is supposed to do.

This straightforward deterrence model implies a very limited role for prosecutorial discretion. One of the respondents quoted above interpreted the legislative intent behind the Clean Water Act's citizen suit provision as a congressional directive that

once you set the permit numbers there shouldn't be any discretion. Undoubtedly there is a little bit. Obviously if you violate the permit [just] once, nobody wants anybody charging into court to do something about it. But essentially Congress said: "We don't want a lot of discretion. . . . We want it to operate almost automatically."

In this view, a government monopoly over prosecution would—and perhaps did, during the period when few private enforcement actions were brought—simply load more leniency into the regulatory system and seriously undercut voluntary compliance.

3. *A Behavioral View: Contingent Power Complex Social Reality.* A third view of regulatory enforcement is more difficult to summarize than the economic and activist perspectives, perhaps because it emphasizes the complexities that the other two views tend to suppress. This third approach, which might be described as a behavioral perspective, does not deny that the actors in regulatory enforcement proceedings are, in some respects, rational analysts who calculate the net present benefits of alternative courses of action and respond to penal and financial incentives. However, the behavioral perspective also acknowledges that the actors in regulatory enforcement settings, exist within complex social and political structures which serve to create and distort incentives in their own right. To assess the effects of a device like the citizen suit, then, it is necessary to understand the social dynamics that surround a particular field of regulation, as well as the ways in which the entry of private enforcers is likely to alter those relationships.

A starting point for behavioral analysis of regulatory enforcement is the assumption that neither the regulated firm nor the

regulating agency can be treated like a single, utility-maximizing individual. On the agency side, there are a number of splits that serve to divide different subgroups of officials and create the possibility of conflict or strategic behavior. One of the most frequently described gaps is the tension between high-level policy-makers and the "street-level" bureaucrats who actually carry out the detailed work of the agency at an operational level—in this case, writing permits, conducting inspections, recommending prosecutions and negotiating with industry spokesmen. As previously discussed, the Ruckelshaus Administration at the EPA sought to reverse the voluntary compliance philosophy advocated by its predecessor and develop a more deterrence-oriented approach to enforcement.¹⁴⁴ One observer expressed skepticism that this turnabout would produce major changes in behavior at the regional office level, where, in effect, much enforcement policy is made:

It's . . . similar to a lower staff in a bureaucracy, a lower staff autonomy. They have to follow policy and everything else, but it's the *way* in which they follow policy. You know, headquarters says: "We want the major cases." Region hands up all their shit and says, "Those are our major cases." And who's going to challenge it? It's the same thing, you know, if the secretary says: "I can't do it because the word processors are out," "the xerox machine is down." I mean you're stuck. It's not that they're not following what you are saying, it's just that there are all kinds of guerrilla tactics. The regions are great on guerrilla tactics. They've got this down to a fine art.

Even at a particular functional level within an agency, regulators can vary in their approach to enforcement. James Q. Wilson distinguished among three basic types of government officials based on their dominant motivation: careerists who are concerned primarily with the maintenance and survival of the agency, politicians who are using their administrative position as a stepping stone to other offices and professionals who are concerned primarily with developing and displaying competence in a technical discipline.¹⁴⁵ In an agency like the EPA, which has traditionally attracted substantial numbers of staffers committed to the agency's mission of protecting the environment, a fourth category—idealists—should probably be added.

144. See *supra* text accompanying notes 112-120; *Ruckelshaus Worried Citizen Suits Will Reveal Poor Enforcement Record*, INSIDE EPA, May 11, 1984, at 1.

145. J. WILSON, *THE POLITICS OF REGULATION* 374-82 (1980).

One interview subject noted that these kinds of career motivations and disciplinary differences can have a real impact on EPA enforcement activity:

[Typically in the regional offices] you've got a water division director who's got ties to the community, he's got ties to the business community—you know, they're basically engineers . . . who are going to get out in the engineering field eventually, and . . . they're not going to do anything controversial. . . . It used to be the enforcement divisions were all run by attorneys. . . . [T]raditionally, you find that lawyers are not as worried about their future. As a matter of fact, they may be helping their future the more aggressive they are, whereas exactly the opposite is going to be true for any water division director. . . . It may be that [the lawyers] just don't understand the issues as well, you know—the technical issues, so they don't have as many doubts in the back of their minds about what will work and what won't; whereas the water division director, being an engineer, usually has a lot of experiences and is more willing to accept excuses. Like: "Oh, we had a bad day," or "somebody dropped a wrench." Lawyers just didn't want to hear it.

Another respondent familiar with the enforcement process thought that disciplinary differences might be less significant than personal experience and attitude: "I've seen good cases turned back because the lawyer didn't want to do it because it was going to be a tough case. Or because he had dealt with this attorney before and had gotten clobbered. Or he had dealt with this attorney before and he liked him."

As these excerpts suggest, there is evidently a good deal of pulling and hauling within the agency over the shape of enforcement policy, both in general and in individual cases. These conflicts are multiplied when state agencies are also involved in enforcing environmental standards. The sudden upsurge in private enforcement actions might well disrupt or challenge the network of norms, assumptions and understandings that have grown up within the EPA and its counterpart state agencies. Because such norms and understandings can serve negative as well as positive functions, disrupting them is not necessarily bad. It is difficult, however, to anticipate and understand all of the effects on this complex system which will result from any change in practices. In this way, widespread use of citizen suits raises the possibility of unforeseen upheavals in established enforcement relationships.

Similar observations have been made about the behavior of regulated firms. Legal sanctions may fail to penetrate to the appropriate operational levels of the company because of interven-

ing bureaucratic or social processes.¹⁴⁶ For example, a former government attorney tells of an environmental enforcement negotiation in which the company was unwilling to settle because that would entail an admission of a very costly error by a high-ranking corporate official:

The Senior VP for Engineering had no doubt designed the [treatment system]. So they couldn't chuck the stuff they had out there. And the reason they were having such problems was not that it was misdesigned in the sense that, yeah, the concept was good, but because the wind blew across the top of the great big lagoons and churned things up when they're supposed to be settling ponds. . . . They sized it right and everything, but they forgot the indirect stuff.

An enforcer who fails to understand and deal with these dynamics in the regulated firm is likely to be ineffective or possibly counterproductive. Recent studies of regulatory enforcement have concluded that the inspector who "goes by the book" and mechanically cites all violations without regard to seriousness or extenuating circumstances will likely be perceived as unreasonable, and may therefore provoke resistance rather than cooperation from the regulated.¹⁴⁷

A more effective strategy may be to tailor enforcement responses to the reasons for violation. Professors Kagan and Scholz¹⁴⁸ have suggested that regulators need to distinguish between at least three types of noncompliance. Some percentage of violations—usually a relatively small percentage—will be committed by "amoral calculators" similar to the rational maximizers hypothesized in economic analysis. Because these firms respond primarily to the likelihood and severity of penalties, a deterrence strategy, backed by vigorous policing, is the appropriate enforcement technique. Another—probably larger—percentage of regulated firms can be characterized as "political citizens" who will generally comply with legal requirements so long as they believe

146. *E.g.*, C. STONE, *WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR* (1975); Stone, *Large Organizations and the Law at the Pass: Toward a General Theory of Compliance Strategy*, 1981 WISC. L. REV. 861.

147. E. BARDACH & R. KAGAN, *GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS* (1982); *see also* K. HAWKINS, *ENVIRONMENT AND ENFORCEMENT: REGULATION AND THE SOCIAL DEFINITION OF POLLUTION* (1984).

148. Kagan & Scholz, *The Criminology of the Corporation and Regulatory Enforcement Strategies*, in *ENFORCING REGULATION* 67 (K. Hawkins & J. Thomas eds. 1984). *See also infra* note 174.

that those requirements are legitimate, reasonable and generally enforced. For this category of firms, the regulator's task is two-fold: he must persuade the recalcitrant that the rules in question are sensible and necessary, and he must adapt the rules to meet valid business problems that would be caused by literal-minded enforcement. Finally, some percentage of noncompliance will be caused by organizational incompetence, such as lack of knowledge of pollution control technologies or failure to hire the right kinds of people to run a control program. In these situations, the regulator is most effective in the role of a consultant who tries to educate the firm about better ways of dealing with pollution problems.

Making these kinds of distinctions and selecting an appropriate enforcement response can be difficult for an established government bureaucracy, as witnessed by the recent political troubles of agencies like the Occupational Safety and Health Administration and the Federal Trade Commission. The citizen enforcer labors under additional handicaps. For one, they do not carry the legitimacy of the public official which, though it may have diminished in recent years, still commands a degree of deference and respect from the private sector. An environmental lawyer with experience in government described the difference in the following terms:

The companies don't like it when EPA knocks on [their] door. They understand that EPA's got the right to do it, but they grouse about it and they get defensive . . . And so it's difficult. It is more difficult by a hundred degrees when you've got a private citizen client and you're involved in this, because [they think]: "Who the hell are you to tell me how to run my plant?"

The citizen plaintiffs are confronted with the problem of establishing their credibility and legitimacy as enforcers, an issue that often surfaces in the legal disputes over standing discussed below.

Another problem facing citizen enforcers is that they are generally following a much more vigorous enforcement policy than the responsible government agencies in at least two respects: in the number and kinds of cases brought, and in the level of penalties sought. This discrepancy is obvious to the regulated firms, and it can easily lead to a feeling that they are being whipsawed between inconsistent requirements or treated arbitrarily. As a defense lawyer asked:

[I]s it fair today—retroactively—to go back and do something to these dis-

chargers which the agencies themselves did not and would not have done, had they been in control and prosecuting? The point [of the citizen suit provisions] is to get the citizens to do what the agencies would have done

To some degree, this may be a transitional problem that can be solved by some of the procedural techniques described below, such as greater elaboration of case selection criteria and penalty policies. In the meantime, however, the discrepancy between agency and citizen group enforcement policy seems likely to be a continuing source of friction between private enforcers and the regulated industries. From a behavioral perspective, then, one of the most important questions about the current upsurge of citizen suits is whether it will lead to a stable set of relationships among the environmental organizations, regulated industries and regulatory agencies in which the private enforcement action is regarded as an established, legitimate and reasonable feature of the regulatory process.

In the first wave of private enforcement litigation, the simple deterrence model favored by the plaintiff organizations has largely been accepted by the courts. This is most evident in the unsympathetic treatment given to the various defenses asserted by dischargers, which is described in more detail in the following sections. Courts adjudicating private enforcement actions have frequently ignored technical defects in notice and have routinely upheld standing based on a simple showing of harm to recreational and aesthetic interests. They have also narrowed the "diligent prosecution" bar, so that few government enforcement actions will prevent private parties from bringing suit on the same violations. On the merits, they have treated the permittee's discharge monitoring reports as admissions and have generally rejected the defense argument that plaintiffs should be required to show continuing violations as a prerequisite for relief. Occasionally, the courts have also expressed their irritation at the failure of dischargers and government enforcement agencies to resolve long-standing violations of law. In *Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd.*,¹⁴⁹ one of the few private enforcement suits that have reached the penalty stage, the court rejected the defendant's argument that the fine should be reduced because its compliance delays were caused by factors beyond its control:

149. 611 F. Supp. 1542 (E.D. Va. 1985).

Contrary to Gwaltney's contention, the Court believes that Gwaltney's penalty ought to be increased, not reduced, because of willfulness. Gwaltney's lackadaisical approach in correcting a problem that posed risks—albeit not “imminent” ones—to both human health and aquatic life should not be countenanced. One may speculate how long Gwaltney would have taken to repair a machine the faulty operation of which would have halted production. . . . [A]t the very least Gwaltney would have exerted more effort to repair such a machine than it did to bring its discharge into compliance with pollution standards.¹⁵⁰

The court went on to impose a \$1.3 million civil penalty on Gwaltney, most of which was designed to deter possible future violations by Gwaltney or other similarly situated polluters.

While simple deterrence has generally prevailed in court, still there are lingering problems that are partly doctrinal, partly managerial and partly attitudinal. They relate to the coordination of public and private enforcement, to the incentives that are created by and for private enforcement actions, and to the legitimacy and accountability of private enforcers.

V. COORDINATING ENFORCEMENT

A. *Consistency in Enforcement Policy*

The goal of coordination in regulatory enforcement policy (that is, the notion that there should be a minimum degree of consistency in enforcement policy, regardless of who is enforcing the law) starts from a simple premise. As a matter of basic fairness, like cases should be treated alike. If two permit violators are equally deserving of punishment, and one receives a heavy fine while the other is not penalized, the system has failed to achieve

150. *Id.* at 1561-62. See also *United States v. Metropolitan Dist. Comm'n*, No. 85-0489, slip op. at n.9 (D. Mass. Sept. 5, 1985), involving consolidated public and private enforcement actions, where the court expressed dismay at a sewer district's continuing failure to make progress toward compliance with simple sewage treatment requirements that had been in effect for nearly a decade:

As I delve into the record in this case, it becomes more and more incomprehensible to me that the defendants have continually discharged the sludge back into the Harbor daily. By doing so, they virtually eliminate any benefit the initial treatment steps may have had. This simply amounts to separating water from filth, and pumping both back into the Harbor.

The court rejected a request by the sewer district and the EPA for more time to negotiate a settlement of the case, noting: “I simply do not have any adequate assurance that the community's federally guaranteed right to a clean harbor will be protected if the parties are left to their own devices.”

fairness between the parties.¹⁵¹ Inconsistencies of this kind can also impair the efficiency and effectiveness of enforcement. If the perception of inequity becomes widespread, voluntary compliance may be undermined. Inconsistency in enforcement policy invites litigation rather than settlement, and litigation generates additional delays and costs, as well as the risk of adverse precedent. In theory, then, enforcement should be consistent both at the level of policy and at the level of implementation.¹⁵² Consistency may be a frustratingly difficult goal to achieve, even without the complicating presence of private enforcement. In a complex regulatory structure like the Clean Air or Clean Water Act, consistency implies codification and formal regularization of enforcement activity. However, enforcement policy is an intricate blend of moral judgments about what the defendant deserves, technical evaluations of the causes and consequences of particular violations, pragmatic assessments of what can be accomplished with available resources, legal opinions about the chances of winning and the precedential significance of various outcomes, and managerial judgments about the ways that various enforcement actions will affect norms and relationships in the relevant bureaucracies. Codifying enforcement policy in a way that reasonably accommodates these potentially conflicting demands is not impossible, as evidenced by the EPA's preliminary success in codifying portions of its enforcement policy. But codification is not achieved without significant effort and cost.

The costs of codifying enforcement policy include the intel-

151. The classic statement of this equal treatment rationale is K. DAVIS, *DISCRETIONARY JUSTICE* (1969).

152. This seems to be the dominant theory today. Inconsistency might be defended on deterrence grounds. If a few violators were arbitrarily selected for severe punishment, the resulting uncertainty might increase general deterrence, at least if substantial numbers of violators were risk-averse. Another theoretical justification for inconsistency, especially in a national environmental program like air or water pollution, would be the desirability of tailoring enforcement to local needs and desires. It might be argued that if New Jersey's voters prefer job preservation over cleaning up the environment, and New York's voters have the opposite preference, those preferences ought to be reflected in enforcement policy, even if this produces inconsistent outcomes. (This assumes that the legal structure has not created formal consistency by including regional location as a variable in the penalty calculus.) The federal environmental programs are mostly designed to establish uniform national standards; however, there still may be some room to accommodate differing state preferences, at least where those preferences are for more stringent controls than the federal programs require.

lectual and personnel resources needed to think through, describe and defend enforcement policy, as well as the loss of some flexibility and deterrent value. As with other rules, enforcement policies may omit some relevant factors and become overinclusive or underinclusive, thereby introducing a destructive element of rigidity where flexible discretion is needed. Moreover, to the extent that enforcement policies officially define some offenses as so low in priority that they escape sanctions altogether, codification lessens deterrence and undermines the applicable rules and standards.

Notwithstanding these costs, some areas of enforcement policy still seem worth codifying. When multiple entities inside and outside government are enforcing regulatory laws, codification is necessary to achieve fairness for the regulated and to improve the quality and acceptability of enforcement policy. Moreover, as the following section indicates, the coordination device provided in the citizen suit statutes has largely failed to achieve its intended purpose. As a result, codification of policy has become the primary method for achieving some consistency in the enforcement process.

B. *The Irrelevance of the Diligent Prosecution Exemption*

The Clean Water Act, like most of the statutes containing citizen suit provisions, has two related mechanisms for coordinating public and private enforcement. Potential plaintiffs are required to give sixty days' notice to the EPA, the discharger and the state where the alleged violation took place before filing an enforcement suit.¹⁵³ In addition, the private action is barred if one of the responsible government agencies is prosecuting a penalty action against the violator.¹⁵⁴ In theory, this system permits the government enforcers to take control of the matter by bringing their own action during the sixty-day waiting period and relegating the private enforcer to intervention in the government's suit.¹⁵⁵ As a practical matter, however, these provisions have been

153. 33 U.S.C. § 1365(b)(1)(A) (1982).

154. 33 U.S.C. § 1365(b)(1)(B) (1982).

155. The Senate Report on the Clean Water Act states: "The time between notice and filing of the action should give the administrative enforcement office an opportunity to act on the alleged violation." S. REP. NO. 414, 92d Cong., 2d Sess. 80, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 3668, 3745. The Act provides that "any citizen may intervene as a matter of right" in a government enforcement action, 33 U.S.C. § 1365(b)(1)(B) (1982).

largely ineffectual in coordinating public and private enforcement. They have instead provided a context within which a variety of informal coordination mechanisms and activities have evolved.

The principal reason why the notice-and-preclusion system has not functioned as originally intended is that sixty days is not sufficient time in most cases to process a referral package from the EPA regional office, through EPA headquarters and the Justice Department's Lands Division, and back to the local U.S. Attorney who actually files the case. In response to the pressure of citizen suits, the EPA has made some attempts to streamline this case referral process, but these changes do not affect the great majority of private enforcement cases against major polluters.¹⁵⁶ Thus, unless the government is on the verge of filing an action when the notice letter arrives, it is not likely to win the race to the courthouse if the plaintiff organization is intent on filing its complaint as soon as possible. Usually, however, plaintiff organizations do not rush to file complaints as soon as the waiting period runs out. Instead, they engage in a variety of informal contacts with proposed defendants and government enforcers. These contacts provide an opportunity for coordinating effort and policy.

Settlement talks between plaintiffs and defendants frequently follow the mailing of a notice letter.¹⁵⁷ Since the notice letter is a

156. In 1983, the EPA negotiated a memorandum of understanding with the Justice Department to permit "direct referrals" of certain kinds of enforcement cases from the EPA regional offices to Justice Department's Lands and Natural Resources Division, thereby cutting out the EPA headquarters review. However, the categories of Clean Water Act cases thus exempted have not figured prominently in the current wave of citizen suits: discharges without a permit, violations by minor industrial dischargers, collection of penalties stipulated in consent decrees and collection of administrative spill penalties. All other referrals have to be reviewed in EPA headquarters both by the Office of Enforcement and Compliance Monitoring, and by the program office. The direct referral system was established for a one year trial period; however, no information has been found about the termination or continuation of the program after September of 1984, when it was due to expire. Letter from Alvin L. Alm, Deputy Administrator, USEPA, to F. Henry Habicht, II, Acting Assistant Attorney General, Lands and Natural Resources Division, USDOJ (Sept. 29, 1983).

157. In the current wave of citizen suits, which are largely the product of file searches and review of agency documents, receipt of the notice letter is often the first direct contact between plaintiff and defendant. By contrast, there has usually been substantial prior contact in the long-running local controversies that one interviewee termed "blood feuds." In the latter disputes, the issues in the debate are well known in the local area. When the case is generated from a review of file documents, however, it is possible that local members of the plaintiff organization have not had any contact with the discharger. Indeed, it may be

formal document specifying the details of alleged violations and explicitly threatening suit, it evidently serves as a powerful prod to negotiations. In the course of these negotiations, the plaintiff, the defendant or both may contact the EPA and the state agency for information and opinion on the seriousness of the violation, the efficacy of the proposed remedies, the reasons why the discharger has been unable to achieve compliance, and similar issues.¹⁵⁸ In some instances, plaintiff organizations may delay filing a complaint with the expectation that government enforcers will get approval to bring their own action within a reasonably short period of time. Alternatively, the citizen groups may try to convince the government to become a co-plaintiff or intervenor in the enforcement action. If negotiation fails to produce a mutually satisfactory result, the plaintiffs have the leverage to move the controversy closer to a formal resolution by filing a complaint. The diligent prosecution bar seems to have little effect in these informal negotiations, since the government usually cannot credibly threaten to invoke it.

A second problem with the diligent prosecution exemption is that the courts have not yet been able to generate a consistent and workable body of doctrine applying it. At the threshold, the issue occasionally arises as to whether notice requirements are jurisdictional prerequisites for citizen suits that must be strictly observed or are instead technicalities that may be waived by the court when there is substantial compliance or actual notice. Court decisions have split on this issue. The majority of opinions conclude that technical defects may be overlooked, so long as the defendants and the responsible government agencies had actual notice that a citizen suit was being prepared.¹⁵⁹ One of the leading cases reach-

difficult to find local people who are willing and able to take on this responsibility. Some of the lawyers of the plaintiff organizations feel that it would be improper for them to make contact with the alleged violator at a time when the matter seems headed for litigation. In addition, many of them probably have little time to do so, given the caseloads of citizen suits and other matters pending in their offices.

158. Unfortunately, we have no good data on the frequency of these agency/party contacts.

159. *E.g.*, *Proffit v. Comm'rs, Township of Bristol*, 754 F.2d 504, 506 (3d Cir. 1985); *Pymatuning Watershed Citizens for a Hygienic Env't v. Eaton*, 644 F.2d 995, 996 (3d Cir. 1981); *Susquehanna Valley Alliance v. Three Mile Island*, 619 F.2d 231, 243 (3d Cir. 1980); *Friends of the Earth v. Carey*, 535 F.2d 165, 175 (2d Cir. 1976). The cases in which notice defects were held to be jurisdictional bars to a citizen suit were mostly actions in which plaintiffs were trying to bring trivial or inappropriate claims under the private en-

ing the opposite result, *Walls v. Waste Resource Corp.*,¹⁶⁰ makes two plausible, but empirically unsupported, policy arguments for strict construction of the notice provisions. The first justification is the court's belief that the notice period is necessary "to give EPA an opportunity to resolve issues regarding the interpretation of complex environmental standards . . . unhindered by the threat of an impending private lawsuit."¹⁶¹ As previously noted, however, the sixty-day period is far too short for the agency to even complete a routine case referral, much less to resolve complex policy issues or statutory interpretations.

The second reason that the *Walls* court insists on literal compliance with the notice provision is congressional intent to foster consent settlements during the sixty-day waiting period: "Congress evidently believed that the filing of a private lawsuit hardens bargaining positions and leaves the Administrator with less room to maneuver."¹⁶² But if the sixty days is insufficient time for government enforcers to make a decision on whether to sue, it is even less adequate to permit a decision on whether to settle the controversy. Even if the time were adequate, the defendant would have little incentive to settle with the government because the settlement would not provide reliable protection against citizen suits. Thus, if the drafters did have the intent ascribed to them by the *Walls* court, they evidently did not foresee the ways that the notice-and-preclusion system would work in practice. Given the slow pace with which government makes and implements enforcement decisions, and the technical issues that have arisen over trivial notice defects,¹⁶³ it is clear that this requirement has made few sig-

forcement provision. Two were actions arising out of grants or contracts for the planning or construction of sewage treatment plants, *Concerned Citizens of Bushkill Twp. v. Costle*, 468 F. Supp. 21 (E.D. Pa. 1978), *aff'd*, 592 F.2d 164 (3d Cir. 1979); *Ventnor City v. Fri*, 6 Env't Rep. Cas. (BNA) 2104 (D.N.J. 1974); one was an attempt to recover damages through an implied right of private action under the citizen suit provision, *City of Evansville v. Kentucky Liquid Recycling*, 604 F.2d 1008 (7th Cir. 1979), *cert. denied sub nom.*, *Louisville & Jefferson County Metropolitan Sewer Dist. v. City of Evansville*, 444 U.S. 1025 (1980).

160. 761 F.2d 311 (6th Cir. 1985).

161. *Id.* at 317.

162. *Id.*

163. See, e.g., *Chesapeake Bay Found. v. Bethlehem Steel Corp.*, 608 F. Supp. 440, 450-51 (D. Md. 1985) (defense claim that a second notice had to be given for violations occurring after initial notice rejected because "[i]t would be incongruous with [the plaintiffs'] right to sue for a continuing violation to conclude that specific incidents of non-

nificant contributions to the coordination of public and private enforcement.

If the plaintiffs' notice is adequate, the next issue that frequently arises in private enforcement litigation is whether the government's previous attempts to abate the pollution in question constitute diligent prosecution, thereby barring the suit. Since virtually every major pollution controversy comes to court with a long history of enforcement (or nonenforcement), defendants routinely raise the diligent prosecution defense, claiming that federal or state authorities have adequately dealt with the problems described in the complaint. These enforcement histories are highly variable, and the courts have little guidance from the statute or legislative history in trying to determine what sorts of prior enforcement can trigger the bar.

To date, two issues have dominated litigation over the diligent prosecution exemption. The first question is whether an administrative sanctioning process can ever be considered the equivalent of a court action for purposes of the diligent prosecution exemption. The citizen suit provisions generally state that private actions are barred only when the responsible government authorities are maintaining "a civil or criminal action in a court of the United States or a State to require compliance."¹⁶⁴ However, the major environmental statutes create a system of enforcement in which many government attempts to induce compliance take place in administrative rather than judicial proceedings. The EPA, for example, typically has the power to issue administrative orders against violators. These orders may carry sanctions for violations, as they do under the Clean Air Act; or they may function as voluntary compliance agreements that cannot be separately enforced, as under the Clean Water Act.¹⁶⁵ In "delegated states,"

compliance within the sixty day notice period could not be sued upon because of a lack of statutory notice"); *Student Pub. Interest Research Group v. AT&T Bell Laboratories*, 617 F. Supp. 1190 (D.N.J. 1985) (failure of one plaintiff organization to give notice does not require that they be dismissed from the action when other plaintiff has given adequate notice); *Student Pub. Interest Research Group v. Tenneco Polymers*, 602 F. Supp. 1394, 1396 (D.N.J. 1985) (failure of one of three plaintiff organizations to give notice does not require dismissal of that party from suit); *Sierra Club v. Raytheon Co.*, slip op. No. 84-1785 (D. Mass. Oct. 26, 1984) (notice sufficient when sent to defendant's president and plant supervisor, but not to registered agent as provided in EPA regulations).

164. 33 U.S.C. § 1365(b)(1)(B) (1982) (Clean Water Act).

165. In the situation where a discharger violates an EPA administrative order under the Clean Water Act (for example, by failing to meet a compliance schedule for installing a

where primary enforcement responsibility has been taken over by state agencies, the range of possible sanctions and procedures is even greater.

The courts have split on the question of whether an administrative enforcement process can ever trigger the diligent prosecution exemption. The Third Circuit considered this issue first in an early Clean Air Act case, *Baughman v. Bradford Coal Co.*¹⁶⁶ The court concluded that an administrative tribunal could be considered the functional equivalent of a court, if it had decision making procedures and remedial powers comparable to those possessed by the federal courts. However, the Second Circuit recently reached the opposite conclusion in *Friends of the Earth v. Consolidated Rail Corp.* by relying on the literal meaning of the statute.¹⁶⁷ In practice, these divergent approaches may make little difference, since the courts applying the *Baughman* test have generally concluded that administrative proceedings are deficient in either or both their sanctions and their procedural rights (such as intervention).¹⁶⁸ The *Baughman* approach does require more data and

treatment system), the agency would have the option of going to court for penalties on the underlying violations. In this situation, the defendant may raise defenses of laches, waiver, or estoppel against the government, citing the administrative order as government acquiescence in prior violations. Compare *United States v. Amoco Oil Co.*, 580 F. Supp. 1042 (W.D. Mo. 1984) (no defense of laches or estoppel against the government) with *United States v. Del Monte de Puerto Rico, Inc.*, 586 F.2d 870 (1st Cir. 1978) (defendant's claim that the EPA waived compliance by approving a schedule change held sufficient to prevent summary judgment on penalty for Clean Water Act violations). In *Heckler v. Community Health Servs.*, 104 S. Ct. 2218 (1984), the Supreme Court held that the government generally cannot be estopped from enforcing the law, even though the regulated firm may have relied to its detriment on erroneous government advice. See also *infra* note 175.

166. 592 F.2d 215 (3d Cir.), cert. denied, 441 U.S. 961 (1979).

167. 768 F.2d 57 (2d Cir. 1985).

168. E.g., *Proffitt v. Comm'rs Township of Bristol*, 754 F.2d 504, 507 (3d Cir. 1985) ("Plainly, EPA's compliance order lacks the indicia of a 'court action' enunciated in *Baughman*, particularly the right of citizens to intervene . . ."); *Student Pub. Interest Research Group v. Fritzsche, Dodge & Olcott, Inc.*, 759 F.2d 1131, 1135-39 (3d Cir. 1985) (lack of public participation in administrative enforcement proceedings is a relevant but not determinative factor; EPA administrative order under Clean Water Act not equivalent to court action); *Sierra Club v. Simkins Indus.*, 617 F. Supp. 1120 (D. Md. 1985) (state administrative proceeding not equivalent to a court proceeding under *Baughman* because state agency lacks "the full remedial powers inherent to traditional judicial courts"); *Student Pub. Interest Research Group v. Georgia-Pacific Corp.*, 615 F. Supp. 1419 (D.N.J. 1985) (consent settlement with the EPA and state agency no bar to citizen suit under *Bradford* test, even though settlement was filed in court); *Student Pub. Interest Research Group v. Monsanto Co.*, 600 F. Supp. 1479, 1482-83 (D.N.J. 1985) (EPA administrative order under Clean Water Act does not meet *Baughman* test); *Student Pub. Interest Research Group v. Ten-*

analysis, however, and as a result, it may increase costs and delays.

Even if the government enforcement action meets the court proceeding test, it still must be diligent in order to bar a citizen suit. This is a difficult standard for the courts to apply. Neither the statutes, the legislative history nor analogous areas of law provide much guidance in determining when environmental enforcement is sufficiently diligent. Apart from a few easy cases, like the situation where a citizen group was able to show that a government enforcement order violated the Clean Water Act,¹⁶⁹ it is not clear that the courts will be able to develop judicially manageable standards for measuring diligence.¹⁷⁰ As the Supreme Court recently noted in *Heckler v. Chaney*, prosecutorial discretion has gen-

neco Polymers, Inc., 602 F. Supp. 1394, 1397-98 (D.N.J. 1985) (EPA order under Clean Water Act no bar to citizen suit because agency lacks sanctioning power, and citizens have no opportunity to participate); *Student Pub. Interest Research Group v. American Cyanamid*, No. 84-1784, slip op. (D.N.J. Nov. 6, 1985) (EPA administrative order under Clean Water Act not equivalent to a court); *Sierra Club v. SCM Corp.*, 572 F. Supp. 828 (W.D.N.Y. 1983); *Love v. New York Dep't of Envtl. Conservation*, 529 F. Supp. 832, 844 (S.D.N.Y. 1981) (state consent order held no bar to citizen suit, primarily because state prosecution not considered diligent. The court also notes: "Furthermore, no hearings were ever held and it does not appear that the plaintiff had the opportunity to intervene."). See also *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 375-76 (10th Cir. 1979) (EPA may bring penalty action against Clean Water Act violator who is already subject to administrative order, without showing that order was violated).

169. *Student Pub. Interest Research Group v. Fritzsche, Dodge & Olcott, Inc.*, 579 F. Supp. 1528, 1535-37 (D.N.J. 1984), *aff'd*, 759 F.2d 1131 (3d Cir. 1985).

170. For example, in *Love v. New York Dep't of Envtl. Conservation*, 529 F. Supp. 832, 844 (S.D.N.Y. 1981), the court brushed aside a diligent prosecution defense with the conclusory statement: "It does not appear that [the state agency] enforced the environmental laws to the fullest extent possible." If the diligence test turned on whether the agency had enforced against a particular violator "to the fullest extent possible," then the diligent prosecution exemption would become a virtual nullity. An alternative holding in *Student Pub. Interest Research Group v. American Cyanamid*, No. 83-2068, slip op. at 6 (D.N.J. Nov. 6, 1985), looked to penalties and deterrence theory in determining diligence. It accepted plaintiffs' argument that state agency prosecution had not been diligent because the agency had not imposed any penalties during an eight-year running dispute over compliance. In making this determination, the court cited the EPA's 1984 penalty policy for the proposition that money penalties "are often necessary even if the underlying violation has been corrected, to deter future violations, and to restore economic equity to other regulated parties." It is not clear from the opinion how much latitude a state agency (or, for that matter, the EPA itself) would have to move from a penal enforcement policy to a voluntary compliance policy that emphasized cooperation and negotiation. Even under a strict deterrence rationale, presumably an agency could "plea bargain" at least some cases by forgiving some violations in exchange for a consent settlement. Apart from extreme cases, it is difficult to see how a reviewing court could second-guess the agency decision to accept a voluntary compliance agreement without venturing outside the bounds of its competence.

erally been immune from judicial review because "[t]he agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities."¹⁷¹ The diligence test effectively invites the courts to enter the thicket that the Supreme Court was careful to avoid in *Chaney*.¹⁷²

As presently applied, the statutory notice-and-preclusion system accomplishes little in the way of coordination, with some cost in terms of increased litigation and uncertainty of result. One possible response is to lengthen the waiting period. This would provide the government with a more realistic opportunity to make and execute its own enforcement decisions after receiving a citizen notice letter. The 1984 amendments to the Resource Conservation and Recovery Act take a step in this direction by extending the waiting period between notice and suit to ninety days.¹⁷³ From the government's perspective, this longer period is probably still inadequate in many cases. Moreover, simply extending the waiting period does not address the problems of where the line between diligent and dilatory should be drawn, and how the definition of reasonable diligence might vary among defendants, regulatory programs and types of violations. More fundamentally, it appears that framing the issue in terms of the government's diligence may ignore some of the most important factors defining the relationship between public and private enforcement.

Diligence, at least in its common usage, seems premised on a simple theory of deterrence. The diligent prosecutor will bring the largest number of cases possible with the available resources and seek the most stringent penalties against the most deserving

171. 105 S. Ct. 1649, 1656 (1985).

172. It is true that the diligence determination in a citizen suit does not involve as direct a challenge to agency priority setting as the kind of judicial review attempted in *Chaney*. A court determination of nondiligence in a citizen suit would simply permit the private action to go forward, leaving the agency otherwise free to set and execute its own priorities. There remains the problem of how the court would find or develop standards to assess the administrative decision. Once an agency says "this is the most we can do on this particular case, given the resources we have and the other problems that require our attention," it seems difficult at best for a reviewing court to decide whether the resources invested by the agency were enough. However, it may be possible to find judicially manageable standards for cases of widespread or systematic failures to enforce. See generally Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653 (1985).

173. Hazardous and Solid Waste Amendments of 1984, § 401(d), 98 Stat. 3221, 3269-70, amending the Solid Waste Disposal Act to bar suit for 90 days "after the plaintiff has given notice of the endangerment" (to be codified at 42 U.S.C. § 6972(b)(2)(a)).

violators. Ideally, though, it is less important to know how hard the prosecutor is trying than it is to know how effective s/he is. The ultimate question is how particular citizen suits will affect compliance among the regulated community. Deterrence may not be the best route to that result. According to some behavioral theories of regulatory enforcement,¹⁷⁴ private suits that contradict prior governmental acceptance of a firm's pollution abatement efforts could undermine the authority and credibility of a company's engineers and managers who are responsible for environmental controls. In the long run, this could diminish a regulated industry's willingness and ability to reduce environmental harm.

A different approach, one which might make it easier to address these concerns, is suggested by the attempts of some defendants in citizen suits to "put the whole picture" before the court. This translates into presenting information showing that there were excuses for the violations that did occur, that the government took reasonable enforcement action in light of the circumstances, or that any resulting pollution did not cause significant harm to public health or the environment. There are a variety of doctrinal bases that defendants can use to make this kind of presentation.¹⁷⁵ The one most relevant for present purposes is the ef-

174. See, e.g., E. BARDACH & R. KAGAN, *GOING BY THE BOOK* (1982). Bardach and Kagan argue that overly rigid, "by-the-book" enforcement can demoralize and impede the "trusteeship stratum" of professionals, technicians and managers who are responsible within the firm for achieving compliance with environmental laws. They conclude that "the social responsibility of regulators, in the end, must be not simply to impose controls, but to activate and draw upon the conscience and the talents of those they seek to regulate." *Id.* at 323. This analysis has been sharply attacked. See Abel, *Risk as an Arena of Struggle*, 83 *MICH. L. REV.* 772 (1985). We do not mean to suggest that the Bardach and Kagan analysis is factually correct in the field of regulation discussed in this Article. At present, we lack sufficient data to accept or reject its applicability to citizen environmental suits. But it does have enough plausibility to raise concerns about the potentially destructive effects of overly rigid enforcement.

175. One legal basis for making this kind of presentation is the standing doctrine, which defendants may use to show that the discharges in question caused only negligible injuries to persons or to uses of the waterway. See *infra* text accompanying notes 242-77. Similarly, defendants have argued (thus far without success) that courts should recognize a de minimis defense. See, e.g., *Student Pub. Interest Research Group v. American Cyanamid*, No. 83-2068, slip op. (D.N.J. Nov. 6, 1985); *Student Pub. Interest Research Group v. National Starch & Chem. Corp.*, No. 84-1119 (D.N.J. Oct. 15, 1985); *Student Pub. Interest Group v. AT&T Bell Laboratories*, 617 F. Supp. 1190 (D.N.J. 1985). Defendants may assert that prior government enforcement activities constitute waiver, estoppel, or laches barring private actions relating to the same discharges, but these defenses have also proved unsuccessful. See, e.g., *Student Pub. Interest Research Group v. Georgia-Pacific Corp.*, 615

fort to have government enforcers participate in citizen suits.

Government agencies may be brought into the private suit as intervenors, as witnesses or as amici curiae. Their participation may be either voluntary or coerced.¹⁷⁶ Whatever the basis from which governmental enforcers participate, they have potentially useful information to present to the court regarding the compliance history of the facility in question. They know how and why the violations occurred, their impact on other uses of the waterway, the efforts of the defendant to achieve compliance, the rationale for the various enforcement actions that the agency has taken, and the practicality of the various remedial alternatives the court may be considering. Even if this sort of information would not justify barring the citizen suit, it seems highly relevant to one of the most difficult aspects of citizen suits—the imposition of penalties.

The EPA and the delegated state agencies have generally not

F. Supp. 1419 (D.N.J. 1985); *Sierra Club v. C.G. Mfg.*, No. 84-1784, slip op. (D. Mass. Apr. 12, 1985); *United States v. Metropolitan Dist. Comm'n*, No. 85-0489, slip op. (D. Mass. Sept. 5, 1985); *Student Pub. Interest Research Group v. Anchor Thread Co.*, 22 Env't Rep. Cas. (BNA) 1150 (D.N.J. 1984); *supra* note 165. The primary jurisdiction doctrine, which would require the court to defer to pending proceedings, has also been used by defendants, and occasionally this argument has prevailed. Compare *Montgomery Env'tl. Coalition v. Washington Suburban Sanitary Comm'n*, 607 F.2d 378 (D.C. Cir. 1979) (primary jurisdiction doctrine bars injunction against polluting authorities while permit renewal is pending) with *Student Pub. Interest Research Group v. Monsanto Co.*, 600 F. Supp. 1479 (D.N.J. 1985) and *Connecticut Fund for the Env't v. Job Plating Co.*, 623 F. Supp. 207 (D. Conn. 1985) (primary jurisdiction argument rejected). A related argument was made in *Maryland Waste Coalition v. SCM Corp.*, 616 F. Supp. 1474 (D. Md. 1985), where the defendant argued that the federal court should defer to a pending state court proceeding under *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). This argument was rejected because the defendant had failed to show beyond "any substantial doubt" that the state proceeding would provide a complete and prompt resolution of the issues.

176. See, e.g., *Student Pub. Interest Research Group v. Monsanto Co.*, 600 F. Supp. 1479, 1484 (D.N.J. 1985) (the EPA and a state agency not indispensable parties); *Nunam Kitlutsisti v. Arco Alaska*, 592 F. Supp. 832 (D. Alaska 1984) (the EPA not an indispensable party to private enforcement action); *Sierra Club v. SCM Corp.*, 572 F. Supp. 828, 831 (W.D.N.Y. 1983) (state environmental agency not an indispensable party because plaintiff had no cause of action against it).

In 1984, the Chemical Manufacturers' Association wrote a letter to the EPA, requesting the agency to make available for testimony in Clean Water Act citizen suits the personnel who had participated in drafting the permits, so that industry could show that there had been informal understandings that some types of violations would not be penalized. Letter from David F. Zoll, Vice President and General Counsel, Chemical Manufacturers' Association, to Jack Ravan, Assistant Administrator for Water, USEPA (June 18, 1984).

taken a very active part in private enforcement litigation, and the courts usually have not compelled them to do so. There are several reasons for agency reluctance to intervene, the most pressing being the lack of resources which keeps agencies from initiating their own actions against violators in the first place.¹⁷⁷ Diverting agency engineers, scientists and lawyers to private enforcement actions takes them away from working on the cases that the agency considers higher priority. The agency may also lose some control in such cases, as its officials are put in the position of endorsing remedies that they had little responsibility for devising. This risks not only bad precedents, but also political attacks for accepting inadequate settlements or decrees.

If it is impracticable for enforcement agencies to participate routinely in citizen suits, then the primary avenue for communicating enforcement policy and compliance history to courts and litigants is some form of codification. Since codification generally grows out of the agencies' own management needs and practices, it is necessary to review briefly some of the ways in which the EPA attempts to manage enforcement.

C. *EPA's Managerial Initiatives for Coordination*

In considering the relationship between public and private enforcement of environmental laws, it is important to recognize that the EPA would have a difficult problem of coordination even if the citizen suit provisions had never been enacted. The structure of the statutes it administers, and the organizational setting in which the agency operates, make it difficult for the EPA to achieve consistency in its enforcement activities. The Clean Water and Clean Air Acts, like most of the federal environmental statutes, incorporate a system of "cooperative federalism" under which the EPA and the states share the responsibility for achieving compliance with regulatory requirements.¹⁷⁸ While they share

177. The resource problem is particularly difficult in the current wave of citizen suits since the bulk of private enforcement litigation is concentrated in a few heavily industrialized parts of the country. Thus, the burden of responding to citizen suits would fall disproportionately on three or four of the EPA's regional offices.

178. The enforcement structure of the Clean Water Act is described as follows in *United States v. Cargill, Inc.*, 508 F. Supp. 734, 740 (D. Del. 1981):

The enforcement provision of the Act sets up a . . . system, giving primary responsibility to the state with an approved NPDES [discharge permit]

the same general goals as the EPA, the state programs may have different types of personnel, different philosophies of enforcement and different political pressures.¹⁷⁹ Thus, even though the EPA may possess the formal legal power both to override particular enforcement decisions and to revoke the delegations of state enforcement authority, the practical need to keep the states functioning as effective enforcement partners can force the EPA to tolerate some departures from federal enforcement policy.¹⁸⁰

Apart from this need to accommodate state enforcement agencies, the EPA has a difficult time setting and communicating its own enforcement policy. The agency has become a large and complex bureaucracy. Within EPA headquarters, program offices like Air and Water sometimes have different ideas about proper enforcement policy from the Office of Enforcement and Compliance Monitoring or the Office of Policy, Planning and Evaluation. The agency's ten regional offices, staffed by officials who deal with

system but reposing significant authority in EPA . . . to step in itself in appropriate situations. . . . [A]s an initial matter, a state must have enforcement authority commensurate with that given EPA by the Act before a state NPDES program may be approved. Thus, enforcement by the states in the first instance is expected. Likewise, whenever the Administrator finds that any person is in violation of a condition or limitation contained in a NPDES permit, he is first required to notify the violator and the state, thus providing an opportunity for either voluntary compliance or state enforcement in the first instance. . . . However, if "beyond the thirtieth day after the Administrator's notification the State has not commenced *appropriate* enforcement action" . . . , the Administrator is required to assume enforcement responsibility himself and either issue a compliance order or bring suit in a United States District Court. . . . [T]he Administrator may bring a suit himself in federal court even though the state has already filed an enforcement action in state court if the Administrator believes that the state is not prosecuting that action "expeditiously and vigorously."

(Emphasis in original). The court also observed, "the tensions inherent in a federal system are recreated, if not exacerbated by the Act, which oftentimes fails to create clear boundaries for the respective authorities of the federal government, the states, and the people." *Id.* at 736.

179. For a description of differing state enforcement styles within a single region of one state, see Goldstein & Ford, *The Management of Air Quality: Legal Structures and Official Behavior*, 21 BUFFALO L. REV. 1 (1972).

180. In recent years, as state responsibility for enforcement of federal environmental standards has increased, federal grant support to run state programs has diminished. In these circumstances, there is concern that some states may become more willing to have their delegations of enforcement authority revoked, and let the EPA take over that responsibility. See generally Stanfield, *Ruckelshaus Casts EPA as 'Gorilla' in States' Enforcement Closet*, NAT'L J., May 26, 1984, at 1034.

different sets of actors and problems on a daily basis, may also have a very different approach to enforcement from their Washington counterparts. Though they are formally subject to supervision and direction from headquarters, the regional offices have traditionally enjoyed substantial autonomy.

In practice, these problems of coordination within and across levels of government have several implications for the integration of citizen suits into existing systems of enforcement. First, it is important to remember that coordination within government is far from perfect, and that consistency is often more a goal than a reality. Therefore, any observed difficulties that private enforcers have in coordinating their activities should not be compared with hypothetically perfect government coordination. In practice, the private enforcers, when compared to their government counterparts, have some advantages and disadvantages in developing coherent policy. A second implication is that the presence of private enforcers gives the EPA's management efforts to achieve internal consistency a more public dimension than they would otherwise have. Parties engaged in private enforcement litigation have a powerful incentive to uncover all the relevant facts about agency enforcement policy and, wherever applicable, to use the agency's policy in support of their own positions. In this respect, citizen suits are an additional pressure for the agency to engage in dialogue with its constituencies over enforcement policy and to codify clearly established enforcement practices. Finally, the EPA's experience in trying to provide enforcement guidance and to monitor performance indicates that the broad concept of "enforcement policy" needs to be broken down into its constituent parts. When examined closely, regulatory enforcement policy is comprised of many decisions and practices. The practicability and desirability of codifying these practices into policy seem likely to differ sharply from one area to another.

Some of the difficulties of codifying enforcement policy are perhaps best illustrated by examining one concerted effort that the EPA has made to achieve consistency in enforcement: the concept of "significant noncompliance" under the Clean Water Act.

By the mid-1970's, when the EPA had completed the initial task of issuing discharge permits as required by the 1972 amendments, the agency began to turn its attention to the task of achieving compliance with those permits. As one internal document put

it: "With this shift in emphasis has come the increased awareness that the program will be effective only to the extent that EPA and the States are able to identify instances of non-compliance and take appropriate and timely actions with uniformity and consistency."¹⁸¹ Several management tools were used to achieve this goal. The *Enforcement Management System Guide* set forth general principles that the EPA regional offices and delegated states should follow in order to set priorities and achieve consistent, effective abatement of violations.¹⁸² The guide incorporated technical review criteria that instructed clerical personnel when to refer dischargers' monitoring reports to professional staff for enforcement action.¹⁸³ The guide also contained an enforcement response guide which suggested appropriate actions to resolve different types of violations. Minor reporting deficiencies, if they were "isolated or infrequent," might be handled through a warning letter. If such deficiencies continued, however, an administrative order would be sought.¹⁸⁴ At about the same time, the EPA began developing a computerized permit compliance system that would receive and generate reports on noncomplying dischargers.

Throughout these efforts to regularize and formalize its management of the enforcement process, the EPA was careful to emphasize that its objective was to utilize limited resources effectively and rationalize management, and not to set substantive policy that would define some violations as serious and others as trivial.¹⁸⁵ At the next stage of management initiative, however, the line became

181. USEPA Office of Water Enforcement, *Enforcement Management System Guide* (undated; App. 1 indicates issue date of 11-75) (available in NPDES Noncompliance and Program Reporting, EPA Docket No. WH-2763-3, item 4 (1984)) [hereinafter cited as EMS Guide].

182. EMS Guide, *supra* note 181.

183. EMS Guide, *supra* note 181, at appendix.

184. *Id.*

185. The introduction to the Technical Review Criteria noted:

The Technical Review Criteria serve as a screening device to assure that limited professional resources concentrate on the most significant violations. These criteria are to be used by nonprofessional compliance analysts in the initial screening of Discharge Monitoring Reports and other reports on the quality of NPDES dischargers. Screening based upon the Technical Review Criteria *does not* establish which deviations from the effluent limitations are violations of the permit or of the Federal Water Pollution Control Act—all such deviations, unless specifically authorized elsewhere in the permit, *are violations*. Nor do the criteria excuse relatively minor violations.

Id. (Emphasis in original).

blurred, and the agency lost some credibility as a result.

In the early 1980's, the EPA began to develop the concept of "significant noncompliance" as a tool for setting priorities and measuring the performance of field-level management. Conceptually, it was a logical outgrowth of the technical review criteria, the enforcement response guide, and the reporting requirements that fed into the permit compliance system computers. The idea was to set quantitative thresholds for distinguishing serious from less serious violations. Thus, a discharger who exceeded a permit parameter by more than x percent, or who violated a limit more than y times in any calendar quarter, would be flagged for special attention on the quarterly noncompliance reports.

Although it made some sense as a management tool, significant noncompliance encountered a number of problems. The phrase itself was probably an unhappy choice. It implied that violations below the action thresholds were "insignificant" and therefore presumably not worthy of enforcement response. Even some of the agency staff people, who were familiar with the rationale for significant noncompliance, had doubts that the numerical thresholds were meaningful. Their skepticism was not decreased by the fact that this re-definition of noncompliance seemed to increase statistical measures of industry compliance without altering polluter behavior.¹⁸⁶ Further suspicions were aroused because the significant noncompliance standard was put into use during the stormy tenure of Anne Gorsuch Burford as EPA Administrator. This period was marked by the public complaints of both environmental groups and some of the agency's own staff that the EPA had become soft on polluters. Finally, the EPA's Inspector General fed the suspicion of significant noncompliance by formally reprimanding the agency for failing to publish the standard in the

186. For example, one person interviewed in this study who was an EPA staff member at the time significant noncompliance was used as a performance measure remarked: [There was] this silly-ass policy that says you have to be a certain percentage over your permit limit before we consider you in violation. That doesn't mean you're in compliance, it just means you haven't gotten over an administrative hurdle. . . . It's long and complicated and it has to do with how many months out of another certain number of months—there's a forty percent figure and a twenty percent figure and a zero percent figure for certain months. By the time you get through it, you don't know what the hell you've got. All I know is that when we put it in, it increased the compliance rates by about thirty, forty percent.

Federal Register.¹⁸⁷

After this inauspicious beginning, the EPA published a proposed rule on quarterly noncompliance reporting that incorporated a modified version of the significant noncompliance standard, but carefully omitted any mention of that term.¹⁸⁸ This time, the notice explicitly pointed out that "the proposal effects [*sic*] only reporting requirements. The proposal has no impact upon what is considered a violation, or on whether or what kind of enforcement action will be taken in a given case."¹⁸⁹ As several commenters pointed out,¹⁹⁰ however, this statement was not quite true, due to the presence of citizen enforcers. The groups bringing private enforcement actions have used the quarterly noncompliance reports to flag the most serious violators for closer scrutiny. Consequently, the EPA's reporting requirements greatly affect the chances that a noncomplying firm may find itself the target of a private enforcement action.

Even before the reporting rule became final in August 1985,¹⁹¹ the EPA had adopted its definition as part of a more detailed policy guidance to delegated states and regional offices. In June 1984, the EPA issued its *Policy Framework for State/Federal Enforcement Agreements*, which included as one of its primary criteria a requirement for "timely and appropriate enforcement response" to violations.¹⁹² The policy statement noted resource problems both within the EPA and the states, but directed that "at a minimum, the focus should be on the greatest problems, i.e., the significant non-compliers."¹⁹³ The Assistant Administrator for

187. See, e.g., *Inspector General Finds Water Policy Officially Sanctions Noncompliance*, Inside EPA, March 16, 1984 at 3:

The [EPA Inspector General's] report . . . reveals that EPA's water enforcement personnel have been abiding by an unofficial policy of reporting only "significant noncompliance," a policy initiated by former water chief Eric Eidsness in February 1982 but which has never been translated into formal regulations. . . . [T]he IG report nevertheless asserts that using the unofficial definition of "significant noncompliance" violated the Administrative Procedure Act.

188. 49 Fed. Reg. 29,720 (1984) (to be codified at 40 C.F.R. § 123.45(a)).

189. *Id.* at 29,722.

190. See 50 Fed. Reg. 34,648, 34,649 (1985) (to be codified at 40 C.F.R. § 123.45).

191. 50 Fed. Reg. 34,648 (1985) (to be codified at 40 C.F.R. § 123.45).

192. USEPA, Policy Framework for State/EPA Enforcement "Agreements" 11-12 (undated; transmitted with cover memorandum from Alvin L. Alm, Deputy Administrator, USEPA, to Assistant Administrators, Regional Administrators, etc.) (June 26, 1984) (available in the Charles B. Sears Law Library, State University of New York at Buffalo).

193. *Id.* at 13.

Water followed up with a directive making clear that "any non-compliance required to be reported in the [quarterly noncompliance report] . . . is considered 'significant noncompliance'. . ."¹⁹⁴ and should receive highest priority.¹⁹⁵ By a rather circuitous route, then, the EPA's significant noncompliance regulations had become a key component not only of the agency's attempts to manage its own staff and oversee the delegated states, but also of the attempts by both public and private enforcers to establish litigation priorities. Given the relatively modest levels of resources currently available to enforcement agencies and to the groups bringing citizen suits, it seems likely that most low-priority violators will entirely escape sanction.¹⁹⁶

Over time, the approach to codification of enforcement policy used for the significant noncompliance rule may become more common. There are a number of incentives pushing the EPA and other federal agencies in that direction. Internally, large-scale regulatory programs like the Clean Water Act must have some formal standards and performance measures. These programs encompass thousands or even hundreds of thousands of individual sources throughout the country, and they rely on decentralized systems of regional offices and state agencies to take initial enforcement action. Norms and expectations must be communicated to field-level enforcers, and measures of productivity must flow back to headquarters so that performance can be monitored. This arrangement is likely to work best when enforcement policies and priorities are clearly and explicitly stated. Hence, the demands of good management can exert a powerful pull toward rationalization of enforcement policy.

In recent years, this trend has been strengthened by the

194. USEPA, National Guidance for Oversight of NPDES Programs FY 1985, at 3 n.1 (undated; transmitted with cover memorandum from Jack E. Ravan, Assistant Administrator for Water, USEPA, to Regional Administrators) (July 6, 1984) (available in the Charles B. Sears Law Library, State University of New York at Buffalo).

195. *Id.* at 3 (noting that "rapid response to instances of significant noncompliance, especially by major dischargers" shares top priority with updating and renewing expired permits).

196. Unless a violator exceeds the significant noncompliance thresholds, neither governmental nor private enforcers would be very likely to bring a court action. However, this is not to say that "nonsignificant" violations by a significant noncomplier would not be included in a complaint, once a decision was made to bring a penalty action. The general practice among both public and private enforcers seems to be to plead all available violations in court papers, and bargain down from there.

politicizing of enforcement at the EPA and other agencies. Basic conflicts over the preferred strategies for enforcing environmental laws have made enforcement issues highly visible and potentially damaging to the agency. Today, enforcement officials can expect to have congressional committees, the General Accounting Office, and a variety of media representatives and constituency groups routinely monitoring their enforcement activities. One way to survive this close scrutiny is to have a defensible set of enforcement standards and priorities, which may be used to justify particular actions—or inactions.

Since agency rules or policy statements are likely to gain more judicial deference than ad hoc justifications for particular decisions, the courts also exert some pressure for codification of enforcement policy. With the spreading of citizen suits, judicial reaction has become a more prominent factor because the agency does not control the litigation where its policy comes into question and, indeed, where it may not even be a participant. As a result, ambiguities or omissions in agency enforcement policy may be resolved by courts and litigants who have no real understanding of what their particular interpretation may do to the agency's program. Here, also, the agency's advance codification may help to protect agency autonomy by forestalling destructive or uninformed judicial decisions.

A related advantage is that codification of enforcement policy can guide the activities of private enforcers and help coordinate them with the government's efforts. To be sure, private enforcers may not be legally bound by government enforcement policies.¹⁹⁷ In practice, however, the major groups bringing the actions have generally followed the EPA's enforcement guidelines. The significant noncompliers identified on the EPA's quarterly noncompli-

197. The EPA, in its preamble to the final noncompliance reporting regulations, National Pollutant Discharge Elimination System Regulations: Noncompliance and Program Reporting, *supra* note 191, at 34,649, recites that "this regulation in no way codifies enforcement policy. That policy remains under EPA discretion . . ." The Justice Department's Assistant Attorney General for Land and Natural Resources, commenting on a draft Administrative Conference recommendation encouraging the EPA to provide more public access to enforcement policy, remarked: "I do not believe that the public, which includes members of the regulated community, should have an active role in setting enforcement policies. Second, members of the public may not necessarily be authorized to rely on many policies, such as policies relating to [calculation] . . . of penalties, in private enforcement actions . . ." Letter from F. Henry Habicht II to Loren A. Smith, Chairman, Administrative Conference of the United States, at 1-2 (April 26, 1985).

ance reports have been the primary targets of private enforcement, and plaintiffs have generally purported to apply the EPA's penalty policy when calculating proposed fines (though admittedly with very different results). The more detailed and accessible agency policy articulations become, the more likely it is that private enforcement activity will remain consistent with public enforcement activity.

The need for consistency may become greater in the future because, to date, the private enforcement effort has been carried out by a relatively small group of private attorneys who have established a network of communication and cooperation. They also have had the luxury of choosing a few of the most frequent or most serious violators in most of the regions where they have been operating.¹⁹⁸ If citizen suits become an established field of litigation, however, and a larger and more diverse group of lawyers begins to look at less egregious violations, the inconsistency problems could become significant. The Administrative Conference took note of this possibility by recommending that the EPA give high priority to articulating its enforcement policies in three areas: selecting cases for enforcement, calculating penalties and settling contested cases.¹⁹⁹

Whatever the impetus to codify, once enforcement policy has been articulated, it will eventually become a matter of public record. Since the policy will be subject to public scrutiny and criticism when it is ultimately disclosed, there may be advantages to getting public input before it is issued in final form. Public participation offers the advantages of uncovering technical problems in proposed standards before they are implemented and, perhaps more importantly, of improving the dialogue between the agency and its constituency groups. The significant noncompliance rulemaking probably contributed to a better understanding of

198. One representative of a plaintiff group described the selection of enforcement targets as a consensus process:

[I]t didn't pay to be argumentative. [If] someone raised an objection, you just dropped [the case], and took a different one. [W]e never really sat down and came up with criteria for cases. . . . [T]here had to be a lot of violations, and they had to be continuing to the present. [Those are] by and large the very broad criteria we use.

Some plaintiff organizations have begun to codify selection criteria and provide guidance for less experienced plaintiffs.

199. Recommendation 85-3, *supra* note 10.

agency enforcement policy among regulated firms and environmental groups. Furthermore, some technical changes in the draft rule were made in response to public comments. The notice-and-comment procedure does take longer to complete, and the rules or policies that have gone through this process are more resistant to change than those issued unilaterally.²⁰⁰ At this point in the history of environmental regulation, however, stability and consistency are more important ingredients of sound enforcement policy than are flexibility and individualization. Pollution control technologies generally require substantial time and money to put into place, and they demand continuing effort to operate and maintain. Sudden changes or inconsistencies in enforcement policy may undercut expectations among the regulated and thereby undermine voluntary compliance.

The EPA has begun to codify major portions of its enforcement policy, particularly in the areas of case selection, penalty assessment and settlement criteria. There are substantial incentives for the agency to continue this process. According to some of the EPA's internal evaluations, codification seems to make a complex system of shared enforcement responsibility function more smoothly.²⁰¹ Nevertheless, it is important to note that broad areas of discretion still remain. Individualized judgments still need to be made regarding factors like the legal and factual strength of a particular case, its potential significance as precedent, and the extent to which a violator deserves harsh punishment because of in-

200. One lawyer who has represented defendants in citizen suits commented on the draft Administrative Conference recommendations:

Articulation of enforcement policy is generally a laudable goal. The policy itself, however, is one which, as a practical matter, will be in constant flux in response to public interest and the political process. Therefore, while articulation is useful and desirable, it can never be expected to constitute long-term guidance on the subject.

This probably overstates the case, both historically and prospectively. As noted previously, the EPA has attempted to codify enforcement policy in several areas, with some success. *See supra* text accompanying notes 178-99. It is doubtful that this process has gone as far as it can or should go. This is not to say that all areas of enforcement policy are amenable to codification, or that policy codifications will ever achieve such stability as to "constitute long-term guidance" in any absolute sense. But stability is a relative term, and it seems desirable to try to achieve some moderation in the sharp swings of enforcement policy that have characterized the EPA in recent years.

201. *See, e.g.* USEPA, Consolidated Evaluation of the Implementation of State/EPA Enforcement Agreements (Dec. 1985) (available in the Charles B. Sears Law Library, State University of New York at Buffalo).

tent, past failures to comply and the like. Even where the agency has codified its criteria, the application of established standards may confer considerable discretion on field-level officials. Finally, the EPA has important discretion to exercise at the level of framing definitions of compliance and establishing reporting requirements to capture evidence of violations. As described in the following Section, this discretion gives the EPA a large measure of effective control over the role that private enforcers can play in a particular regulatory program.

D. *Information as a Means of Controlling Enforcement Policy*

Litigation is fundamentally a process of gathering, presenting and evaluating information. Easy access to accurate information is a prerequisite to bringing successful citizen suits. One of the primary reasons that most of the private enforcement activity has centered on the Clean Water Act is the system of monitoring, self-reporting and data processing developed under that statute.

The statute creates a self-monitoring system by requiring each discharger to obtain a permit and by providing sanctions for failure to submit periodic compliance reports.²⁰² While monitoring for toxic pollutants may be difficult, the "conventional pollutant" parameters, such as biological oxygen demand or pH, can be monitored routinely and inexpensively. This allows the permitting agency to reasonably require dischargers to report monthly or weekly average discharges of these pollutants, in addition to reporting maximum daily discharges. The agency's computerized permit compliance system collects information from the permittees' periodic discharge monitoring reports (DMRs) and compares it to their permit limits. This makes it possible to generate the quarterly noncompliance reports (QNCRs) identifying significant violators. As previously noted, these QNCRs are widely used both for internal program evaluation by the EPA and for case selection by many of the citizen suit plaintiffs.

For most of the plaintiff organizations, scanning the QNCRs to identify persistent permit violators is only the first step in case

202. 33 U.S.C. § 1318 (1982), gives the Administrator of the EPA broad authority to require that regulated entities keep records and file reports. It also provides that these records will generally be available to the public. Recordkeeping violations can result in administrative orders, civil penalties, or criminal sanctions under 33 U.S.C. § 1319 (1982).

screening. To develop a full understanding of the violations, and to document them for possible courtroom use, it is necessary to get into the detailed paper records. This usually means spending an extended period of time in the state agency or the EPA regional office tracking down and working with the appropriate files. This is commonly regarded as grubby, tedious work—a far cry from the fancy computer systems at EPA headquarters in Washington. As one plaintiff's lawyer stated:

[Y]ou have to go look at the permit file; there may be a separate administrative compliance file; there could be a separate enforcement file. There's sometimes four and five files in five or six different buildings, and people are hanging on to them, and have them on their desks for a variety of reasons, or they don't want to show [them to] you because they think it's confidential, even though it's not. And it's a hassle. . . . It eats your time, you're really spinning your wheels, and usually you're under the gun to whoever is paying the toll for this to produce results as quickly as possible.

Plaintiff groups and their counsel have developed a variety of methods for completing this initial investigative phase. Methods range from having lawyers do most of the work to training relatively inexpensive personnel such as college students to do the detailed file reading under expert supervision. However it is accomplished, file review is still likely to be a slow and rather expensive process; \$15,000 would probably be a very conservative estimate of the minimum cost of mounting a modest file review campaign in a large state.

In some of the delegated states, where the primary files are kept by state agencies rather than the EPA, record keeping practices can be rather slipshod.²⁰³ One plaintiffs' lawyer noted the "huge gaps" that had been found in the records of one delegated state: "There will be months, periods of time, where you won't know whether there is a violation or not." Another recounted the misfortune of trying to review the permit files in a different state when the agency was in the process of reorganizing its record-keeping system:

[T]he attempt was to decentralize decision making in the agency back to the field offices. And part of the decentralization was putting the files on trucks and sending them out to the eight or nine regional offices, and we have had

203. If the gap in the record is a result of the discharger's failure to file a required report, this failure may be charged as a separate offense in a citizen suit. *See* *Sierra Club v. Simkins Indus.*, 617 F. Supp. 1120 (D. Md. 1985).

it happen just in the last two months three or four times where you literally can't find a file. [Headquarters] claims it has been shipped off to [a regional] office; [the region] claims they never got it, or they haven't opened that box yet. . . . So what we did after our QNCR review and our first cut was, I had a summer legal intern . . . [go] to the regional offices and to [headquarters] to review files in both places.

Sloppy agency record keeping can increase the cost of researching a citizen suit and perhaps also cause the plaintiff organizations to bring some bad cases.

Because data systems play such a key role in preparing penalty cases, the EPA still retains a substantial measure of practical control over private enforcement through its regulations on monitoring, record keeping, and reporting, as well as through its quality control over record keeping.²⁰⁴ At one extreme, the agency could, by its inaction or tacit approval of sloppiness, let the record keeping systems degenerate to the point where plaintiffs would be unable to identify violators or generate prima facie cases from official records. This is reportedly the situation in some of the newer programs, such as that under the Resource Conservation and Recovery Act (RCRA),²⁰⁵ where record keeping systems are under development and have not yet reached the level of sophistication and reliability achieved in the Water program.²⁰⁶ As a result, groups contemplating citizen suits against noncomplying toxic dumpsites face formidable practical and technical obstacles, and few private enforcement cases have been brought under RCRA.

204. There is some indication in the legislative history of the Clean Water Act that Congress intended this discretion to be exercised in support of citizen enforcers. For example, the Senate Report on the 1972 Federal Water Pollution Control Act Amendments notes: "The information and other disclosure obligations required throughout the bill are important to the operation of this [citizen suit] provision. The Administrator would have a special duty to make meaningful information on discharging sources available to the public on a timely basis." S. REP. NO. 414, 92d Cong., 2d Sess. 81, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 3668, 3746.

205. Resource Conservation and Recovery Act, §§ 6901-6987, 42 U.S.C. §§ 6901-6987 (1984 & 1986 Supp.).

206. For example, in a recent self-evaluation of the agency's Hazardous Waste Data Management System, an EPA study team observed:

The RCRA enforcement data management system has many problems. These include confusion over data element definition and coding conventions and problems within Regions with data entry. In addition, few states use the system and, therefore, have little stake in data quality.

USEPA, *supra* note 201, at 48.

At the other extreme, the EPA could mount a major effort to upgrade monitoring, reporting and record keeping systems in all of the media programs that have citizen suit provisions. This would greatly facilitate private enforcement. According to Professor John Coffee, something similar to this has happened in the field of securities law enforcement, where the SEC is willing to accept very low, or "painless" settlements in its consent decrees because entry of the decree operates as a "signal to the plaintiff's bar that an attractive [class action damages] case is available."²⁰⁷ More generally, Professor Coffee argues that "it often may be more efficient for public agencies to concentrate on detection (an area where they have the comparative advantage because of their superior investigative resources) and leave the actual litigation of the case to private enforcers, who are frequently more experienced in litigation tactics."²⁰⁸

The EPA's handling of information systems has fallen somewhere between these two extremes. The agency has generally made most of the relevant information in its files readily available upon request. It has also attempted to upgrade its own information systems. Nevertheless, most of the emphasis seems to be on building improved management tools to oversee and measure aggregate performance, rather than on designing systems to facilitate the selection and proof of individual cases. If the EPA is serious about cooperating with citizen group plaintiffs, it could make major gains in private enforcement by upgrading monitoring and reporting systems in programs like RCRA.²⁰⁹ It might also make some modest improvements in Clean Water Act enforcement through further refinement of information systems, particularly in the area of quality control over state recordkeeping. One apparent obstacle to this refinement is the Office of Management and Budget's (OMB) reputedly stringent review of reporting requirements under the Paperwork Reduction Act. In undertaking such reviews, the OMB should at least be alert to the possibility that better reporting may make it possible to achieve a given level of

207. Coffee, *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 225 n.21 (1983).

208. *Id.* at 224-25.

209. For a general discussion of the technical and resource limitations on environmental monitoring, see Stanfield, *No One Knows for Sure if Pollution Control Programs are Really Working*, NAT'L J., Mar. 23, 1985, at 643.

enforcement at significantly lower cost to the federal treasury, if private enforcers are able to take over part of the workload.²¹⁰

Beyond case selection and development of evidence, citizen suit plaintiffs rely on agency records to assure that there will not be a protracted factual trial about whether violations actually occurred. Ideally, the plaintiffs hope to win summary judgment on issues of liability and proceed quickly to issues of penalty and other remedies. A number of cases have thus far unfolded in this fashion. Defendants, however, have begun trying to open up the question of whether the monitoring data in the DMRs are accurate. This is tactically rather awkward, because it requires defendants to attack the reliability of their own test data (which are submitted to the agency in the normal course of business subject to a corporate officer's certificate of accuracy).²¹¹ A defense lawyer explained the basis for this line of attack as follows:

One situation is this: you have a company which just plain screwed up—they tested the wrong thing, they used the wrong methodology, whatever . . . [T]hose reports, true as they were at the time they put them in, reflect nothing . . . ; they're just mistaken. . . . The other situation is this: You have accuracy levels for various analytical techniques. For example, you have "one" . . . as your limit in your permit. And the analytical test you must employ—and that's specified in your permit, you don't have any choice about this, . . . you must employ this particular analytical method using a particular type of instrument—says that the accuracy for testing that parameter at the level is plus or minus point two. If you get a reading of one, or if one is your limit, there is still an argument, I believe, that anything that falls

210. The Administrative Conference recommended that the EPA and the Office of Management and Budget take into account the potential relevance of private enforcement when deciding upon data collection proposals. 50 Fed. Reg. 28,366 (1985) (to be codified at 1 C.F.R. § 305.85-3).

211. Under 40 C.F.R. § 122.22(d) (1985), a corporate officer submitting a DMR is required to sign the following statement:

I certify under penalty of law that this document and all attachments were prepared under the direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violation.

The regulations were recently liberalized to permit a larger number of corporate officers to be the designated signatories of DMRs. *See* 49 Fed. Reg. 38,035-36 (1984) (codified at 40 C.F.R. § 122.22(b)(2) (1985)).

between point eight and one point two, because of the accuracy of the underlying equipment, is still equivalent to one.

So far the courts have not accepted this argument,²¹² but it seems likely that defense lawyers will keep raising it.

This seemingly arcane technical question of monitoring accuracy has significant practical implications for the use of citizen suits—at least for groups employing private lawyers to bring them. One of the most attractive features of Clean Water Act suits has been the high likelihood—indeed, the virtual certainty—of winning on the merits if the courts treat the DMRs as admissions by the defendants. As one experienced plaintiffs' lawyer put it:

The minute you say that you can lose a very substantial amount of cases on the merits after putting in very substantial resources, obviously the desire of more private lawyers like myself to take those kinds of risks changes enormously. . . . [I]f you win fifty percent of your cases, eighty dollars an hour is not worth a damn.

If the defendants succeed in opening up the validity of the DMRs to trial on the merits, this will most likely mean protracted hearings with extensive testimony from statisticians, engineers and other expensive experts.²¹³ Even with the prospect of fee and cost recovery if plaintiffs ultimately prevail, it seems clear that the greater the time and "front money" investment, the longer the delay before recovering; and the increased risk will deter some plaintiffs and plaintiffs' lawyers from bringing the actions. There will also be comparable problems for the EPA and the state enforcement programs. Clearly, the data reliability issue is one that the EPA needs to keep in sight as it drafts permits for previously unregulated pollutants and develops monitoring and reporting requirements for other media programs. As a separate enforcement issue, the agency should also be alert to the possibility that the private enforcers' growing use of DMRs is creating incentives for noncomplying dischargers to overlook filing requirements and even to "fudge" the data.

212. See, e.g., *Student Pub. Interest Research Group v. Tenneco Polymers*, 602 F. Supp. 1394 (D.N.J. 1985); *Student Pub. Research Group v. Fritzsche, Dodge & Olcott Inc.*, 579 F. Supp. 1528, 1538.

213. See generally Kropp & Flannery, *Guilty or Not Guilty—Only Your Statistician Knows for Sure*, ENVTL. F., Apr. 1984, at 23.

VI. REMEDIES AND INCENTIVES

Ultimately, the purpose of the citizen suit provisions is to change behavior by changing incentives: the incentives of dischargers to comply with their permits, the incentives of private parties to bring actions against noncomplying dischargers and nonenforcing agencies, and the incentives of agencies to enforce the environmental laws more effectively. At least from the discharger's point of view, the most potent incentive is the remedy imposed by a court or agreed to in settlement talks. Remedies have also proved to be the most serious sticking point in the progress of cases brought under the Clean Water Act and in the evolution of workable ongoing relationships between plaintiff and defendant organizations.

As noted above, the remedial provisions of the Clean Water Act differ from those in most of the other statutes administered by the EPA. Under the remedial provisions of the Clean Water Act, private enforcers can seek money penalties as well as injunctive relief from violators, while most citizen suit statutes allow only injunctions in private enforcement suits. Additionally, the agency lacks authority under the Clean Water Act to impose any administrative sanctions on a party violating a permit or a statutory duty. The statutory maximum penalty is \$10,000 per day of violation,²¹⁴ and either the EPA or the citizen suit plaintiff can—and sometimes does—ask the courts to impose penalties based upon the theoretical maximum calculation of number of days in violation times \$10,000. There are very few legal constraints on penalty calculations. One of the few cases discussing Clean Water Act penalty assessments, *United States v. Detrex Chemical Industries*,²¹⁵ held that a discharger could not be fined more than \$10,000 for any given day, regardless of the number of permit limitations violated during that day. However, major permit violations involve chronic problems rather than one-shot failures. Courts have generally interpreted statutes of limitations as giving private enforcers the right to include violations occurring within

214. 33 U.S.C. § 1320(d) (1982).

215. 393 F. Supp. 735 (N.D. Ohio 1975). This maximum daily penalty limit from the *Detrex Chemical* decision was applied to a private enforcement action in *Gwaltney of Smithfield*. See *infra* text accompanying note 232. Since the district court in *Gwaltney of Smithfield* assessed a \$1.3 million penalty, it is clear that the *Detrex* formulation will not serve to keep penalties low in a major pollution case.

the five-year limitations period allowed for government enforcement.²¹⁶ As a result, it is relatively easy for citizen suit plaintiffs to total up maximum fines running well into the six or seven figure range.

With few legal constraints, the dispute between dischargers and private enforcers has centered on the EPA's administrative practice in calculating civil penalties under the Clean Water Act. The agency has promulgated some general guidelines for penalty calculations, first in 1980 and then in revised form in 1984.²¹⁷ Both the EPA and the leading citizen suit plaintiff organizations purport to be applying this policy, but the figures they generate from it are markedly different. The citizen groups' damage figures reportedly run ten to one hundred times higher than the amounts the EPA customarily receives in settled cases.²¹⁸ As might be expected, this discrepancy has generated considerable resentment and opposition from citizen suit defendants. One defense

216. The Clean Water Act does not have a special statute of limitations applicable to penalty actions. Dischargers generally argue that the federal courts should apply an analogous state statute to citizen suits, which may have a limitations period as short as two years. To date, the federal courts generally have not followed that approach. They have split over the issue of what limitations provision to apply. District courts in Maryland and New York have applied the five-year federal statute of limitations applicable to government civil penalties, 28 U.S.C. § 2462 (1982). *Chesapeake Bay Found. v. Bethlehem Steel*, 608 F. Supp. 440 (D. Md. 1985); *Sierra Club v. Simkins Indus.*, 617 F. Supp. 1120 (D. Md. 1985); *Friends of the Earth v. Facet Enter.*, 618 F. Supp. 532 (W.D.N.Y. 1984). The New Jersey district court, on the other hand, has ruled that no statute of limitations applies, since application of the federal statute would put private enforcers in an inferior position to their government counterparts as a result of the 60-day waiting period. *Student Pub. Interest Research Group v. AT&T Bell Laboratories*, 617 F. Supp. 1190 (D.N.J. 1985); *Student Pub. Interest Research Group v. American Cyanamid*, No. 83-2068, slip op. (D.N.J. Nov. 6, 1985); *Student Pub. Interest Research Group v. Monsanto Co.*, 600 F. Supp. 1474 (D.N.J. 1985); *Student Pub. Interest Research Group v. National Starch & Chem.*, No. 84-1119, slip op. (D.N.J. Oct. 15, 1985); *Student Pub. Interest Research Group v. Tenneco Polymers*, 602 F. Supp. 1394 (D.N.J. 1985); *Student Pub. Interest Research Group v. Anchor Thread Co.*, 22 *Env't Rep. Cas. (BNA)* 1150 (D.N.J. 1984).

217. Environmental Protection Agency Civil Penalty Policy for Major Source Violators of the Clean Air Act and the Clean Water Act, *ENV'T REP. (BNA)* 41:1101 (July 8, 1980) [hereinafter cited as "1980 Penalty Policy"]; Environmental Protection Agency Civil Penalty Policy of 1984, *ENV'T REP. (BNA)* 41:2991 (Feb. 16, 1984) [hereinafter cited as "1984 Penalty Policy"].

218. When settlement negotiations fail and a case goes to court, however, the 1984 Penalty Policy, *supra* note 217, indicates that the agency "will request the statutory maximum penalty in the filed complaint. And, as proceedings warrant, the EPA will continue to pursue a penalty no less than that supported by the applicable program policy." *Id.* at 2991.

lawyer who had handled several private enforcement cases described client reactions in the following terms:

[S]ometimes that number [of total penalties and accrued fees and costs] is astronomical; and that alone . . . says, "Why bother to talk? We can litigate an awful lot for the kind of money those people want. And there's a chance we might win." . . . [A]gencies have generally taken the position "Let's get the problem taken care of. You've been naughty, but put the technology in. . . . [A]nd we're going to get you [with a penalty] as well, just to let you know we're serious." And they may go anywhere from five hundred dollars to ten thousand; it's not likely to be anything in the range of even five figures, [let alone] six figures. The focus of the agency is to clean up the problem. And they'll even suspend part of the penalty to give you an additional incentive to comply with a compliance schedule. . . . [T]o some degree [the companies] have no problem with this philosophically. They realize they've got to comply; at least the ones we've dealt with have not been bad guys. They may have been screwed up, they may have been taken by a vendor, they've got all sorts of problems, but they're not intentionally flouting the environmental laws. . . . And this [penalty calculation by private enforcers], which is just a cash register approach, even though plaintiffs don't intend to end up [in a final negotiated settlement] where they start out, . . . they start out so terribly, unrealistically high that the defendants just say, "Why talk?"

While the spokespersons for plaintiff organizations would take sharp issue with the "cash register" characterization and the implication that their penalty demands are unreasonable, many would agree that the discrepancy between the EPA's and the private enforcers' penalty calculations is currently the primary deterrent to settlement.²¹⁹ To understand how such widely divergent results are being produced from the same documents, it is necessary to take a closer look at the EPA's penalty policy.

The 1984 penalty policy, like its predecessor, draws heavily on the concept of "economic law enforcement" that became widespread in the 1970's. This concept holds that penalties should be

219. For example, one plaintiffs' attorney made the following remarks in an interview:

For some [defendants] they are right, they have been done in by us—in a sense. They say to themselves, "We go to the [agency] people that enforce this law, we talk to them. We have a relationship, they say we're doing good. Then all of a sudden you guys out of nowhere come in here and ask for \$500,000 from us. What is this about? We operate in good faith. We've been trying, we spend a lot of money." . . . So some of them—I'd say close to half—won't settle if I said to them \$5,000. They would say, "I don't care, that's outrageous, you're holding us up and I'm not going to do it." But the other half, I think I can get settlement on half quite easily with low numbers. And that I'm worried about.

calculated with a view toward depriving the violator of any financial gains s/he might have realized from noncompliance.²²⁰ Thus, the official penalty calculus begins with two primary factors: an economic benefit component and a gravity component. These components are to be calculated separately, added together and then adjusted to reflect a variety of considerations relating to the blameworthiness of the violator and the strength of the agency's case.

The economic benefit component is to include the estimated benefits to defendants from delayed costs (such as purchasing treatment equipment), avoided costs (such as operating and maintenance expenditures that would have been incurred if the treatment system had been installed at the proper time) and competitive advantage.²²¹ Even if this amount could be perfectly calculated, however, a fine that simply removed economic benefits would put the violator in the same position as if s/he had originally complied. To deter violations, additional sanctions must be added; hence, the penalty policy adds a gravity component. This component reflects such factors as the actual or potential harm to the environment from the violation, the importance of the violated provision to the statutory scheme, the amount needed to achieve an appropriate impact and other program-specific factors.²²²

The sum of the economic benefit and the gravity components, called the "preliminary deterrence amount," is then adjusted to account for other factors such as the discharger's willfulness or negligence, its degree of cooperation or recalcitrance with enforcers, its ability to pay, its history of noncompliance, and the strength of the agency's case.²²³ To promote settlement, the EPA is willing to reduce the gravity component if the

220. See *supra* text accompanying notes 123-27.

221. 1984 Penalty Policy, *supra* note 217, at 2996-98.

222. *Id.* at 2999.

223. *Id.* at 2999-3002. The policy generally provides that such adjustments are not to exceed the amount of the gravity component, and further sets percentage limits for particular types of adjustments and levels of justification. *E.g., id.* at 3000, 3001. It seeks to limit settlements for less than the economic benefit to cases where the benefit is an insignificant amount, or is overridden by compelling concerns, or is unlikely to be obtained due to litigation practicalities. *Id.* at 2998. If the gravity component reduces rather than increases the preliminary deterrence amount, the violator must clearly demonstrate that it is entitled to the reduction.

violator promptly began corrective measures before litigation.²²⁴ The agency may also accept additional environmental cleanup in lieu of a portion of the penalty.²²⁵ On the other hand, the EPA is prepared to raise the gravity component if the defendant delays compliance during settlement negotiations.

Application of the penalty policy is at least as much art as science. Even the relatively precise terms of the calculus, such as economic benefit, may be elusive. The capital cost of a treatment system that should have been purchased five years ago may be possible to reconstruct with some precision, but how much would it have cost the company to operate and maintain that system? Are there current, reliable data available on average operation and maintenance costs in this industry and the amount of variance across firms? Should one assume that this firm would have average, high, or low operation and maintenance costs? How would the installation of the treatment system have affected production and tax liabilities? What interest rate, if any, should be applied to determine the net present value of the funds made available by virtue of noncompliance? The EPA has developed "rule of thumb" methods for estimating these values, and more guidance is promised in the near future.²²⁶ For the current wave of citizen suits that are already in litigation, however, there is ample room for disagreement.²²⁷ A former agency staff attorney now involved

224. *Id.* at 3000.

225. *Id.* at 2993.

226. For example, the 1984 Penalty Policy states:

[E]xperience indicates that it is possible to estimate the benefit of delayed compliance through the use of a simple formula. Specifically, the economic benefit of delayed compliance may be estimated at: five percent per year of the delayed one-time capital costs for the period from the date the violation began until the date compliance was or is expected to be achieved. This will be referred to as the "rule of thumb for delayed compliance" method. Each program may adopt its own "rule of thumb" if appropriate.

Id. at 2996. Since the prime interest rate has been well over five percent for many years, the question naturally arises why the five percent figure should be applied in place of market interest rates. The penalty policy does not address this issue. It is possible that the five percent is a net figure taking account of inflation, tax treatment, and so on. The EPA guidance for penalty calculations under the Clean Air Act, 40 C.F.R. §66 (1984), provides a detailed analysis of these kinds of issues, and the agency's 1984 Penalty Policy, *supra* note 217, promises more "program-specific" guidance in other areas like the Water program.

227. It should also be noted that much of the information concerning economic benefit will be more readily available to defendants than to agencies or private plaintiffs. Since defendants can be expected to come forward with this information only in situations when it would lower the amount that the enforcer would otherwise demand, the long-term effect

in citizen suits remarked:

It was very common for the case engineer to pre-decide how severe a penalty he wanted to see in a particular case and then raise [or] lower the capital and O & M costs to obtain the desired result, without having to debate the gravity of the harm or other factors. I personally have seen penalty calculations be reduced by 50% or more in this manner.

The scope of discretion, and thus the chance for differences of opinion, is much greater in other parts of the penalty calculus. The gravity component of the preliminary deterrence amount, for example, includes the risk of or actual harm resulting from the violation. The penalty policy seeks to give content to that concept by specifying some subsidiary factors that go into the harm assessment, including the amount of pollutant the duration of violation, the toxicity of pollutant and the sensitivity of the environment where the discharge took place.²²⁸ However, most of these factors have very little, if any, precise content. The duration-of-violation guidance, for example, simply says: "In most circumstances, the longer a violation continues uncorrected, the greater is the risk of harm."²²⁹ A few citizen suit plaintiffs have filled these gaps with more detailed guidance of their own.²³⁰

Through these discretionary gaps in the penalty policy, users are able to inject their own enforcement philosophies. The citizen suit plaintiffs, in accord with their predominant emphasis on the importance of deterrence, generally interpret the penalty policy to achieve that goal. The state agencies and the regulated firms assume a much smaller role for deterrence in practice. The EPA has shifted its official position on the role of deterrence, especially during the Gorsuch-Burford Administration. Its current pronouncements, like the 1984 penalty policy, give considerable emphasis to the importance of deterring violations. The EPA's actual behavior in seeking and obtaining penalties, however, has fallen

may be to bias the benefit calculus downward.

228. 1984 Penalty Policy, *supra* note 217, at 2999.

229. *Id.*

230. One law firm handling several private enforcement cases has developed a penalty calculation matrix to generate precise, consistent dollar measures of environmental harm. In this matrix, violations of daily maximum pH or temperature parameters are assessed at \$10 per day, conventional pollutants like BOD and COD at \$50 per day, and toxics or heavy metals at \$100 per day. Standard factors are used to increase these amounts if the discharge is two, three, or more times the permit limit, and a parallel calculus is provided when the relevant permit limit is based on average rather than daily maximum discharges.

much closer to the behavior of state agencies than to the behavior of citizen suit plaintiffs. To use the behavioral terms previously mentioned, these agencies appear to be acting on the assumption that most of the violators are either good citizens who need a bit more time and persuasion to clean up their effluents, or that they are organizationally incompetent firms that need the carrots of advice and assistance rather than the sticks of civil penalties to get into compliance. The plaintiffs, by contrast, tend to assume that beneath every professed incompetent or good citizen lurks an amoral calculator, its eyes firmly fixed on the bottom line. One experienced environmental lawyer reflected this difference when describing negotiations with noncomplying firms in some of the recent citizen suits:

They say, "In 1979, we did this, in 1980 we did that, in 1981 we did this." And I [say] to them, "Look, if you were losing money you wouldn't be operating at this level. What you're doing, I know, you are kind of trying. But failing doesn't hurt, [does] it? It didn't hurt a bit to fail."

From the plaintiffs' perspective, then, the primary objective of the penalty policy should be to make pollution abatement failures hurt enough to force widespread compliance.

With the limited data currently available, it is not possible to make an indisputable empirical case for either of these views of environmental compliance. Past efforts by the public-sector enforcers of the Clean Water Act seem to have left a substantial amount of noncompliance uncorrected. It does not necessarily follow, however, that a strict deterrence-oriented penal enforcement strategy would have produced much better results. There are strong theoretical and practical reasons why cooperative strategies can be preferable to strict deterrence.²³¹ At the same time, total

231. For example, Professor John Scholz has developed sophisticated game theory models of regulatory enforcement. He argues that the best approach is a "tit-for-tat" strategy in which the agency cooperates with firms that demonstrate a willingness to comply voluntarily, but comes down hard on firms that abuse the agency's trust. Scholz, *Cooperation, Deterrence, and the Ecology of Regulatory Enforcement*, 18 *LAW & SOC'Y REV.* 179 (1984) [hereinafter cited as Scholz I]; Scholz, *Voluntary Compliance and Regulatory Enforcement*, 6 *LAW & POL'Y* 385 (1984) [hereinafter cited as Scholz II]. At the risk of oversimplifying Professor Scholz's complex analysis, we note several assumptions which affect the applicability of the game theory analysis to particular areas like Clean Water Act enforcement: that the system of rules applicable to the area in question will be significantly over and underinclusive, that it is possible for the actors to identify these aspects of the rules, that the parties to the compliance transaction are locked into a long-term relationship and have the capacity to make life miserable for one another, and that it is possible to make reliable

reliance on voluntarism is an open invitation to procrastination, manipulation and backsliding. A mixed enforcement strategy combining elements of cooperation and coercion is needed. The trick is to know how much carrot and how much stick is likely to work in a particular context. The appropriate proportion of these components is likely to vary from one polluter to another and from one regulatory area to another; this proportion may also shift over time. Considerable additional research would be needed to make confident judgments about the ideal mix of toughness and reasonableness in enforcement of the Clean Water Act and other statutes containing citizen suit provisions.

Apart from the ultimate efficacy of enforcement strategies, the different interpretations of the penalty policy by the EPA and the private enforcers have some unfortunate consequences. The actual and perceived fairness of the enforcement system will suffer if the size of the penalty imposed varies by an order of magnitude depending on whether a private or public enforcer reaches the courthouse first. Such a discrepancy also invites a variety of unseemly tactics, if not outright collusion, because enforcement targets may see substantial advantages in being sued by a particular enforcer. Violators may ask sympathetic agency personnel to impose token money penalties or lenient consent orders upon them in order to forestall private penalty actions. They could also borrow a page from the environmental organizations' book and try to find a friendly local plaintiff willing to bring a relatively toothless private enforcement action. They could then argue that subsequent actions relating to the same violations are barred by the doctrines of *res judicata* and collateral estoppel.

There are two related ways in which this gap could be closed and an authoritative interpretation of environmental penalty policy developed. As contested citizen suits are resolved in the courts, the federal judiciary will inevitably have to give more detailed content to the generalities of the EPA's penalty policy. If the first reported decision to reach the penalty stage is any indication, defendants may find themselves facing much stiffer penalties in private actions than the EPA or the state agencies ever assessed for comparable violations. In *Chesapeake Bay Foundation v. Gwaltney of*

distinctions between good actors and bad actors. Most of these assumptions are debatable in the EPA context.

Smithfield, Ltd.,²³² the district court applied the EPA's penalty policy to produce a \$1.3 million penalty for longstanding violations of a Clean Water Act permit. Less than five percent of this amount represented the supposed economic benefit to the defendant from delayed compliance. Most of the total reflected the court's assessment of the environmental harm and the need for deterrence. The *Gwaltney of Smithfield* decision is currently on appeal, and it may ultimately turn out to have been an aberration. In the long run, however, one effect of private enforcement litigation may be to shift the penalty horizon sharply upward for both public and private enforcers. As the total amounts and standards for calculating penalties become more clearly established, more settlements will probably be negotiated in private enforcement cases.

Litigation is a relatively slow and uncertain way to refine the penalty calculus. The easier route toward greater consistency in penalty policy is the EPA's elaboration of its guidance for calculating penalties and settling cases. The process of better defining penalty standards gained momentum under the Ruckelshaus Administration and is apparently continuing under the agency's current leadership. Following and refining the Clean Air Act's penalty model, the current penalty policies for individual regulatory programs like Air and Water will reportedly provide more detailed information about how and why the various elements are to be estimated, give more rules of thumb for generating ballpark figures quickly and create new computer programs to perform the whole operation automatically when the appropriate figures are fed in. The agency has also announced plans to incorporate information from all judicial enforcement actions into a computerized data base. Settlement policy for government litigation is being codified, especially in the hazardous waste field.²³³ By rapidly developing these systems and making explanatory information easily available, the EPA can go a long way toward improving the fairness and consistency of penalties for violations of the environmental laws.

The appropriate amount of penalties for violations is not the

232. 611 F. Supp. 1542 (E.D. Va. 1985).

233. See, e.g., Macbeth, *Settling with the Government*, 1 NAT. RESOURCES & ENV'T 9 (1985); Mays, *EPA's Superfund Settlement Policy*, ENVTL. F., Feb. 1985, at 6.

only factor creating friction between plaintiffs and defendants in the current wave of Clean Water Act citizen suits. There is also an ongoing debate about where the money paid in penalties should go. As the legislative history indicates, the drafters of the Clean Water Act's citizen suit provision contemplated that any penalties recovered after final decision in a private enforcement action would go to the federal treasury.²³⁴ Apparently, there was little thought before the current wave of suits about what would happen when a controversy was settled rather than decided by the court. Such settlement agreements are usually incorporated into judicial decrees to insure enforceability and to protect the parties. However, courts traditionally give settling parties considerable latitude to work out the precise terms of their agreements.

As several of the early private enforcement cases neared settlement, the possibility of creating "environmental funds" surfaced.²³⁵ These funds would include sums of money equivalent to agreed-upon penalties, but instead of being paid into the U.S. Treasury, the money would be used to fund conservation-related work in the area where the violations took place. This option could have advantages for both the plaintiff and the defendant. On the defense side, a local investment in the environment could partially offset the negative publicity typically associated with a penalty suit. It might also improve the general quality of life for the firm's employees—the potential users of amenities (like boat ramps or waterfront parks) purchased with environmental funds. Moreover, payments might be tax deductible.²³⁶ For the plaintiff groups, the prospect of investing the money in environmental res-

234. The Senate Report states: "It should be noted that any penalties imposed would be deposited as miscellaneous receipts and not be recovered by the complainant." S. REP. NO. 414, 92d Cong., 2d Sess. 80, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 3668, 3745.

235. It is not clear exactly where, or at whose instance, the possibility of creating the funds first arose. Some of the early plaintiff groups, who had obtained foundation funding to conduct investigative work for the initial private enforcement cases, had hoped to "recycle" some cost recovery awards for use in future case investigations. This does not mean that they necessarily suggested the funds to defendants as a way of financing further cases. Some of the plaintiffs' representatives interviewed in this study recalled that in their cases the suggestion had originally come from the defense side.

236. The tax status of payments made in settlement of citizen suits seems debatable. According to interviews, two law firms representing defendants reached opposite conclusions as to whether the payments could be deducted from the firm's tax returns. Apparently nobody has sought a ruling from the IRS on this question.

toration or improvement is usually preferable to having it disappear into the federal treasury, where it would almost surely be diverted to different uses. These groups could also receive public relations benefits from the funds by insisting upon recognition in press releases, placards, and other acknowledgments.

It is difficult to discover what has been happening in practice with the environmental funds since there is no centralized, authoritative source of data about settlements in citizen suits. Representatives from the regulated community have collected and made available some information about the disposition of settlement awards. Their tabulations indicate that settlements have been split among the federal treasury, state environmental and natural resource agencies, plaintiff organizations, and various charitable, educational, or public service entities that have some interest in environmental issues.²³⁷ It is even less clear what environmental benefits are being realized from the funds. There is no question, however, that plaintiffs' acceptance of the funds has both increased the hostility among the defense bar to citizen suits and given some credibility to the assertion that the plaintiffs are mere bounty hunters motivated by the prospect of lucrative cash payoffs.²³⁸ For this reason alone, the environmental funds may eventually prove counterproductive.

The final, major incentive created by the citizen suit provi-

237. According to data collected by industry sources, during the period from January 1983 to May 1985, 29 controversies produced settlements containing lump-sum payment provisions totalling just under one million dollars. Public-sector entities received slightly less than half of this amount, with the U.S. Treasury receiving about 22% of the total (\$218,900) and state or local agencies getting another 20% (\$201,950). Of the \$555,600 that went to private recipients, the largest share (\$337,900) was given to the Open Space Institute, a foundation with ties to several of the plaintiff organizations. Twenty-one of the 29 settlement agreements had special monitoring requirements, and many also had negotiated penalty provisions for future permit violations.

238. *E.g.*, Guida, *Dramatic Growth in Citizen Suits Under the Federal Clean Water Act*, Nat'l L.J., Dec. 3, 1984, at 24:

[E]nvironmental groups are negotiating settlements with dischargers on the basis that the discharger make a "public interest" contribution to an environmental organization other than the one threatening suit.

The organizations threatening suit do not accept contributions themselves, apparently to avoid the appearance of blackmail. However, some people see little difference between coercion benefiting a third party and coercion benefiting the organization threatening suit.

In any case, a third-party contribution settlement serves as a useful fundraising effort for environmental causes in general.

sion is the opportunity for plaintiffs to recover costs and attorneys' fees. This cost-recovery provision was included in the Clean Water Act's citizen suit section because of the drafters' belief that "in bringing legitimate actions under this section citizens would be performing a public service."²³⁹ In the terminology of contemporary economics, pollution abatement can be considered at least partly a collective good. Therefore, normal litigation incentives—including the "American rule" prohibiting fee recovery from the losing party²⁴⁰—will probably generate less private litigation to protect the resource than a social cost-benefit calculus would find desirable.

While the theoretical case for fee awards is straightforward, it is difficult to assess the practical operation of this cost-recovery provision at the present time. In the current wave of enforcement cases, very few have progressed far enough to produce a fee award. On the positive side, there is no indication from the judicial decisions that plaintiffs are bringing frivolous cases; their battling average thus far seems remarkably high. The real test of the fee incentives, however, will come after a body of precedent accumulates which resolves the dischargers' primary defenses. As discussed above, the risk of losing is a crucial element to the private law firms that are bringing citizen suits. Delay between the lawyer's investment and the ultimate fee recovery is also an important consideration; office and personal expenses continue to accumulate, even if the cash flow from citizen suits does not. At present, these downside risks seem to be limiting the number of private firms willing to take on citizen suits and the number of cases those firms are able to handle. The technical nature of the field is also a barrier to entry. Gaining a working mastery of a complex regulatory program like the Clean Water Act, along with

239. S. REP. NO. 414, 92d Cong., 2d Sess. 81-82, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 3668, 3747. This section of the report also states: "Concern was expressed that some lawyers would use section 505 to bring frivolous and harassing actions. The committee has added a key element in providing that the courts may award costs of litigation . . . to defendants where the litigation was obviously frivolous or harassing." *Id.*

240. *See generally* *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983); *Alyeska Pipeline Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975). According to the *Sierra Club* case, there are approximately 150 federal statutes that permit fee-shifting similar to the environmental citizen suit provisions. Although that case involved a different kind of suit, it did make clear that statutes like the Clean Water Act which permit fee awards in "appropriate" cases do not authorize the courts to award fees to parties who are wholly unsuccessful.

a related knowledge of monitoring and treatment technologies, agency recordkeeping practices, and all of the other details that go into successful representation in citizen suits, requires considerable time and effort.

If the plaintiffs continue to prevail over motions to dismiss and defenses on the merits, both risk and delay should decrease markedly and citizen suit cases should become correspondingly more attractive.²⁴¹ If this happens, the plaintiffs' success may have a perverse effect: less expert lawyers and clients who are less constrained by an ideological commitment to protect the environment may be attracted to the field. Abuses may result. For the present, however, it seems clear that a small cluster of active plaintiffs' lawyers are making, at some risk, considerable personal and organizational investments. Any problems with the system seem more attributable to the citizen suit device itself than to the incentives currently offered to plaintiffs and their lawyers.

VII. STANDING AND THE LEGITIMACY OF PRIVATE ENFORCEMENT

The question of incentives touches upon what is probably the most fundamental issue in assessing the role of citizen suits: whether private enforcement will ultimately come to be regarded as a legitimate means of securing compliance with regulatory laws. Regulatory compliance is not only a question of the power of legal and monetary incentives, but also a matter of the acceptability of the ways in which that power is exercised. The legitimacy issue lies behind many of the claims and defenses asserted by the citizen suit defendants as they seek to convince the courts that private plaintiffs are intruding into a complex situation and upsetting the

241. Even if this happens, there may still be an incentive gap for one important category of cases: the big, factually complex, and sharply contested case against a major polluter who is willing to fight everything to the last breath. The difficulty is that everybody has a disincentive to bring this kind of case. Agency personnel, who are probably under pressure to make some kind of quota or "bean count" of case referrals, often tend to stay away from the messy cases that will create a lot of work for them with no corresponding personal benefits. Staff attorneys for environmental organizations typically have overcrowded agendas, and will weigh the opportunity cost of such a case very carefully. They may also be concerned about the organization's won-lost record, and be reluctant to take on risky cases. Private attorneys have an incentive to gravitate to the low-risk, quick-turnover cases that will generate a steady stream of fee income. Some plaintiffs' lawyers have talked about a cooperative system in which participating firms take on a mix of easy and hard cases; but it is not clear whether this goal can be realized.

network of reasonable expectations, understandings and commitments that have evolved to give practical content to broad legal requirements. Doctrinally, the legitimacy question is most directly raised by challenges to the plaintiffs' standing and the related claim that private enforcement is an unwarranted delegation of executive power.

A. *Standing, Delegation and Separation of Powers*

The legislative history of the Clean Water Act, the statute under which most of the standing claims have been litigated, suggests that the Congress intended to incorporate the liberalized law of standing developed by the Supreme Court in the early 1970's. The Conference Committee Report²⁴² indicates that the conferees changed the definition of "citizens" who are entitled to bring suit so that the statute would track the Supreme Court's then-recent decision in *Sierra Club v. Morton*.²⁴³ The Act defined the citizen plaintiff as "a person or persons having an interest which is or may be adversely affected."²⁴⁴ This meant that injuries to recreational and aesthetic interests, in addition to direct economic injuries, would be sufficient grounds for establishing standing.²⁴⁵

Despite this clear indication that Congress wished to expand private enforcers' standing to include nontraditional kinds of injuries, there has been a considerable amount of litigation over standing in the current wave of citizen suits. Part of the motivation for this focus on standing has been tactical, in the sense that differing interpretations of the standing requirements impose different factual burdens on the parties bringing suit. If plaintiffs have to produce affidavits from affected members, make those members available for depositions, and brief and argue standing on a motion to dismiss, the costs of getting to the merits of a case

242. S. CONF. REP. No. 1236, 92d Cong., 2d Sess. 146, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 3776, 3823.

243. 405 U.S. 727 (1972).

244. Clean Water Act § 505(g), 33 U.S.C. § 1365(g) (1982).

245. The latter inference is suggested by comparing the relatively precise Clean Water Act standing language with section 304 of the Clean Air Act of 1970, the only other citizen suit provision in effect in 1972 when the Clean Water Act citizen suit was enacted. Clean Air Act § 304(a), 42 U.S.C. § 7604(a) (1982), simply provided that "any person may commence a civil action on his own behalf," thereby leaving the courts considerable latitude to give some content to the constitutional and prudential requirements of standing.

rise significantly.²⁴⁶ Several defense arguments could, if accepted, impose this kind of factual burden on the plaintiffs. Defendants generally try to push the standing requirement of injury-in-fact to approximate the kind of showing of individualized harm and causation that is demanded in private damage actions such as nuisance. For example, if a waterway is being polluted by multiple dischargers, defendants may assert that plaintiffs have not been uniquely harmed by defendants' discharges. Granting the requested relief will not then redress the plaintiffs' claimed injury.²⁴⁷ In addition, when the litigation is being managed and perhaps initiated by a national environmental organization, defendants may invoke the standing doctrine in an attempt to show that the plaintiff organizations generate cases in the citizen suit campaign without adequate membership control. One defendant argued that "the concept of a representational suit is not so attenuated as to permit a large organization and its private attorneys to comb the nation in search of causes, commence lawsuits as they elect, and then scramble to find some affiliated person to endorse the action after-the-fact."²⁴⁸

Nevertheless, the courts usually have not required the plaintiff organizations to go beyond standardized allegations that their members live or recreate near the affected waterway.²⁴⁹ While the

246. Investing scarce lawyer time and out-of-pocket expense money in establishing the organization's standing can be especially frustrating when plaintiff's law firm is depending upon an eventual award of attorneys' fees to cover these expenses. One lawyer handling several citizen suits remarked:

[W]e got a judge this morning who said they can depose all of the nine people we submitted affidavits for. I think that's a horrible waste of time and resources . . . Theoretically you're entitled to it in the sense that you have a right to say the guy who submitted the affidavit doesn't really swim in that river. . . . But . . . think about it for a moment. Is it very likely that we have nine affidavits from people who say that they canoe on the river, when they don't canoe on the river? I mean, what are the chances of a lawyer breaking down a witness on a fact like that? Lawyers have got it in their minds that you don't accept affidavits, . . . you take depositions. There's a style of litigation that says that's what you're supposed to do.

247. *E.g.*, *Student Pub. Interest Research Group v. Tenneco Polymers*, 602 F. Supp. 1394, 1397 (D.N.J. 1985).

248. *Sierra Club v. Aluminum Co. of Am.*, 585 F. Supp. 842, 852 (N.D.N.Y. 1984).

249. *See, e.g.*, *Sierra Club v. Simkins Indus.*, 617 F. Supp. 1120 (D. Md. 1985); *Student Pub. Interest Research Group v. Georgia-Pacific Corp.*, 615 F. Supp. 1419 (D.N.J. 1985); *Student Pub. Interest Research Group v. Monsanto Co.*, 600 F. Supp. 1474 (D.N.J. 1985); *Friends of the Earth v. Facet Ent.*, 618 F. Supp. 532 (W.D.N.Y. 1984); *Nunam Kitlutsisti v. Arco Alaska, Inc.*, 592 F. Supp. 832 (D. Alaska 1984); *Student Pub. Interest Research*

courts have required that plaintiffs identify specific members who claim to be injured by the defendants' discharges,²⁵⁰ affidavits from only a few members of a large organization has been found to be sufficient.²⁵¹ The courts have also declined defendants' invitations to push citizen suit standing in the direction of personal injury suits. They have refused to demand a showing that a particular discharge from a defendant's plant prevented the plaintiff's members from using the lake or stream on the ground that such a restrictive interpretation would limit citizen suits to huge discharges or small waterways, thereby violating the congressional intent.²⁵² Similarly, courts have held that total redressability of the harm is not a prerequisite to standing; instead, it is sufficient if a decision for the plaintiff would produce a public benefit.²⁵³ The

Group v. Anchor Thread Co., 22 Env't Rep. Cas. (BNA) 1150 (D.N.J. 1984); Sierra Club v. C.G. Mfg., No. 84-1784-Z, slip op. (D. Mass. Apr. 12, 1985); Friends of the Earth v. Consol. Rail Corp., 768 F.2d 57 (2d Cir. 1985).

250. In several cases, the Sierra Club tried to establish what might be called a "zip code theory" of standing. *See, e.g.*, Sierra Club v. Coca-Cola, No. 84-827-Civ-7-15, slip op. (M.D. Fla., Oct. 10, 1984) (a private enforcement action against a citrus processing plant in Florida in which the Sierra Club alleged that it "has 9,627 members in the State of Florida and one member in United States Postal Service Zip Code 33823 in which the violations complained of herein have occurred."). This type of standing claim has been uniformly rejected, not only in the *Coca-Cola* case but also in others where the Sierra Club has tried variations on the zip code theory. *See, e.g.*, Sierra Club v. SCM Corp., 580 F. Supp. 862 (W.D.N.Y.), *aff'd*, 747 F.2d 99 (2d Cir. 1984) (plaintiff claimed that 2,200 of its members resided within a 70-mile radius of the plant, that one member lived in the town where the plant was located and that it was burdensome for this one member to be subjected to interrogatories and depositions). *Id.* at 864 n.3. The court rejected these generalized allegations. Plaintiffs' standing may not be defeated if government enforcers "overfile" the citizen group's lawsuit, or seek to enter it. *United States v. Metropolitan Dist. Comm'n*, No. 85-0489-MA, slip op. (D. Mass. Sept. 5, 1985). In one unusual case, a corporation claiming esthetic damage rather than economic injury was denied standing in the lawyers' fees stage of a private enforcement action. *Citizen's Coordinating Comm. on Friendship Heights, Inc. v. Washington Metropolitan Area Transit Auth.*, 765 F.2d 1169 (D.C. Cir. 1985).

251. In a few instances, plaintiff organizations have sought protective orders or otherwise attempted to prevent public disclosure of the identities of allegedly injured members. *See, e.g.*, Sierra Club v. SCM Corp., 747 F.2d 99 (2d Cir. 1984) (first amendment associational privacy claim regarding members' identities waived); Chesapeake Bay Found. v. Bethlehem Steel Corp., 608 F. Supp. 440 (D. Md. 1985) (protective order granted); Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd., 611 F. Supp. 1542 (E.D. Va. 1985) (injured members need not be identified).

252. *E.g.*, Student Pub. Interest Research Group v. Tenneco Polymers, 602 F. Supp. 1394 (D.N.J. 1985).

253. *Student Pub. Interest Research Group v. American Cyanamid*, No. 83-2068, slip op. (D.N.J., Nov. 6, 1985).

deterrent effect of a penalty can constitute such a benefit.²⁵⁴ With standards such as these, issues of standing are becoming rather routine formalities that plaintiffs can easily meet if they are careful to conform their allegations to the accepted formulae.

Treating standing as a mere technicality, however, would miss a major part of what some defendants are trying to accomplish by invoking the standing doctrine. Since standing focuses on harm to the plaintiffs' interest, it provides a useful doctrinal vehicle for suggesting to the court that the discharges in question actually caused little or no harm to the recreational uses of the resource, even though the pollution may have technically violated the permit. Standing may thus open the door for defendants to raise the question of whether it is legitimate for the courts in particular or the government in general to be interfering with the dischargers' activities at all. More fundamentally, the standing doctrine questions whether the government's regulatory power can be legitimately invoked by private parties.

Challenges to the legitimacy of imposing sanctions for trivial violations may be based on the assumption that beneficial economic activity ought not be subject to legal sanction unless it unreasonably interferes with other legitimate interests. Professor William Rodgers suggests that this assumption has a long history in the American law governing the use of natural resources:

[I]ndustrial interests traditionally have viewed "pollution" as a "relative thing." In the words of one industry spokesman: "Pollution is the discharge of material that unreasonably impairs the quality of water for maximum beneficial use in the overall public interest." According to the National Association of Manufacturers, "This definition of pollution hinges on the word 'unreasonable.' Economic, sociological, and political factors will inevitably influence any attempt to agree upon an interpretation."²⁵⁵

In Professor Rodgers' opinion, this relativist view of pollution has several implications for the enforcement process: most notably, that enforcers have the burden of showing unreasonable harm, and that "enforcement is a particularly local concern because the unique characteristics of the receiving water, the economics of the discharging plant, and even the prevailing political tolerance level,

254. *Student Pub. Interest Research Group v. AT&T Bell Laboratories*, 617 F. Supp. 1190 (D.N.J. 1985).

255. Rodgers, *Industrial Water Pollution and the Refuse Act: A Second Chance for Water Quality*, 119 U. PA. L. REV. 761, 782 (1971).

are crucial to any decisions to compel treatment or process change."²⁵⁶ From this perspective, decisions to enforce legal requirements strictly against trivial violations would have questionable legitimacy, regardless of who was doing the enforcing. Even if the law speaks in the absolute language of fixed numerical limits and strict liability, there is still an expectation that it will be "reasonably" enforced.

When private enforcers enter the picture, this expectation of reasonable enforcement may be defeated. These self-appointed guardians of the environment (from the dischargers' perspective), can disrupt the existing legal structures of authority and accountability that are based on the division between public and private law. While wrongs to individuals are properly within the domain of private liability, wrongs to the general public are properly brought only by public officials. In this view, the phrase "private attorney general" is not just an oxymoron; it is virtually a logical impossibility.

This bipolar view is probably articulated most clearly in *Student Public Interest Research Group v. Monsanto Co.*, where defendants sought to raise the legitimacy issue both in a standing motion and in an unusual claim that the Clean Water Act's citizen suit provision was an unconstitutional delegation of executive power.²⁵⁷ The company's brief on the delegation issue asserted that the plaintiffs had claimed "sovereign equivalence" in assuming "the unique and awesome civil penalty enforcement power," and had used this power in a manner far different from the power wielded by the responsible federal and state agencies. "[T]he entire rationale of plaintiffs' suit appears to be bottomed on a punishment theory rather than a compensatory theory of injuries actually suffered by plaintiffs."²⁵⁸ In the terms used by social scientists, the plaintiffs, who should in theory be limited to private remedies, were in fact converting an established public compli-

256. *Student Pub. Interest Research Group v. Monsanto Co.*, 600 F. Supp. 1479 (D.N.J. 1985).

257. *Id.* at 783.

258. Brief of Defendant at 5, 8, 25, *Student Pub. Interest Research Group v. Monsanto Co.*, 600 F. Supp. at 1479 (motion for summary judgment based on unconstitutionality of § 505 Clean Water Act Civil Penalty Citizen Suit Provision). The brief argued both a violation of separation of powers and an unconstitutional delegation, but the basic issues addressed in the two theories were very similar.

ance system into a penal system.²⁵⁹ Monsanto argued that this was an unconstitutional arrogation of power by the plaintiff organizations. Some commentators have raised similar concerns, though not in the same constitutional terms. Joseph Guida has suggested that the citizen suit plaintiffs can be viewed as a “shadow government” whose exercise of enforcement powers is “inimical to fundamental notions of representative government and the oaths of office taken by” agency officials.²⁶⁰

The plaintiff organizations naturally take a much different view of the citizen suit mechanism, as have the courts for the most part.²⁶¹ Many of the environmental group representatives²⁶² believe that the Clean Water Act permits them—indeed, was designed to permit them—to stand in the shoes of government and sue as enforcers vindicating a general public interest in environmental protection, rather than to act simply as spokespersons for the individual interests of specific members who may be harmed by particular discharges.²⁶³ In this view, the private attor-

259. *E.g.*, K. HAWKINS, *ENVIRONMENT AND ENFORCEMENT: REGULATION AND THE SOCIAL DEFINITION OF POLLUTION* 4 (1984) (emphasis in original):

A penal style is accusatory and adversarial. Here enforcement is reflective: a matter of determining what harm was done, of detecting the lawbreaker and fixing the appropriate sanction. . . . If [a violation and a violator can be detected], then the breach *deserves punishment*. In a compliance strategy, on the other hand, the style is conciliatory and relies upon bargaining to attain conformity. . . . If prevention of future misconduct occurs, it does so as a result of negotiation rather than . . . deterrence A standard which has not been attained in a compliance system *needs remedy*.

260. Guida, *Dramatic Growth in Citizen Suits Under the Federal Clean Water Act*, National L.J., Dec. 3, 1984, at 26, col.1.

261. *E.g.*, Student Pub. Interest Research Group v. Fritzsche, Dodge & Olcott Inc., 579 F. Supp. 1528, 1535 (D.N.J. 1984): “[P]ublic participation in enforcement actions promotes the goals of the Act, as well as administrative efficiency. Responsible citizen groups, concerned with the quality of our environment, and willing to contribute to its betterment, perform a public service in their efforts to enforce the Clean Water Act.”

262. As previously mentioned, the various plaintiff organizations in the current wave of citizen suits are not all in agreement on matters of policy and strategy. For example, one of the organizations contacted in this study tends to stay relatively close to the dispute resolution model. It will not bring a case unless there are complaints from members who reside near the discharge and demonstrate interference with usage of the resource. The paper record of permit violations is not enough. A number of other organizations begin with a paper record of violations, culled from the files of the EPA or the responsible state agency, and then contact local members or a friendly local group to see whether they are interested in becoming parties to an action.

263. In the delegation dispute in *Monsanto Co.*, the plaintiffs argued not only that their enforcement actions were in fact consistent with the EPA’s expressed enforcement policy,

ney general concept evolved over a period of decades and won general acceptance by the 1970's as a result of the widespread perception that effective public participation was necessary to overcome the resource shortages, institutional constraints, and risks of capture that made the administrative agencies chronically timid enforcers.²⁶⁴

These debates over the legitimacy of private enforcement are also relevant to the standing doctrine, especially since recent Supreme Court decisions have begun to address standing issues in terms of the separation of powers among the branches of the federal government. This approach was stated most clearly in *Allen v. Wright*,²⁶⁵ where the majority observed that "the law of Article III standing is built on a single basic idea—the idea of separation of powers."²⁶⁶ The Court also noted, however, that "the constitutional component of standing doctrine incorporates concepts concededly not susceptible of precise definition,"²⁶⁷ and so the relationship between private enforcement devices like the citizen suit and separation of powers remains somewhat obscure.

The primary concern expressed by the Court in *Allen v. Wright* was the fear that weakening the standing doctrine's injury-

but also that "Congress did not want EPA's prosecutorial discretion to be conclusive. It deliberately established a dual enforcement scheme which would place a check on EPA's discretion." Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment Based on Unconstitutionality of Section 505 of the Federal Water Pollution Control Act at 23. In one case, the NRDC and Hudson River Sloop Clearwater argued more explicitly that they were standing in the shoes of the government. The company they were pursuing in a penalty action filed for bankruptcy, and the environmental organizations responded that they came within a statute exempting suits by governmental units from the bankruptcy law's stay of legal actions against the debtor. The court disagreed, holding that "both the statute and the legislative history demonstrate that the term 'governmental unit' in the bankruptcy code refers exclusively to actual government groups and not to organizations acting in a governmental capacity." *In re Revere Copper and Brass Inc.*, 32 Bankr. 725, 727 (S.D.N.Y. 1983).

264. The gap between these two philosophies of regulatory enforcement echoes a recent observation by Professor John Coffee in a related context:

[I]t may well be a recurring characteristic of our legal culture that formal changes accepted on a doctrinal level are still frequently resisted and partially nullified on the less visible level where operation decisions are routinely made. . . . [O]ur society's actual acceptance of the private attorney general may be more tentative and incomplete than it first appears.

Coffee, *supra* note 207, at 238.

265. 104 S. Ct. 3315, 3325 (1984).

266. *Id.*

267. *Id.*

in-fact requirement might lead to adjudication of abstract controversies in which the plaintiffs would have no real connection to or stake in the particular issues being litigated. This concern seems not to apply to citizen suit standing as interpreted by the lower courts. Plaintiffs are being required to plead and prove harm to property, recreational or aesthetic interests in the particular waterway where the discharge is occurring. Moreover, the behavior standard applied to the defendant has been quite clearly specified in the public permit writing process. As a result, the factual issues being litigated on the merits are generally very concrete and specific. Citizen suit standing seems in this respect to fulfill one of the primary functions of the injury-in-fact requirement described in the Court's 1982 opinion in the *Valley Forge Christian College v. Americans United for Separation of Church & State*: that the issues be presented "in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action."²⁶⁸ Beyond this rather amorphous principle, the recent Supreme Court standing cases provide little guidance on the functional aspects of the separation of powers that might be implicated by citizen suits.²⁶⁹

268. 454 U.S. 464, 472 (1982). One situation in which the court may not have "a realistic appreciation of the consequences" of its decision in a citizen suit is when the government declines to become a party, and has not articulated a policy on a matter of decisional significance. See *supra* text accompanying notes 176-77. While this is theoretically a significant problem, it has not yet emerged as a serious practical problem. It is possible that the EPA's efforts to codify enforcement policy, together with selective intervention in cases of precedential significance, will provide adequate protection against uninformed judicial decisions during the transitional period when many unresolved issues relating to the citizen suit provisions are being litigated. To some degree, the *Valley Forge* formulation quoted in the text can be criticized on the ground that a focus on particular facts relating to the parties will not be "conducive to a realistic appreciation of the consequences of judicial action." The parties to the litigation may be atypical of the larger universe of actors potentially affected by the court's decision. See D. HOROWITZ, *THE COURTS AND SOCIAL POLICY* (1977). Thus, in decisions affecting implementation of a regulatory statute, what may be most needed are general "legislative" facts relating to the anticipated programmatic consequences of alternative decisions.

269. *Valley Forge*, 454 U.S. at 472, notes two other functional justifications for a constitutional injury-in-fact requirement. First, the requirement "reflects a due regard for the autonomy of those persons likely to be most directly affected by a judicial order," because it limits the power to invoke the judicial process to those who have suffered actual injury. *Id.* at 473. However, the Court makes clear that noneconomic injuries like those asserted by plaintiffs in citizen suits adequately serve this purpose. *Sierra Club v. Morton*, 405 U.S. 727 (1972), is cited with approval, and the majority later states explicitly: "[W]e do not retreat from our earlier holdings that standing may be predicated on noneconomic injury," *Id.* at 486. See also *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979). Second, the Court notes that "[t]he exercise of the judicial power also affects relationships between

Apart from case law, there is a superficial appeal in the notion that law enforcement—the duty to “take care that the laws be faithfully executed”—is inherently an executive function that should not be usurped by courts and private litigants.²⁷⁰ This position was developed by Judge Scalia in a law review article analyzing the role of the standing doctrine in preserving separation of powers.²⁷¹ According to Judge Scalia, courts exist solely to redress unique, individualized, “nonmajoritarian” harms. Majoritarian harms—those which fall upon a broad sector of the populace—are properly the concern of the political branches. Constitutional notions of separation of powers impliedly “limit the power of Congress to convert generalized benefits into legal rights.”²⁷² If it is true, as the defense commonly argues, that plaintiffs have only a trivial interest in the abatement of any particular pollution source, then private enforcement of pollution control laws presumably would raise these problems.

There are several difficulties with this analysis as applied to citizen suits. First, and most obviously, the domain of unique, nonmajoritarian, redressable harm is not a tightly bounded category that exists in the world apart from legal definitions of injury. This is evident in the analogous field of nuisance law, where the boundary between “public” and “private” nuisance actions against polluters has been highly variable from state to state and over time.²⁷³ Thus, when validly enacted legislation says that boat-

the coequal arms of the national government,” *Valley Forge*, 454 U.S. at 473. It also states, however, that this “effect is . . . most vivid when a federal court declares unconstitutional an act of the Legislative or Executive branch.” *Id.* Arguably, private enforcement would be less disruptive of interbranch relationships than either a declaration of unconstitutionality or an invalidation of a major policy decision of the other branches. As noted in the text, however, there are other ways to analyze the relationships among the branches.

270. See, e.g., Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 669-70 (1985):

The suggestion [that judicial review of agency inaction would usurp executive functions] is based on the understanding that enforcement activity is entrusted to the executive, not to the courts, and that judicial involvement—in the form of a decree compelling prosecution—would violate the separation of powers. While this basic understanding is correct, the conclusion does not follow. The “take care” clause is a duty, not a license; it imposes an obligation on the President to enforce duly enacted laws.

271. Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U.L. REV. 881 (1983).

272. *Id.* at 886.

273. The general rule at common law is that a plaintiff cannot bring an action against

ers or fishermen are sufficiently injured by pollution to invoke the judicial machinery, there may be no principled basis for courts to devise more stringent standing criteria to reject that determination. Second, to the extent that losses of environmental amenity are regarded as majoritarian harms, there may be collective goods problems that prevent the political system from providing optimal quantities.²⁷⁴ If so, then the individualized enforcement incentives built into the citizen suit can serve as a corrective to the free rider problems inherent in collective goods. Most fundamentally, however, it is not clear what results the separation of powers doctrine requires in the field of regulatory enforcement.

According to Judge Scalia, separation of powers concerns are raised by a liberalized law of standing. This is because a lowering of the standing barrier can inject the courts into the province of administrators in two ways: it can affect the time at which certain issues are presented to the courts and it can interfere with the power of administrators to modify or nullify regulatory laws by failing to enforce them.²⁷⁵ Of these two grounds for noninterfer-

a "public nuisance" that affects the community generally unless s/he can show special damages distinguishing her or his harm from the harm to the public at large. *See, e.g.,* Weinstein v. Lake Pearl Park, 347 Mass. 91, 196 N.E. 2d 638 (1964). However, special damages adequate to support a private action need not be harm to a traditional property interest; it could, for example, be loss of income to a commercial fisherman when water pollution interfered with her or his right (held in common with the general public) to catch fish in state waters. *See, e.g.,* Hampton v. North Carolina Pulp Co., 223 N.C. 535, 27 S.E.2d 538 (1943); Columbia River Fishermen's Protective Union v. City of St. Helens, 160 Or. 654, 87 P.2d 195 (1939). In addition, some states have abolished the distinction by legislation, and have permitted individuals to sue for abatement of a public nuisance. *See, e.g.,* Florida *ex rel.* Gardner v. Sailboat Key, Inc., 295 So.2d 658 (Fla. Dist. Ct. App. 1974). *See infra* text accompanying note 291.

274. The basic collective goods problem is described as follows in M. OLSEN, THE LOGIC OF COLLECTIVE ACTION 48 (1977):

[T]here are . . . three separate but cumulative factors that keep larger groups from furthering their own interests. First, the larger the group, the smaller the fraction of the total group benefit any person acting in the group interest receives, and the less adequate the reward for any group-oriented action, and the farther the group falls short of getting an optimal supply of the collective good Second, . . . the larger the group the smaller the likelihood of oligopolistic interaction [among subsets of group members] that might help obtain the good. Third, the larger the number of members in the group the greater the organization costs, and thus the higher the hurdle that must be jumped before any of the collective good at all can be obtained.

275.

Does what I have said mean that, so long as no minority interests are affected, "important legislative purposes, heralded in the halls of Congress, [can be] lost

ence, the latter is clearly the more important and the more directly threatened by private enforcement. Traditionally, separation of powers arguments have been made for the opposite position—that is, that allowing administrators to repeal statutes by disuse violates the constitutional allocation of powers and responsibilities:

"The doctrine of separation of powers . . . stands in the way of holding that a legislative enactment which complies with constitutional requirements can be rendered ineffective by non-use or obsolescence or repealed by failure of those entrusted with its administration to enforce it." In short, the rejection of desuetude is only superficially a limitation on the judiciary. Its essence is a limitation on the executive.²⁷⁶

In this view, private enforcement could serve to *correct* a separation of powers deficiency by overriding bureaucratic defiance and carrying out the will of the political branches as authoritatively expressed in legislation.²⁷⁷

If the separation of powers consequences of private regulatory enforcement are indeterminate as a matter of constitutional doctrine, then the key question becomes an empirical one: What will private regulatory enforcement do to the structures of control, accountability and legitimacy that have evolved to govern the modern regulatory state? At present, there are no definitive answers to this question; but both the historical record and some current developments in the field of environmental protection suggest that private enforcement has a strong claim to legitimacy.

B. *Common Informers and Private Attorneys General: Citizen Suits in Historical Perspective*

While the citizen suit appears to be a new technique for enforcing regulatory statutes, the concept of shared public and pri-

or misdirected in the vast hallways of the federal bureaucracy?" Of course it does—and a good thing, too. When no peculiar harm to particular individuals or minorities is in question, lots of once-heralded programs ought to get lost or misdirected The ability to lose or misdirect laws can be said to be one of the prime engines of social change, and the prohibition against such carelessness is (believe it or not) profoundly conservative.

Scalia, *supra* note 271, at 897 (emphasis in original).

276. Allen, *The Police and Substantive Rulemaking: Reconciling Principle and Expediency*, 125 U. PA. L. REV. 62, 83 (1976) (quoting J. SUTHERLAND, *IA STATUTES AND STATUTORY CONSTRUCTION* § 23.25, at 267 (4th ed. 1972)).

277. Sunstein, *supra* note 270, at 670.

vate responsibility for enforcement can be traced back at least 600 years in Anglo-American law. In 1388, Richard II and the English Parliament²⁷⁸ enacted a water pollution statute designed to deal with a serious public health risk.²⁷⁹ The problem, as described in the statute, was "that so much Dung and Filth of the Garbage and Intraills as well as of Beasts killed, as of other corruptions, be cast and put in Ditches, Rivers, and other Waters, . . . that the air there is greatly corrupt and infect, and many Maladies and other intolerable Diseases do daily happen." Like many modern pollution control statutes, this one provided both for the cleanup of past pollution before a set deadline and for the prevention of future pollution. It also provided for a dual system of enforcement: either public officials or others who "feel [themselves] grieved" or who "will complain" could bring enforcement actions. The penalty for unremedied past violations was set by the legislature, whereas the remedy for future violations was left to the considera-

278. During this period, control over the initiation and specification of legislation was shifting from the Crown to the Parliament. Therefore, it is probably impossible to determine just where the proposal for this statute came from, although we can be confident that Parliament, at the very least, approved it. See 2 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 435-40 (4th ed. 1936).

279. The Statute of 12 Rich. II, ch. 13 (1388), reads in relevant part as follows:

For that so much Dung and Filth of the Garbage and Intraills as well as of Beasts killed, as of other Corruptions, be cast and put in Ditches, Rivers, and other Waters, . . . that the Air there is greatly corrupt and infect, and many Maladies and other intolerable Diseases do daily happen, . . . to the great Annoyance, Damage and Peril of the Inhabitants, Dwellers, Repairers, and Travelers . . . ; (2) . . . all they which do cast and lay all such Annoyances . . . in . . . Waters . . . shall cause them utterly to be removed, avoided, and carried away [before the next Feast of St. Michael] . . . every one upon Pain to lose and to forfeit to our Lord the King [twenty livre] . . . (3) . . . the Mayors and Bailiffs . . . shall compel the same to be done upon like Pain. (4) And if any feel himself grieved, that it be not done in the Manner aforesaid, and will thereupon complain him to the Chancellor after the said Feast of St. Michael, he shall have a Writ to make him of whom he will complain come into the Chancery, there to shew why the said penalty should not be levied of him, and if he cannot excuse himself, the said penalty shall be levied of him. (5) . . . none of what Condition soever he be, [shall] cause to be cast or thrown from henceforth any such Annoyance . . . into the . . . waters . . . ; (6) and if any do, he shall be called by Writ before the Chancellor, at his Suit that will complain; and if he be found guilty, he shall be punished after the discretion of the Chancellor.

2 STATUTES AT LARGE 382 (O. Ruffhead ed. 1763). For the most part, this translation of the Statutes at Large is simply a reprinting of the translation current at the time. Since the statute is not to be analyzed in detail here, it is unnecessary to go into the potentially complicated problems of verifying the meanings of particular provisions and detailing the duties or prerogatives created by them.

ble discretion of the chancellor.²⁸⁰

In several respects, the 1388 water pollution act was a logical outgrowth of a legal system based on very different assumptions from modern American legal culture. Distinctions between statutory and common law, and between public and private law, held little significance in the post-conquest English legal system. Like other early statutes, the 1388 water pollution act came to be considered part of the common law²⁸¹ and was incorporated into the law of public nuisance.²⁸² Eventually it became conventional wisdom that only public authorities could bring actions against public nuisances.²⁸³ At the time of its enactment, however, the 1388 law was part of an undifferentiated body of authoritative rules²⁸⁴ whose breach might result in multiple remedies at the instance of different parties. For example, a rule-violating deed could give

280. This statute did not explicitly establish financial incentives for private enforcers, but other statutes enacted at the same time did. A 1331 statute, for example, allocated one-fourth of any fines imposed on stallholders selling goods after the close of a fair to "every Man that will sue for our Lord the King". Statute made at Westminster In the Fifth Year of the Reign of K. Edward the Third After the Conquest, 5 Edw. III, ch. 5 (1331).

281. S. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 417 (2d ed. 1981):

Such changes as came about in the criminal law were made from the outside. The most important method was the direct one of legislation, . . . To lawyers in the fourteenth century a statute was not something external to the law: it was an internal alteration, and it lived in its context so that its application was neither mechanical nor unalterable.

282. *E.g.*, McRae, *The Development of Nuisance in the Early Common Law*, 1 U. FLA. L. REV. 27, 35 (1948).

283. Private plaintiffs could bring actions only for private nuisances, which were defined as infringements on their rights in the use and enjoyment of land. Prosser, for example, offers the following:

A private nuisance is a civil wrong, based on a disturbance of rights in land. The remedy for it lies in the hands of the individual whose rights have been disturbed. A public or common nuisance, on the other hand, is a species of catch-all criminal offense, consisting of an interference with the rights of the community at large, which may include anything from the obstruction of a highway to a public gaming-house or indecent exposure. As in the case of other crimes, the normal remedy is in the hands of the state.

W. PROSSER & W. KEETON, *LAW OF TORTS* § 86, at 618 (5th ed. 1984).

284. Glanville, writing in the twelfth century, noted that legal pleadings were of two kinds—civil and criminal. But as Milsom observes, "his distinction is not ours. Civil pleas are those concerning land and the old personal actions; and all wrongs are criminal, presumably because there is offense to the community as well as to the victim." S. MILSOM, *supra* note 281, at 285. By the "old personal actions," Milsom refers to claims of the middle ages known as debt, detinue, covenant, and account. *Id.* at 244. Another way of understanding the distinction between civil and criminal pleas is in terms of the "demand for a right," as opposed to the "complaint of a wrong." *Id.* at 243.

rise to legal action by a representative of the public authority as well as by a private individual.²⁸⁵ As a practical matter, what was often different about the two actions was the remedy sought. Public authorities were generally more interested in punishing and deterring wrongful behavior; private plaintiffs were generally more interested in getting compensation for the injuries they had suffered and in preventing future injuries.²⁸⁶ At the same time, public authorities often were quite interested in collecting the revenues they expected from the imposition of fines for wrongful acts, and private plaintiffs often were motivated primarily by the desire to punish wrongful behavior.

It is important to understand that a singular definition of wrongful behavior gave rise to various possible legal actions. Most of the different actions were distinguished by what type of remedy was sought, by whom sought it, and by whom had authority to provide it. Only over time did English and American legal doctrine attempt to establish a systematic distinction between public and private actions based on ostensibly separate domains of public and private rights.²⁸⁷

It is impossible here to meaningfully summarize the complex

285. Indeed, even attempting to distinguish between "private individuals" and "public authorities" during the era is artificial. Both "privateness" and "publicness" were embedded in the roles of individuals based on their positions (property rights) in the feudal tenure system. Merryman puts the point nicely:

In a truly feudal system the distinction between public and private law fails to make sense. Property and office are indistinguishable; tenure of land determines both "public" and "private" rights and duties. Depending on one's premises he could today characterize all feudal law either as private law or as public law, but there was no occasion for such speculation at the time.

Merryman, *The Public Law-Private Law Distinction in European and American Law*, 17 J. PUB. L. 2, 7 (1968).

286. 2 W. HOLDSWORTH, *supra* note 278, at 453 (a private person had to show a grievance personal to him, but a king could sue for general harm).

287. We are not suggesting that the distinction between public and private actions ever became as strong or as consciously fundamental in English and American law as in Continental European law. Nonetheless, it became a critical force in the nineteenth century, as courts tried to sort actions into private (contracts, torts, property, commercial law) and public (constitutional, criminal, and administrative law) categories. To a certain extent, no doubt, the effort was pragmatic; courts wanted to limit the number of actions available in response to any given infraction. Such a separation became increasingly necessary with the emergence of strong, centralized states. To a significant extent, the effort was also political and ideological. The explicit goal of many nineteenth century judges was to create spheres of private activity in which market forces would be able to operate free from state interference. For a short argument quite similar to ours, see Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423 (1982).

process by which the writ system of legal actions changed from the fourteenth to the nineteenth centuries,²⁸⁸ but several key points can be noted. First, the authoritative rules that comprise law came from a variety of sources. In addition to statutes, there were two other major sources of authoritative rules. The first, in the early centuries after the Norman Conquest, were very local and now are all but forgotten. They included the county, the hundred,²⁸⁹ and the manor.²⁹⁰ The division of jurisdiction among them is lost to us. It is clear, however, that in the early times after the Conquest these local bodies would have settled local disputes and determined local policy regarding such matters as pollution control and natural resource use. Typically, their decisions were based on established customs, which varied by locale. Since these courts generally were quite close to local residents, it would have been common for those residents to bring actions in the local courts to enforce the applicable community rules.

The king's courts gradually supplanted the local courts and produced the writ system and most of what we now call the common law. Like the local courts, these courts probably viewed their role as merely defining and enforcing established norms and customs. Nevertheless, they had much larger effects. First, they pressed toward the establishment of a single set of legal norms governing the entire realm. Second, in responding to new problems over time, they gradually created a body of rules that went far beyond the system they inherited. The 1388 statute quoted above, for example, eventually was absorbed into the much larger body of nuisance law, which was capable of encompassing an almost unlimited array of annoyances and requested remedies. Private prosecutions for acts that would eventually be defined as public nuisances seem to have been common, in significant part because many such acts would also interfere with various interests in the use and enjoyment of property. Gradually, common law judges sought to impose certain unifying constraints on

288. For useful summaries of the history of writs for remedying the nuisance-like problems we have referred to, see McRae, *supra* note 282, and Winfield, *Nuisance as Tort*, 4 CAMBRIDGE L. J. 189 (1931). See also F. MAITLAND, *THE FORMS OF ACTION* (1908).

289. The hundreds were institutionalized meetings of important landholders in subdivisions of counties. They were generally served by bailiffs, and the right to hold hundreds meetings was often held in a proprietary fashion we would think of as a form of private property. S. MILSOM, *supra* note 281, at 15-16.

290. *Id.* at 21-22.

this developing body of law, such as the distinction between public and private nuisances.²⁹¹

A second key point is that an equally diverse array of remedies and enforcement mechanisms was available for application to rule-violating behavior. A given infraction might be punished by imprisonment, a fine, an injunction (generally backed by the threat of imprisonment or fine) or damages. There might also be a variety of reasons for prosecuting an offense. Public officials might wish to put down perceived threats to their effective rule, placate their superiors or obtain part of the reward for convicting

291. It appears that this distinction, quoted from W. PROSSER & W. KEETON, *supra* note 283, was only laboriously built up over the passage of centuries. We have already noted that there was no meaningful distinction between crime and tort in the early centuries after the Conquest. To the degree that "private" plaintiffs were excluded from certain kinds of nuisance actions, the basis seems to have been that the crown or the lord "owned" them, and not that it was inappropriate for a private plaintiff to bring such an action as a matter of policy. Glanville, for example, maintained that "[w]henver a nuisance is committed affecting the King's highway, or a city, the suit concerning it belongs to the King's Crown." McRae, *supra* note 282, at 36. Conversely, a landholder had an action when the nuisance interfered with his rights to use and enjoyment of land.

The unifying principle, if there was one, was that rights of action should be allocated according to whose rights and prerogatives were interfered with in the feudal tenure system. This formalist impulse, of course, was frequently confronted with the reality that a given wrong interfered with more than one type of feudal right. In the early years actions might be brought by a variety of actors. As the law attempted to systematize actions, however, it also attempted to limit the available set of actions. The courts eventually retreated from the enterprise, in significant degree, by propounding a proto-realist analysis that a public nuisance might also give rise to an action in an individual who had suffered "special damages". The earliest suggestion of this proposition appears to have occurred in 1411, Statute made at Westminster In the Thirteenth Year of the Reign of K. Henry IV, 13 Hen. IV, ch. 3 (1411). But it was clearly stated in a much discussed dictum by Judge Fitzherbert in 1536:

If one makes a ditch across the highway, and I come riding in my way by night, and I and my horse are thrown into the ditch, so that I suffer great damage . . . in this case I shall have an action against him who made the ditch across the way, because I am more damaged by this than any other.

Y.B. 27 Hy. VIII. Mich. pl. 10 (1536), *quoted in*, VIII 2 W. HOLDSWORTH, *supra* note 278, at 424. The courts had tremendous difficulty coming to any remotely coherent definition of special damages. See the rather tortured discussion in W. PROSSER & W. KEETON, *LAW OF TORTS* § 88, at 586-91 (5th ed. 1984). The important point is that the courts have long permitted private rights of action even in cases they have declared to be public nuisances (i.e., crimes), and where no such right is statutorily granted. On the other hand, it has been extremely difficult to predict when such private rights would be permitted, and they were more often than not denied. Overall, then, while the courts, in response to rapid urbanization and industrialization, declared an ever growing list of activities to be public nuisances, they curbed the import of those declarations by generally—but not always—limiting actions to public officials.

an offender. Private plaintiffs might wish to receive compensation for past injuries, obtain injunctions against possible future injuries, punish an offender for violating a common code or garner a portion of the fines offenders would be required to pay. All of these incentives appear to have been common during most of the history of the common law.

Although private enforcement seems to have been common through the nineteenth century, the general understanding of its role seems to have changed over time. In the first few centuries after the Conquest, it appears that private enforcement was common because there was no well developed conceptual distinction between public and private functions. Any violation of community rules was the business of the entire community and all its members. We might even speculate that authorities encouraged community members to participate in prosecuting wrongs because they knew it increased members' investment in and commitment to the existing order. Participation would thus increase their own sense of obligation to comply with the rules. By the same token, such a commitment to the existing order might often have been sufficient incentive to promote and legitimate considerable private enforcement.

By the dawn of the industrial revolution, the basis of private enforcement appears to have shifted considerably. In the mid-eighteenth century, the view was widespread in England that the country was suffering from an epidemic of crime, largely perpetrated by the growing urban lower class.²⁹² At that time, the country still had no substantial police force, either centralized or local.²⁹³ The response to this problem took several forms. First, more severe penalties for many offenses were widely advocated and frequently enacted.²⁹⁴ Second, many new offenses were created, especially for petty crimes like vagrancy, drinking, and the like.²⁹⁵ Third, there were major efforts to deter crime by greatly increasing the incentives for private enforcement. In cases of particularly heinous crimes, government agencies would often advertise rewards for capture or conviction of their perpetrators.

292. See generally 2 L. RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750, at 1-29 (1956).

293. Hay, *supra* note 11.

294. 2 L. RADZINOWICZ, *supra* note 292.

295. *Id.* at 8-14.

Wealthy parties would regularly do the same when they had been the victims of crime, indeed, failure to do so “was likely to be interpreted as an offer of impunity to the offenders.”²⁹⁶ In addition, numerous new common informers statutes were passed providing that parties aiding in the apprehension and conviction of violators would share in the fines collected as a result. In sum, while the diagnosis of the problem remained basically moralistic, the proposed solutions became increasingly utilitarian: the legal system sought to increase the costs of crime by increasing the penalties and to enlist the citizenry in the enforcement process by making private prosecution lucrative.²⁹⁷ In practice, however, this theory was to confront a variety of problems.

In the heyday of the English common informer’s actions, they were available for a wide variety of offenses. Private actions could be brought to penalize violators of price and quality regulations for consumer goods (such as merchants “selling salt above the as-size price,” or bakers offering bread made with unwholesome materials); to enforce regimes of occupational licensing and taxation (including a “pawnbroker trading without a license, or keeping more than one shop under a single license” and a person “practis[ing] as an apothecary without the necessary certificate”); and to punish “Offenses leading to Corruption of Morals” (such as a publican allowing “gaming in his house by journeymen, labourers, servants, or apprentices” or a “person found guilty of having opened, without license, disorderly houses, or gardens for

296. *Id.* at 112.

297. Interestingly, liberals and reformers of the eighteenth century also sought to use incentives to encourage *collective* responsibility for enforcement. The collectivity, generally through the hundred, might be held responsible to pay damages to the executors of any person killed while trying to arrest an offender, and sometimes to those whose property had been damaged by rioters. *Id.* at 163-65. In 1766, Edmund Burke proposed that the hundreds be required to indemnify parties injured by thefts from shipwrecks within their jurisdiction. Moreover, there was serious discussion about compelling parishes to pay rewards to those who solved and prosecuted crimes committed in their areas, as well as to individuals who prevented crimes. *Id.* at 166. By the middle of the nineteenth century, however, with Sir Robert Peel’s reforms and the rise of a professional police force, the idea of creating incentives to force collective responsibility had largely fallen into disuse.

Another form of reward which should be noted is that individuals were often exempted from various onerous community offices for successfully apprehending and convicting certain types of offenders *Id.* at 158-63.

Finally, there was an incentive-based analogue to our modern action forcing provisions. Constables were encouraged toward more vigorous enforcement by various fines—many statutorily set—for failure to perform their duties. *Id.* at 162.

music and dancing or for entertainment in, or within twenty miles of London").²⁹⁸

Several features of these statutes made them vulnerable to abuse and resistance. The offenses themselves were largely victimless crimes, if indeed they could properly be regarded as crimes at all. The overt class bias and paternalism in these informer's statutes also seemed calculated to inspire resentment among those who were being regulated. Occasionally, the "regulatory backlash" was immediate and unmistakable.²⁹⁹ More commonly, however, the effect of the excessive enforcement of these petty laws was a growing disrespect for the laws themselves and widespread contempt for those who enforced them. "In the end," as Professor Radzinowicz notes, "this long-continued distaste caused the very name of common informer to be regarded as a term of abuse,"³⁰⁰ and the actions were eventually abolished.

The early history of the common informer's action indicates that private enforcement can undermine rather than reinforce the purposes of the relevant statutes, particularly if those purposes are not widely shared by the affected populace. Moreover, even when the underlying law serves a widely accepted public purpose, the incentives created to induce private enforcers to bring suit may exceed the bounds of the society's tolerance for enforcement. When this happens, the enforcers may come to be regarded not as legitimate spokespersons for the public interest, but rather as "unprincipled pettifoggers" whose office [is] a nuisance and 'an instrument of individual extortion, caprice and tyranny.'³⁰¹

While English history suggests that private regulatory enforcement can lead to abuses and backlash, the American experience indicates that this is not an inevitable result. As the Supreme Court pointed out during the early decades of this century, *qui*

298. *Id.* at 139-46; see also Kurland & Waters, *Public Prosecutions in England, 1854-79: An Essay in English Legislative History*, 1959 DUKE L.J. 493.

299. *E.g.*, 2 L. RADZINOWICZ, *supra* note 292, at 147:

In 1736 a statute was passed which aimed at securing what almost amounted to the prohibition of all alcoholic liquors, at a time when drinking was particularly rife. This was an opportunity of which the informers could not fail to take advantage. They rushed to assist in the enforcement of this drastic law, and their infamous achievements became notorious. . . . In 1738 the legislature felt it necessary to extend to common informers penal protection against the rage of the populace.

300. *Id.* at 155.

301. *Id.* at 139.

tam actions providing private enforcers with a share of criminal fines “have been in existence . . . in this country ever since the foundation of our government”³⁰² and “have not been without defense by the courts.”³⁰³ Similarly, private prosecution of criminal cases, without the financial incentive of the *qui tam* bounty, was traditionally a common feature of American public law. As late as 1955, a law review survey found that the practice was still extensively used:

In thirty jurisdictions, appellate courts have decided that privately employed attorneys may assist the public prosecutor, while only three have said that they may not. Moreover, sixty-two percent of 151 public prosecutors from forty-five states who responded to a questionnaire on prosecution procedures stated that they permit privately hired attorneys to assist in criminal proceedings. Most states find authority for permitting private prosecution in the inherent power of the court to administer justice. . . . No restrictions have been placed on the crimes private attorneys may assist in prosecuting.³⁰⁴

In jurisdictions where private prosecutions were permitted, courts sometimes took responsibility for coordinating public and private efforts, and assuring “that a public prosecution for a criminal offense does not degenerate into a private persecution [or] . . . the gratification of private malice.”³⁰⁵ One method of doing so was to require that the private prosecutor remain under the control and supervision of the responsible public official.³⁰⁶

302. *Marvin v. Trout*, 199 U.S. 212, 225 (1905).

303. *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 (1943).

304. Note, *Private Prosecution: A Remedy for District Attorneys' Unwarranted Inaction*, 65 *YALE L.J.* 209, 218-19 (1955-56). For a more recent but less useful analysis of this topic, see Comment, *Private Prosecution—The Entrenched Anomaly*, 50 *N.C.L. REV.* 1171 (1972) (discussing *State v. Best*, 280 N.C. 413, 186 S.E. 2d 1 (1972)).

305. *Thalheim v. State*, 38 Fla. 169, 170, 20 So. 938, 938 (1896).

306. In *Thalheim*, 38 Fla. at 183, 20 So. at 942, the court reasoned:

A public prosecution must be conducted by the proper official representative of the State, and must not under any circumstances be under the entire management and control of private parties and their attorneys. It is proper, however, for the State Attorney, when there is no express statutory prohibition, to obtain, with the consent of the court, the assistance of other counsel, and other members of the bar are not incompetent to be engaged for such assistance and taking part in the trial by reason of being retained and compensated by the prosecuting witness, the party injured by the crime, or other private interests. When such assistants are employed in the case, the State Attorney should always remain present at the trial.

Accord, *Oglesby v. State*, 83 Fla. 132, 90 So. 825 (1922). Some states interpreted statutes granting powers to public prosecutors as denying a role to private parties in criminal mat-

As private prosecutions gave way to the monopoly of public prosecutorial bureaucracies, concern for the accountability of public prosecutors began to grow. The decision not to prosecute, which may have occasioned relatively little concern when private parties were free to take the initiative, now posed both a systemic problem and a problem of individual justice. Decisions to drop a case or to bargain it down to a lesser charge might be the product of "corruption, political ambition, or insufficiency of funds or personnel"³⁰⁷ and not the result of a considered judgment of the social threat posed by the offender and the offense. Enforcement could thus fall below the level needed to maintain deterrence and respect for the law. Unconstrained discretion to refrain from prosecution also created a risk of injustice to particular individuals. As Kenneth Culp Davis pointedly asked in *Discretionary Justice*:

If [the prosecutor] finds that A and B are equally guilty of felony and equally deserving of prosecution, why should he be permitted to prosecute B for felony but to let A off with a plea of guilty to a misdemeanor, unless he has a rational and legal basis for his choice, stated on an open record? . . . Why should he have a complete power to decide that one statute . . . shall not be enforced at all, [and] that another statute will be fully enforced . . .?³⁰⁸

Defenders of broad prosecutorial discretion were generally unable to provide a convincing answer to these questions.

In short, experience has shown that both an extensive system

ters. For example, in *Meister v. People*, 31 Mich. 99, 104 (1875), the court construed such a statute to mean

that the legislature do not consider it proper to allow the course of the prosecuting officer during the trial to be exposed to the influence of the interests or passions of private prosecutors. His position is one involving a [d]uty of impartiality not altogether unlike that of the judge himself.

Other courts thought that this characterization understated the adversary role of the prosecuting attorney. In *Thalheim*, 38 Fla. at 186, 20 So. at 943, the court rebutted the impartiality argument in the following terms:

The public interests demand that a prosecution should be conducted with energy and skill. While the prosecuting officer should see that no unfair advantage is taken of the accused, yet he is not a judicial officer. Those who are required to exercise judicial functions in the case are the judge and the jury. The public prosecutor is necessarily a partisan in the case. If he were compelled to proceed with the same circumspection as the judge and the jury, there would be an end to the conviction of criminals. Zeal in the prosecution of criminal cases is therefore to be commended, and not condemned. . . . And if such zeal in the court room, on the trial, does not result in error, what conceivable difference can it make whether such assistant was employed by the public, or by private persons?

307. Note, *supra* note 304, at 210.

308. Davis, *supra* note 151, at 189.

of private prosecution and a public monopoly in criminal enforcement are susceptible to abuse. What is needed is the appropriate mix of public and private enforcement that will fit the particular time and its social needs, together with adequate systems of accountability to prevent abuse.

VIII. CONCLUSION

Although solutions to many problems still need to be worked out, there is reason to be cautiously optimistic that private enforcement, modeled on the citizen suit provisions of federal environmental laws, will prove to be a useful device for achieving compliance with regulatory laws. Whether that promise will be fully realized depends in part upon the development of appropriate legal doctrines and management practices. More fundamentally, however, the success or failure of private enforcement appears to be a function of the relationships and attitudes among the principal actors.

Despite the fact that private enforcement has eroded administrative control over the enforcement process, the agencies still retain a dominant position in defining and implementing enforcement policy. At least at the federal level, the growth of private enforcement is acting as a competitive spur to government enforcers, prodding them to improve their management tools for measuring, securing, and overseeing compliance. This increased emphasis on compliance might well have evolved even without the consistent pressure of private enforcers. Several of the major environmental laws have been on the books for more than a decade, and a shift from policymaking to policing seems a natural part of the life cycle of regulatory statutes. Still, there is no doubt that private enforcement helped to keep compliance issues high on the agendas of top agency officials and gave additional urgency to their attempts to abate the most serious violations.

While citizen suits are prodding the EPA and the state agencies to reassert their control over environmental enforcement, it seems unlikely that the government can wholly recapture its enforcement monopoly. In the short run, compliance rates are not likely to rise to such high levels that private enforcement becomes unnecessary, or unattractive to plaintiff organizations. The sweep of environmental regulation is too broad, the resources available to the agencies for enforcement too modest, and the difficulties of

the regulated industries too severe to predict dramatic increases in the compliance rates. Barring a legislative movement to repeal citizen suit provisions, which has not yet materialized, private enforcement will probably continue to be a significant force in environmental regulation.

This private enforcement power is tempered by the fact that the agencies will retain the initiative in responding to private enforcers. By deciding how regulations will define compliance, what kinds of monitoring and reporting will be required, how compliance information will be gathered and disseminated, and what levels of noncompliance will be considered significant, the EPA and the state agencies will effectively determine what role private enforcement can play in particular regulatory programs. Thus far, agencies have not given much attention to private enforcement when making these decisions, although their attempts to improve their management capabilities have generally benefitted private plaintiffs. These conditions could change in the future, especially if agency officials conclude that private enforcement is counterproductive or unduly disruptive of their own activities and priorities.

The groups bringing the private enforcement actions must be concerned not only about the agencies' response to them, but also about three other potential problems. Most immediate is the need to continue the string of court victories in order to make private enforcement a legal and economic success. A few adverse precedents could significantly increase the delay and riskiness of fee recovery and limit private enforcement to a pro bono activity. If plaintiff organizations can manage to avoid defeat, they may then have to deal with the opposite problem—success. Private enforcement may become too attractive to litigants who lack the skills to prosecute complex cases, or who have the wrong motivation for bringing suit. As victory in private enforcement cases becomes easier, the quality control problem will likely become more severe. Energies may then have to be shifted from the actual bringing of cases into the developing of educational programs and guidelines for case selection, settlement and penalty calculation. Plaintiff organizations have begun to do this to a limited extent, but so far their efforts have been small-scale and informal.

The third question affecting the long-term success of private enforcers is whether they will be able to convert courtroom victo-

ries into actual environmental gains. This is partly a resource problem. Tightening the screws on compliance will bring increased pressure to bear on other parts of the regulatory system, where there are typically no fee recovery provisions to support legal representation. Thus, if private enforcement makes it clear that Clean Water Act permits will be strictly enforced, dischargers can be expected to redouble their efforts to weaken permit limits, expand the availability of variances and acceptable excuses for permit violations, and liberalize the effluent guidelines governing permit writing. All of these efforts can easily involve lengthy, expensive administrative proceedings and judicial review. The plaintiff organizations have participated sporadically in these other stages of the regulatory process, but it seems clear that they presently lack the capacity for a sustained, comprehensive presence at all of the key decision-making stages.

Beyond the resource questions, however, is the more fundamental issue of whether private enforcement will be grudgingly accepted or bitterly resisted by the regulated industries and their representatives. Plainly, there is considerable resentment within the regulatory community at having the "rules of the game" changed and at having established relationships and understandings undermined by private enforcement campaigns. There is also widespread skepticism about both the motivations of private enforcers and their legitimacy as surrogates for government. These attitudes could harden into unremitting legal and political opposition to private enforcement—indeed, to all regulatory enforcement—or they could dissipate over time as private enforcers gain acceptance as regular participants in the enforcement process. The direction of development seems to depend less on the inherent characteristics of the citizen suit than on the nature and quality of the relationships that evolve among the major parties.

In the model of regulatory behavior applied here, the quality of the ongoing relationships existing among participants in a regime of social control will greatly influence, if not determine, the efficacy of that regime. Thus, the effectiveness of traditional economic regulation has always depended on the relationship between the regulatory agency and the regulated industry. The familiar "capture" theory holds that an overly cooperative regulatory agency can easily become subservient to the demands of the regulated industry. When this happens, a standard remedy

is to replace the agency's leadership with more independent, less sympathetic administrators who will meet any resistance from the regulated industry with sheer coercive power. The analysis assumes that the agency will then be able to fulfill its protective mission.

The American regulatory experience suggests that effective regulation is rarely so simple. Rather, the relationships between the regulators and their constituencies are inherently complicated because administrators must achieve ongoing cooperation in the face of divergent interests. Regulatees often have the means to frustrate regulators' ends by adopting tactics such as information withholding, subtle resistance to implementation, perverse responses to regulatory orders, or political counterattacks. Similarly, the regulators have the capacity to inflict substantial expense and aggravation on the regulated, or at least on those firms considered "bad apples." As a result, the regulator/regulatee relationship is often characterized by a substantial degree of mutual dependency.³⁰⁹ In this context, the parties will have choices about how to define their relationship. Although such choices will to some degree reflect the peculiarities of the situation, they will also reflect the three general factors that this article has focused upon: the material interests of the parties, the perceived legitimacy of the regulatory endeavor and the history of the relationships among the parties. Robert Axelrod and others have hypothesized that when the regulatory framework is taken as given, and when regulator and regulatee have both an interest in each other's survival and the long-term ability to punish or reward each other for past behavior, cooperative relationships are likely to emerge.³¹⁰

What is new about private enforcement is the large role the private enforcers are attempting to play in the compliance process. Although the citizen suit provisions were originally responses to perceived problems of capture and favoritism in the traditional model of regulation, some scholars have recently argued that they

309. Commentators from a variety of perspectives have made broadly similar arguments on this point. See, e.g., S. BREYER, REGULATION AND ITS REFORM 109-14 (1982) (concluding, inter alia, that agency information needs in the standard-setting and enforcement processes frequently make the agencies dependent on the industry).

310. See generally R. AXELROD, THE EVOLUTION OF COOPERATION (1984) for an exposition of this position. For its application to enforcement problems, see Kagen & Scholz, *supra* note 148.

are likely to create more problems than they solve. Professor Richard Stewart, for example, suggests that expanded third party rights like the citizen suit are likely to be dysfunctional for several reasons: (1) environmental groups increase regulatory transactions costs; (2) they are single-issue interests, and therefore may ignore or discount competing values; (3) they are often most effective in garnering resources from an adversarial posture; and (4) the environmental regulatory agencies themselves may reinforce these tendencies because they have little responsibility for the industries they regulate.³¹¹ We have not seen much evidence to confirm Professor Stewart's thesis in our research and are not persuaded that he captures the key problems as a matter of theory.

Assessments of the impacts of third-party interventions like private enforcement depend heavily upon the observer's belief about the substantive desirability of the regulatory program and upon the program's compliance history. If one believes that third-party participation will disrupt the status quo, it then becomes necessary to ask whether that status quo is good or bad, and how and why it developed the way it did. In the case of environmental compliance, the argument that giving increased leverage to single-issue constituency groups might tilt agency policy unduly toward protectionist values implies that the existing system reflects a desirable—or at least acceptable—social equilibrium. However, the recent political history of EPA enforcement suggests that the voluntary compliance strategy of the 1980's was generally perceived as an unacceptable tilt in the other direction, and that there is a social demand for enhanced compliance and enforcement. In such a situation, opportunities for third party intervention might be better viewed as corrective devices to help keep the agency from straying too far outside the bounds of political consensus.

A second theoretical problem is that interest-analysis models like the one used by Professor Stewart, which seek to identify external, objective interests that drive or influence participants' behavior, can be faulted for defining interest too narrowly. Short-term interests may conflict with long-term goals; perceived interests may vary from "real" interests; and perceptions of interest may be shaped by forces, such as status desires and social relation-

311. Stewart, *The Discontents of Legalism: Interest Group Relations in Administrative Regulation*, 1985 WIS. L. REV. 655.

ships, that are not easily translated into economic incentives. A complete theory of ongoing relationships in the regulatory arena would have to take into account these broader dimensions of the concept of interest. More specifically, Richard Axelrod's work suggests that environmental groups are likely to seek cooperative relationships to the degree that (1) they have—or perceive that they have—long term interests in the regulatory arena; and (2) the other players can punish or reward them for their past behavior—and vice-versa. On the other hand, their role is likely to be dysfunctional if they frequently operate as "gypsies" —that is, players who flit in and out of the game with no long term interests in it.

Our research thus far suggests that environmental groups often have, perceive and act upon long-term personal and institutional interests in the environmental policy arena, and that these interests impose definite constraints on their behavior. Most of the organizations sponsoring private enforcement suits also have other major involvements in environmental regulation. These organizations constantly participate in all kinds of formal proceedings and informal negotiations. Crucial to their success in these undertakings is what they and the other parties often call "credibility." Credibility means being tough (carrying through on threats and promises), being competent (understanding the issues, having access to the decision makers), and being reasonable (compromising where appropriate, looking for areas of common ground). If an environmental group—or other party—loses its credibility, it becomes less effectual, and less able to pursue its interests effectively.

What seems crucial is that most of the parties in the regulatory arena have ongoing relationships with each other, and that those relationships are not mere reflections—or vectors—of their external interests. Rather, these relationships also are constitutive; they help both to determine the nature of regulatory policy and to define the content of the various interests.³¹² The ongoing relationships help define the content of interests, first, because environmental regulation is necessarily an exercise in the management

312. For a more complete discussion of this point, see Meidinger, *The Culture of Regulatory Politics* (paper presented at Law & Society Association Meetings, Chicago, Ill., May 30, 1986).

of massive uncertainty. What is desirable for any interest, particularly in light of the demands of other interests, is often unclear until substantial discussions have occurred. Second, interests are defined because the parties often come from common backgrounds in schooling, disciplinary traditions and work experience, and they generally work with each other on a regular basis. As a result, they seek both to win each other's respect and to mold each other's understandings of the issues. They act, in other words, not only to further their interests, but also to improve and consolidate their relationships with each other. Both their long-term interests and the quality of their work lives depend, in part, on those relationships.

In essence, then, the regulatory arena has many of the attributes of any other human community. Its members pursue their own interests within that community. But at the same time, their perceptions of those interests are partly shaped by the community. Most importantly, they spend much time in the community not merely attempting to advance their interests, but to define the very rules under which the community should operate—in this case, to implement their visions of the good regulatory system. To be sure, such visions will be oriented by interests, and their interests will impose constraints on acceptable outcomes. To understand the general operation of citizen suit provisions in the regulatory system, however, we must understand these community-like attributes and their constitutive role in environmental regulation.

When we view the citizen suit statutes as effectuating the private enforcer's membership in the regulatory community, they become both easier to understand and harder to discount. On the one hand, it is not surprising that the environmental groups should want to seize the initiative in enforcing regulatory rules. Like the community members in fourteenth century England, they may feel they have an ownership interest in those rules. On the other hand, the added participation surely complicates relations within the community and may make it somewhat harder to work out and implement rules. This leads analysts like Professor Stewart to ponder whether citizen suits are a desirable addition.

On the whole, we see no workable alternative. The addition of environmental groups to the regulatory community helps to make the regulatory community more congruent with the structure of the larger political community of which it is the adminis-

trative arm and it eases the transfer of values and information between the smaller and larger units. The presence of environmental interests provides an important corrective, not only for problems such as agency capture, but also for unduly narrow decisions that can result when an agency has too few conduits to its political environment.³¹³ Because it is virtually impossible for legislatures to determine pollution policy in any detail, large and direct delegations of authority are probably a necessary and desirable fact of life in modern policy arenas like environmental regulation.³¹⁴ The active participation of environmental organizations in the formulation and implementation of environmental policy can help to keep policy from getting too far out of kilter with the broader political environment. Such participation will also legitimate policy where legislative directives are unclear or where administration appears overly subject to political swings. To be sure, making private enforcement successful requires coping with the problems of coordination, incentives and legitimacy detailed above. Both the empirical and theoretical cases against private enforcement, however, are much weaker than those for it. The important scholarly task is to determine how those problems are in fact being handled and how they might be better handled. Such problems will necessarily be confronted in the day to day operations of the regulatory community and in the relationships that its parties continue to develop with each other. More abstract speculation on the functioning or desirability of citizen suits will get us nowhere. We need to understand the operation of the policy community in much greater detail than we presently do if any significant advances are to be made in the design of the regulatory institution known as the citizen suit.

313. See, e.g., Boyer, "Too Many Lawyers—Not Enough Practical People": The Policy-Making Discretion of the Federal Trade Commission, 5 LAW & POL'Y Q. 9 (1983).

314. Mashaw, *Prodelegation*, 1 J. L., ECON. & ORG. 81 (1985).