ARE CITIZEN SUIT PROVISIONS OF THE CLEAN WATER ACT BEING MISUSED?

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BEFORE THE

SUBCOMMITTEE ON
WATER RESOURCES AND ENVIRONMENT

OF THE

COMMITTEE ON
TRANSPORTATION AND
INFRASTRUCTURE
HOUSE OF REPRESENTATIVES

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Thursday, September 30, 2004

HOUSE OF REPRESENTATIVES, COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE, SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT WASHINGTON, D.C.

The Committee met, pursuant to call, at 10:00 a.m., in room 2167, Rayburn House Office Building, Hon. John J. Duncan, Jr. (chairman of the committee), presiding.

Mr. DUNCAN. I would like to welcome everyone to this morning's hearing on Citizens Suits under the Clean Water Act. Today we will review whether the citizen suit provisions of the Act are being misused by some parties.

The Federal EPA and States have primary responsibility for ensuring compliance with permits and other requirements under the Clean Water Act. The Act also allows affected citizens to file a civil action against a party alleged to be in violation of a permit or order in the absence of Federal or State enforcement. Congress originally envisioned the citizen enforcement. Under the Act, citizen suit provisions could be a useful supplement to a Government agency oversight.

Citizen enforcement was not intended to replace the Government's primary responsibility in enforcing the Act. However, it appears that citizen enforcement has taken on a life of its own in some cases. A number of citizen lawsuits have been filed since the enactment of the Clean Water Act in 1972. While some of these suits have played a role in ensuring compliance, we've heard about others that do little or nothing to enhance water quality.

In fact, the question is whether some of these suits are done almost exclusively or primarily for the legal fees involved. For example, some citizen suits involve violations already being remediated in an enforcement action or remedied in an enforcement action with Government regulators or they focus on very minor, sporadic or technical violations.

What this hearing is really all about was probably best summarized in a story in the Press Democrat, the Santa Rosa Press Democrat. This story says the tactics of a Sonoma County environmental watchdog group and its attorney are under fire from several north coast cities and leading environmentalists. It charges the group is misusing environmental laws. River Watch, created in 1996 by Santa Rose attorney Jack Silver, uses provisions of the Federal Clean Water Act to sue cities and others accused of environmental pollution.

The law allows Silver and River Watch to collect attorneys and other fees if they prevail in court or persuade those being sued to reach out of court settlements. Using the law, Silver has collected at least $310,000 in attorneys' fees since 2000—this was written in 2002—often, for environmental violations that were in the process of being remedied.

A second story the next day was entitled Green Greed. That's what this hearing is all about, to determine whether these suits really are doing some good or are they just simply green greed. We also heard about citizen suits where the plaintiff uses the threat of substantial litigation costs and penalties to exact payment of significant settlements, including, as I said, sizeable plaintiff's attorneys' fees from regulated parties. Recent experiences reported in California illustrate some of these problems.

Numerous citizen lawsuits have been brought against communities in California, not just the one I read about, but others, alleging Clean Water Act violations, even though State regulators already may have taken enforcement action against these targeted communities. Some of the suits have been brought by the same plaintiff who has sought significant settlement payments and attorney fees from the communities. Many of the targeted communities are small and have only limited financial resources. A number of these communities facing the threat of very substantial litigation costs and penalties that they cannot afford have decided to pay cash settlements rather than litigate the issues.

As a result, plaintiffs may end up getting enriched at the expense of the community's local citizens with little or no water quality improvements being realized. Some local critics have accused plaintiffs of shaking down communities and businesses for cash settlements to avoid costly settlements and costly lawsuits. Such suits divert funding from necessary infrastructure and environmental projects.

It remains appropriate where a Government regulator is not diligently enforcing the Clean Water Act that citizen suits be available to fill the gap. However, where Congress's intended primary enforcers of the Act are doing their job, in this point private permit holders should be protected from duplicative or costly third party lawsuits.

Let me just conclude by saying this, that the problems our witnesses today from California and what we've seen—I was a lawyer and a judge before I came to Congress—citizen suits can better function as a supplement to government agency oversight. We've sent so many millions of good jobs to other countries for so many years now, almost everybody feels they have to go to graduate school or law school or medical school, and there's way too many lawyers out there today. The law schools don't tell these kids that half the people getting out of law school could make more managing a McDonald's or driving a long haul truck or something like that.

So what happens is, when people notice certain types of litigation in one State, they have a way of spreading all over the whole country. And it's primarily done, as I said, to get legal fees rather than to do actual good for the people of this country. So we've got to start looking into this to make sure that this is not some kind of

virus that spreads all over the country, and to make sure that this is not Green Greed, as this newspaper said, or if it is a good thing.

So that's what this hearing is about. I thank these witnesses for coming from such a long distance, all the way across the country, to be here with us this morning.

I now recognize the Ranking Member, Mr. Costello.

Mr. COSTELLO. Mr. Chairman, thank you.

Mr. Chairman, I actually was asking a question here, and I didn't know if I heard you correctly, that there are too many students in law school today or too many lawyers, but I agree with both. I don't know which you said, but let me thank you for calling the hearing today and you have summarized the topic and the issue that we are dealing with today.

I want to thank our colleague, Mr. Thompson, who has brought this issue to our attention on more than one occasion. Frankly, it was because of his persistence and his request that we are holding this hearing today. I will submit my statement for the record and yield my time to Mr. Thompson at this time.

Mr. THOMPSON. I would like to thank the Ranking Member. Mr. Chairman, thank you and the Ranking Member for agreeing to hold this hearing. Also, I want to thank my constituents for traveling all the way out to Washington. I think it is emblematic of the problem that we out in California face. We had to hold the witness list down. There's not anyone from any local government entity, probably not just in California but across the country, who wouldn't want to come and testify on what I think is a real serious problem.

So thank you for holding this hearing. I would like to revise and extend my statement for the record. But I would like to say this morning that it is a real problem, and I am not against citizen lawsuits. I don't think anyone is. If the State or the Federal Government is failing to protect the citizenry, by all means, we should file suit to stop that practice.

But in this particular case, it's a different situation. The State and/or the Federal Government has already stepped in and the problem is being addressed. But they recognize that these small municipalities, and there's not one in the country that is any different, don't have the money to do all at once everything that needs to be done. When they're allowed to engage in administrative lawsuits, any money that goes to pay lawyers fees, or is used to fight these cases, is money that's taken directly away from fixing the problem at hand and impacts the health and safety of the people who live in these areas. That's something that needs to be stopped.

I heard the Chairman refer to Green Greed. I'd just like to read two excerpts from an editorial that was written in probably the largest affected area in my district, in the Santa Rosa Press Democrat. They wrote, "Lawsuits are a tool that should be available to the public to force blatant violators to clean up their act. But when lawsuits are filed in response to lesser violations that have already been acknowledged and are being corrected, there is an appearance that the only person benefiting is the lawyer collecting the attorneys' fees. In fact, the public may be damaged if a city is forced to spend money on fighting a lawsuit instead of spending it on improving water quality."

In that same paper, a leading environmentalist out in California, David Drell, who is the Director of the Willetts Environmental Center, said that demands in a suit filed by this one entity, River Watch, against the City of Willetts "could result in damaging the reputation of responsible environmental advocacy in our region." I think that those two quotes hit the nail directly on the head. We need to fix this, we need to make sure the money, every penny that's being spent is being spent to fix these water quality problems and protect the health and safety of the citizenry.

Mr. Chairman and Ranking Member, I thank you very much for having this hearing. Hopefully it will lead to fixing this problem in the long run. So thank you.

Mr. DUNCAN. Thank you very much, Mr. Thompson. You are the first one that called our attention to this, so we'll try to find out what this is all about.

Mr. Miller.

Mr. MILLER. Thank you, Mr. Chairman. It's kind of funny, my first year in Congress I introduced a bill dealing specifically with this issue. Because in California, it's out of control in some areas. You have many situations where an attorney will go to a district, sanitation district or water agency and just file a lawsuit. They're meeting water quality standards, but yet the agency is forced to settle out of court because it's cheaper, rather than having to go to court and defend yourself. It's basically because of a misinterpretation of the citizen suit provision of the Clean Water Act that we are where we are at today.

When you have an agency trying to do the right thing, and if they are out of compliance in some small fashion and trying to come in compliance and regulators are working with them, it's ridiculous to do that and have to go to court at the same time.

So Mr. Chairman, I'd like to associate myself with your comments. This is really a huge issue for California, especially with trying to provide for growth and the population demands we have in California to begin with. We need not spend all our time in lawsuits.

I would like to introduce my statement into the record and I would like to yield back and hear what the individuals have to say today.

Mr. DUNCAN. All right. Your full statement will be placed into the record, Mr. Miller.

Mr. Ehlers.

Mr. EHLERS. Thank you, Mr. Chairman. I just want to note that I certainly support continuation of citizen suits. They've proved to be very valuable. But obviously we have to deal with any abuse or misuse of those suits. We have passed legislation through the House to deal with frivolous lawsuits, where the party bringing the suit would have to pay for the legal expenses of the others and also pay some court costs.

I don't know if that will ever see the light of day on the other side of the rotunda, but I think it is a good idea and could be applied here. Also, we have to make certain that these are legitimate suits and not filed just to harass a project and delay it, which is also one misuse that has occurred upon occasion.

So I support the concept. I hope we can continue the citizen suits, but let's make sure they accomplish the goal that we intended for them, and that is to bring a solution when no community is willing to bring it to a solution. Thank you.

Mr. DUNCAN. Thank you very much.

Mr. Pearce.

Mr. PEARCE. Thank you, Mr. Chairman. As a business owner who has watched the progression of class action lawsuits and lawsuits against just almost every small business, I can tell you that your problem and your situation just illuminates the need for serious tort reform, because it has become an industry rather than seeking to correct grievance. It has instead become a way to create cash flow for trial lawyers. I just sympathize with the situation that exists and we need to look at the underlying problems of the entire litigious nature of our society.

Thank you, Mr. Chairman.

Mr. DUNCAN. Thank you very much.

We are very pleased to have three very distinguished witnesses with us this morning. As I mentioned earlier, all three of these witnesses happen to be from California. We have had many witnesses from California before, but we have never had a hearing with a panel all three from the same State. So this is a first.

We have representing the City of Fort Bragg the Honorable Jere Melo, who is the Mayor of that city. We have representing the California Association of Sanitation Agencies Mr. Mark Dellinger, who is the Special Districts Administrator for Lake County, California. We have representing the Association of Metropolitan Sewerage Agencies Mr. Christopher M. Westhoff, who is the Assistant City Attorney of the Department of Public Works General Counsel from Los Angeles, California.

Gentlemen, we are pleased and honored to have all of you with us. All the committees and subcommittees of the Congress ask the witnesses to limit their opening statements to five minutes. In this Subcommittee we give you six minutes. But when the six minutes runs out, in consideration of the other witnesses and everybody's schedule, we cut you off. So we ask that you stop after six minutes.

Mayor Melo, we will start with you, please. Your full statements will be placed into the record and you will be allowed to summarize at any point that you wish to do so.

TESTIMONY OF THE HONORABLE JERE MELO, MAYOR, CITY OF FORT BRAGG, CALIFORNIA; MARK DELLINGER, SPECIAL DISTRICTS ADMINISTRATOR, LAKE COUNTY, CALIFORNIA, ACCOMPANIED BY: MELISSA THORME, ESQUIRE; CHRISTOPHER M. WESTHOFF, ESQUIRE, ASSISTANT CITY ATTORNEY, PUBLIC WORKS GENERAL COUNSEL, LOS ANGELES, CALIFORNIA

Mayor MELO. Mr. Chairman, members of the Subcommittee, thank you and your staff for inviting me to present testimony here today. My name is Jere Melo and I am the Mayor of the City of Fort Bragg in Northern California.

Our city is located about 150 miles north of San Francisco, right on the Pacific Ocean. We are a city of about 7,000 persons and we serve a larger population of 18,000 to 20,000 persons who live and

work along 65 miles of the California coast. I will refer you to the details in my written testimony, the City of Fort Bragg case study.

My participation this morning is as a small town mayor. I am not an NPDES permit expert nor am I an expert, a legal expert on the Clean Water Act. To get right to the point of this hearing, I believe that the citizen suit provisions in the Clean Water Act are being misused. We believed we were in compliance with our NPDES permit for nearly all the alleged violations listed in the citizen complaint.

But the time and cost to defend the charges was beyond the diminished return. So we came to a settlement with the citizen group in order to cut our losses. The group was from a city about 100 miles from Fort Bragg and located in a different county.

Fort Bragg's experience is not unique. Nearly all the cities in our part of California have encountered citizen suits. One particular city, Santa Rosa, has been challenged several times, all with the same result. Each city or sanitation district settled before the matter went to court. The potential costs of defending the suit and prevailing on all the points makes a settlement the most cost effective solution.

And business is not exempt from the citizen suit. The citizen suit is to some degree a job killer because it makes plants marginal due to the increased legal costs. I am very active in environmental policy matters through the League of California Cities. I tell you that the experience I relate to you about Fort Bragg and its neighboring cities is becoming more frequent throughout California, as more plaintiffs' attorneys see the possibility of easy money in settlements, there are more threats of citizen suits. So it is a matter deserving the attention of this Subcommittee and we thank you very much.

Earlier I indicated that the group that threatened our city with a citizen suit is located about 100 miles away. It is also a very small group. The membership of this group, Northern California River Watch, seems to consist of less than ten persons. The "book" on River Watch is to suggest a settlement as soon as possible. While the first reaction to a settlement is always a rejection, no one has waited very long for settlement negotiations to begin. They always begin with a discussion about their costs to prepare their threat, some costs for their board members to review your plant and your process and some funding for public groups or pet projects.

In Fort Bragg's case, we paid $12,000 to a River Watch selected consultant to review our plant. In an unmitigated promotion of his private business, his recommendation was to purchase his brand of water treatment chemicals, the White Knight brand, as I recall. Now this consultant is a member of the River Watch board.

Another provision was to set aside $35,000 in an educational fund, which we did. A local group was assigned control over that. The group has unanimously agreed to work to relocate a county road in three locations where very substantial amounts of sediment are placed in the Noyo River, a local river.

River Watch is objecting to the use of the funds for this work. My best guess is that River Watch wants the $35,000 to end up in someone's pocket of its choosing rather than eliminating three sub-

stantial sources of sediment to a stream that provides habitat for coho salmon and steelhead trout.

I would read my recommendations, sir, but it seems to match the members of the Committee. So I will yield my time to the rest of the speakers. Thank you, sir.

Mr. DUNCAN. Thank you very much, Mayor Melo.

Mr. Dellinger.

Mr. DELLINGER. Thank you. Good morning, Mr. Chairman, members of the Subcommittee. I am Mark Dellinger, Special Districts Administrator for Lake County Sanitation District in Northern California.

It is my privilege to address the Subcommittee on behalf of the California Association of Sanitation Agencies, CASA. CASA is a statewide non-profit association of over 100 local public agencies that provide wastewater collection, treatment, disposal and water recycling services to millions of Californians. Lake County Sanitation District is a member of CASA.

Citizen enforcement has played an important role in the implementation of the Clean Water Act and other environmental statutes. However, in recent years we have seen a cottage industry develop in which plaintiff's attorneys file suit after suit against numerous local agencies, despite the fact that communities may already be taking steps to remedy violations. From CASA's point of view, reform is needed to ensure that citizen suits serve their intended purpose of supplementing limited Government enforcement resources and preventing future violations.

I would like to discuss Lake County Sanitation District's experience and close by offering possible suggestions for reform to reinforce the original intent that citizen litigation serve as a backstop. Our sanitation district manages and operates four wastewater treatment plants and is responsible for 200 miles of sewer collection pipes. We serve a large geographic area that is relatively rural with a low population density.

Median household income in the communities we serve is 60 percent of the statewide average. Our board, however, recently approved a series of rate increases to raise revenues to improve our entire system. The State regulatory agency placed one of the district's two largest treatment systems under an enforcement order. This requires that certain actions be taken by specified dates.

The regional board was contemplating taking similar enforcement action for the district's southeast regional system, but it had not yet issued an administrative order. A so-called citizen group, Northern California River Watch, as you have already heard, sued the district in October 2003 for alleged violations of the Clean Water Act at both of the treatment plants and the associated sewer collection systems.

Because the district had not yet paid monetary penalties as part of the State enforcement and compliance actions, under Ninth Circuit case law, River Watch's suit was not barred by Clean Water Act section 1319(g). The district is now faced with the worst of both worlds, expending its limited resources to defend a citizen lawsuit and paying potentially duplicative penalties.

The important point is that in our case, and the other cases cited in my written testimony, either the community was already acting

by itself or the State had already stepped in and programs were being implemented to guard against similar future violations. The availability of attorneys' fees is without question a significant motivation for some third party plaintiffs to bring or threaten lawsuits. Of all the possible reforms, revisions to the attorneys' fees provisions of the Act are most likely to bear fruit as the availability of these fees is what is motivating many of the abuses.

With that in mind, CASA recommends that the Subcommittee consider the following. Limit attorneys' fee awards to the degree of success on the claims included in the complaint. Issue a clear statement of Congressional intent that the attorneys' fees provision of the Act be read as reciprocal, so that attorneys' fees are available to the prevailing party, period. Place a cap on the amount of fees that may be obtained in a lawsuit against a public agency.

Congress specified that no citizen suit could be maintained where the State or the U.S. EPA is diligently prosecuting an action against the alleged violator. Given the time it takes to process a State enforcement action, the fact that the State is already diligently prosecuting is not enough to bar a citizen suit. In addition, the Ninth Circuit has determined that only a State enforcement action requiring the payment of monetary penalties will serve as a defense to a citizen lawsuit.

In light of this, we ask the Subcommittee to consider requiring courts to consider the improvements and actions already being undertaken by the community, either on its own initiative, or pursuant to an enforcement order, a capital improvement program or master plan, etc. Clarifying that where the State has already taken or is in the process of taking enforcement action for violations, citizen litigation for the same or similar violations is barred, whether or not the State action is complete or included the assessment of monetary penalties.

There may be other reforms suggested here today. CASA is very appreciative of the Subcommittee's interests and leadership in finding solutions to the citizen suit abuses. We urge the Subcommittee to consider carefully the various options for improving the law and ensuring that citizen suits against local governments only proceed where they will promote real environmental solutions.

Thank you for your time. Melissa Thorme, an attorney with the Sacramento law form of Downey Brand, and a member of CASA's Attorneys Committee, is here with me and we would be pleased to answer any questions that the Subcommittee may have.

Thank you.

Mr. DUNCAN. Thank you very much, Mr. Dellinger.

Mr. Westhoff.

Mr. WESTHOFF. Good morning, Chairman Duncan, Congressman Costello, Congressman Thompson and members of the Committee.

My name is Chris Westhoff. I am the Assistant City Attorney for the City of Los Angeles, and I have served as General Counsel for the city's Department of Public Works for over 20 years. I am also a board member of the Association of Metropolitan Sewerage Agencies, and serve as AMSA's secretary and as chair of AMSA's legislative policy committee. I am here testifying in that capacity.

AMSA represents nearly 300 clean water agencies across the country. AMSA's members treat more than 18 billion gallons of

wastewater each day and service the majority of U.S. sewered population. I have been asked to read a brief letter before I begin my testimony in earnest from six elected officials in the City of Los Angeles.

"Dear Chairman Duncan and Congressman Costello, on September 30th, 2004, the Water Resources Environment Subcommittee will conduct a hearing regarding the citizen suit provisions of the Clean Water Act, wherein reference will be made to the City of Los Angeles' prior lawsuit with citizen plaintiffs over sewerage issues.

The City of Los Angeles would like to express to the Committee our ongoing support for the principles contained in the settlement agreement for this case, which was initially brought by citizen plaintiff, Santa Monica Baykeeper and later joined by the State of California and the U.S. Environmental Protection Agency. The recent settlement is a win-win for everyone in Los Angeles, and the undersigned remain committed to moving forward with a successful rehabilitation of our sewer system and the resulting environmental benefits from such action."

On behalf of AMSA, I would like to thank Chairman Duncan and the members of this Committee for your continued commitment to clean water issues in California and nationwide. Our Nation's streams, rivers, lakes and oceans are cleaner today than they have been in over half a century. This has been accomplished by the unparalleled efforts of the many cities, special districts, municipalities and industries that discharge treated effluent into the waters of the United States under the Clean Water Act.

Hundreds of billions of dollars have been spent by the Federal Government, States, industries and cities around the country to bring our Nation's waters to our current condition. We must continue to spend billions more to maintain the improvements we have achieved to date and to continue moving forward in the pursuit of improving the quality of our receiving waters.

Without question, the efforts of governmental regulators entrusted with the enforcement authority under the Clean Water Act, and in some cases actions citizen environmental organizations, have contributed to our national water quality improvements. However, the natural tension between appropriate governmental regulatory action and citizen enforcement frequently has placed permitted entities like my city in a losing battle.

The drafters of the Clean Water Act clearly saw governmental enforcement against permitted dischargers as a critical element in the ultimate success of the intent of the Act. In the Act itself, citizen enforcement was designed to play a secondary, supplementary role allowed only when the appropriate governmental regulators failed to diligently prosecute a permit holder for violations.

When a permitted discharger has already answered to its governmental regulator in an enforcement action, it is patently unfair for the permit holder to be required to address the same issues in a third party lawsuit filed under the citizen suit provisions of the Clean Water Act. When regulators diligently enforce, citizen suits should be precluded.

Nonetheless, Los Angeles just finished six years of litigation initially filed in 1998 by a third party citizen group. The citizen suit was brought notwithstanding the fact that the city had settled an

enforcement action for the same violations with our State permitting entity in the month immediately prior.

Los Angeles has the largest municipal wastewater collection system in America, which consists of close to 7,000 miles of pipe. In the winter of 1998, Los Angeles experienced an El Nino climactic condition which resulted in one of the wettest winters in 120 years of recording such statistics.

Needless to say, the city's wastewater collection system was overtaxed and experienced overflows during this rainy winter. Close to 50 million gallons of diluted wastewater spilled from the city's pipes in the winter of 1998.

I know 50 million gallons seems like a large number, but to give you a frame of reference, Los Angeles transports between 165 and 190 billion gallons of wastewater a year. So even in this extraordinarily wet year, the city still only spilled less than 5/100ths of one percent of all the wastewater collected that year and kept 99.995 percent of the wastewater in the pipes.

The city's permitting regulator sought to enforce against the city for these spills as well as other small spills caused by roots and grease. In September 1998, the city agreed to settle the enforcement action by agreeing to a cease and desist order and paying a penalty of $850,000, $200,000 in cash and $650,000 in environmental projects. Further, the city agreed to construct over $600 million in sewer improvements.

In October of the same year, a press conference was held which announced a third party lawsuit concerning the exact same sewer spills addressed by the cease and desist order issued by the city's permitting regulator one month before. To complicate matters, in January 2001, the EPA, through the Justice Department, filed a lawsuit covering the same spills and adding all of the small spills that occurred between 1998 and 2001.

It is important to note than in the six years since the 1998 El Nino winter, Los Angeles has had only four wet weather related spills. All other spills have been from roots and grease. In the six years since 1998, the average yearly volume of wastewater spilled was less than one ten thousandth of one percent. That is a pretty good batting average in any league, except the Clean Water Act. You see, EPA's interpretation of its own Clean Water Act regulations is that all spills from a separate sanitary collection system are flatly prohibited, regardless of volume, cause or impact on water quality.

EPA has publicly documented that even the best run, best maintained separate sewer system will overflow. Yet, using a strained regulatory and legal analysis, EPA and enforcement authorities take a strict liability approach to these inevitable overflows.

This makes every community with a separate system an easy target for third party plaintiffs. The hard dollar cost to the City of Los Angeles for the suit exceeded $14 million, for our attorney's fees, the Baykeeper's attorney's fees, intervenors attorney's fees, $800,000 in cash to the Federal Government and $8.5 million in environmental projects.

Let me be clear. No one is asking that citizen suits go away. As responsible environmental stewards, we realize that the citizen suit provisions of the Clean Water Act is a powerful and necessary tool

to fill enforcement gaps. Where a regulator is not diligently enforcing the Clean Water Act, citizen suits are critical and an important secondary source of Clean Water Act enforcement. However, where Congress' intended prime Clean Water Act enforcer has done or is doing its job, municipalities need protection from redundant third party lawsuits that will raise the cost of the clean water services we provide.

Let me conclude by stating that AMSA would welcome the opportunity to work with the Subcommittee and staff to discuss ways to focus on future third party lawsuits and on trying to rectify any problems that this Committee believes exist.

Thank you, and I will receive any questions you have.

Mr. DUNCAN. Thank you very much, all three of the witnesses have given very fine testimony. Mr. Westhoff, I particularly appreciate what you said about the hundreds of billions that we've spent cleaning up the water over the last 50 years or so. I heard a talk a few months ago by Charlie Cook, who is probably the most respected political election analyst up here, on both sides. He said he had never seen a figure over a billion dollars that any human being could really comprehend, or that really made much of an effect on them. So when you say hundreds of billions, it's just mind boggling how huge that is.

But it's just amazing how much cleaner the water is today than it was say, 30 years ago, when the Cuyahoga River caught on fire in Cleveland. Yet there are some groups that can't admit how much water quality has improved. It doesn't mean that we can stop. We still need to do more. But these have to keep getting their contributions in, so they've got to continually tell everybody how bad everything is.

And you know, it's easy to do, because as you pointed out, that once in a lifetime probably rainfall that you had that caused a 50 million gallon overflow, somebody can go to a school and say, isn't that terrible, 50 million gallons. But then you point out it was .005 percent, and that 99.995 percent was handled properly and cleanly, environmentally safely. I mean, it's just amazing.

Anyway, we're going to go first to Mr. Thompson, since he's the one that really requested that we look into this. We'll proceed to others after Mr. Thompson concludes his questions.

Mr. THOMPSON. Thank you very much.

Maybe I could just get a clarification. It's my understanding that this is a west coast problem and probably a court jurisdiction problem. It doesn't seem to be an issue on the east coast, where the Federal appeals court ruled that, I guess it was co-joined language that said if you either had a violation or were fined, whereas the First District Court of Appeals said it had to be disjunctive, you had to have the violation and you had to be fined, is that correct?

Mr. DUNCAN. Let me just interrupt there. This is something that's apparently the heaviest at this point in California. But there are many other places where I said, and including, for instance, the little town of Maynardville, Tennessee, right outside of Knoxville, Tennessee, my home town. Maynardville used to be in the district I represent. It's not now.

But they had a case, Ehler versus the City of Maynardville, Tennessee that had to go all the way to the Sixth Circuit U.S. Court

of Appeals. And the Sixth Circuit dismissed the case because the citizen suit duplicated the State's administrative enforcement action for the same type of violations, and Maynardville already had been implementing improvements to its wastewater treatment system that had been agreed to under the State enforcement action. Yet they had to go all the way to the Sixth Circuit.

I can't tell you how small Maynardville is. I can tell you that about five or six years ago, they had me as the grand marshal of their Christmas parade, and this State representative, now State Senator, was driving me in his 1950 Studebaker truck. About 95 percent of the way around the parade route, the truck broke down, and he got real embarrassed and he apologized. He said, Jimmy, I hate to ask you this, but would you get out and push? And I had to push that truck around the last few hundred yards or so of the parade.

But what's it got, Lincoln? What's Maynardville's population? Eight hundred. Yet this little town, I can't imagine how much they would have had to pay in legal fees. And they won the case. This is happening a lot of places.

Sorry to interrupt you. Go ahead.

Mr. THOMPSON. Mr. Chairman, I'm sorry you had to push. Next time, call me and I'll be happy to drive you in my old pickup truck.

I'm just trying to figure out if codifying the first court ruling on the disjunctive language solves our problem or not. And if in fact it does, would that follow to other Federal court jurisdictions? The truth of the matter is, and it has been said a number of times, what California is doing today the rest of the country is going to be doing some time in the future. That can either be a good thing or a bad thing. But I see these two competing or two different court rulings as maybe being an underlying problem and/or cure. I just want to get a sense from the witnesses if that's correct.

Mr. DELLINGER. Congressman Thompson, a short answer is yes. I don't know if our counsel has anything to add to that, but that's correct.

Mr. THOMPSON. So if we codified the First District Court ruling, it would not only solve the problem for California, but it would solve it for all the other areas within different court jurisdictions and would be a loud message for the 800 population towns in the Chairman's district or 800 population towns in my district not to worry that these citizen lawsuits would be frivolous at best?

Mr. DELLINGER. Yes.

Mr. THOMPSON. Thank you. I yield back, Mr. Chairman.

Mr. DUNCAN. Thanks very much.

Mr. Pearce.

Mr. PEARCE. Thank you, Mr. Chairman. The contemplation that it's maybe just a west coast problem and also, even the observation that it's the Clean Water Act that's being used, the Endangered Species Act has been used in the same way. After I was elected, I went on a listening tour, and every one of our 18 counties expressed that the Endangered Species Act is being used as a tool to take away private property rights or whatever.

Just for your information, you may want to investigate it, last year, I don't know exactly what level court, but in Wyoming three BLM employees were found guilty of racketeering and conspiracy

for implementing decisions that were in fact channeling business back to different groups. I would recommend that you can fight fire with fire.

I think you should look at, especially when the groups are coming in and extorting you to use their products and maybe we'll go away if you'll simply do that. I would think that we have to hold Government employees accountable when the EPA begins to come in and narrowly define its bill the way you're talking about, Mr. Westhoff's testimony there, define a very narrow interpretation which makes it impossible for anyone to live up to it.

Then somehow we simply are encouraged to use these people right over here, your problem will go away. The BLM in New Mexico is so obvious that they will say to different producers, different businesses, we know that you are really not doing anything wrong. But if you would fund $50,000 for this archaeological study over here about 25 miles away, what you're not doing wrong certainly wouldn't be investigated as hard as what you're not doing wrong if you don't contribute.

So we've got a combination of trial lawyers who are looking for easy money from communities or anyone else. We also have a government agency mentality that says we're going to assist in that in every way that we can.

So Mr. Chairman, I would ask that we begin to have formal hearings on the people who are suggesting that these communities, any communities across the country use the products that they are providing when they are bringing a lawsuit. I think that's a serious, serious problem. I think also to look at how the EPA is narrowly defining the law, thereby throwing it into a difficult strait.

I think one last observation, we were in a different committee, and a woman waited almost four hours to testify. At the end of her testimony, she said, I'm a city councilor from the greenest community California, I think it was Santa Barbara. So she said, I'm the greenest of the green and California is the greenest of the green States. And she said, we're seeing bumper stickers in my green community and I've got one on my car that says, just open the damned beach.

They say the Endangered Species Act is being used to stop people from building bedrooms on their houses, it's closing the beaches. The extremists in the environmental movement I think are doing exactly what you're talking about, they're hijacking good and noble purposes. Who can say that we wouldn't want to keep our water clean, but they're hijacking it to fund their own particular projects.

And so I think that there is a growing sentiment among all political persuasions that something needs to be done, we need to curb it. I will be happy to be in on the fight with you.

I think my only question, Mr. Chairman, if I have time left, is Mr. Westhoff, you had mentioned the narrow definition that the EPA has placed on top of Congress' intent on the Clean Water Act. Can you give me specifically what that definition is and how you perceive that it was more intended by Congress?

Mr. WESTHOFF. It is clear in the Clean Water Act that citizen suits were to be of a secondary enforcement vein, that the primary enforcer was supposed to be the governmental regulators, whether

it be EPA or a delegated State like we have in California. They have in some instances allowed citizen suits to exist even where there has been governmental enforcement, and have incurred citizen suits even where there has been governmental enforcement just prior to.

The other narrow interpretation that I think will have the greatest impact on cities going into the future is their narrow interpretation or the prohibition that there shall not be any sanitary sewer overflows. My question is somewhat rhetorical to all of you, when do you call Roto-Rooter out to your house, before or after you have a spill? In every community in this country, you go to the phone book and there are hundreds and hundreds of Roto-Rooter sewer contractors in your phone book, because all of our pipes will back up at some time or another.

Our pipes are no different than your pipes, they're just bigger and there are just more of them and there are more spill points. We can't turn off the water to prevent a spill out of our toilets or sinks or bathtubs.

So that's certainly one area where, if they would just move off of that prohibition language, it would assist many municipalities in focusing their dollars on what needs to be done, which is to reduce bills as much as possible. But it is impossible to eliminate them.

Mr. PEARCE. All right, sir. Thank you. And Mr. Chairman, thank you for holding this hearing. Mr. Thompson, thank you for bringing it up.

Mr. DUNCAN. Thank you very much, Mr. Pearce. Certainly I think any common sense definition of conflict of interest would have included the use of the blackmail of the use of the products that you mentioned. Certainly at the very least those types of activities would have the appearance of impropriety.

Mr. Costello.

Mr. COSTELLO. Mr.Chairman, just one question. From reading the testimony of the witnesses and hearing their testimony this morning, it's clear that none of you are advocating the prohibition of citizen lawsuits. We understand that what you want to do is stop the abuses.

Mayor, in particular in your testimony you recommend that additional burden of reason and proof should be placed on those who threaten a Federal lawsuit prior to the filing of the required 60 day notice of intent to sue. I wonder if you might elaborate on that, what additional recommendations would you make?

Mayor MELO. Yes, sir. Well, again, I'm not a legal expert. But let me just tell you our situation. We had a 60 day notice presented to us after Northern California River Watch reviewed the reports that we are required to send to our original water quality control board on the performance of our plant.

As I see it, that serves two functions. The first thing is a quality control measure, how is this plant performing and we need to know that, as does the regional board.

The second thing is, of course, it becomes the basis for enforcement if necessary. All they did is read our reports and re-interpret them so that there was such a huge number of alleged violations they were not, they had no burden to prove them, they simply alleged them and filed the 60 day notice.

The legal advice that we got is the current construction of the Act putting us in a losing position, because if we did not prevail on each and every count, then we would lose much more. So we went to the settlement.

So that is why I am recommending without any technical language that some burden needs to be placed on the individual filing the citizen suit.

Mr. COSTELLO. So the burden of proof should be on the citizen filing the suit?

Mayor MELO. Yes, sir. I sit on a city council, we have a planning commission that makes land use decisions. If an appeal comes to me, I expect the appellant to prove it on the appeal. Otherwise I'm going to uphold the planning commission.

Mr. COSTELLO. Mr. Chairman, I really don't have any other questions. I do want to give the witnesses an opportunity, if you would like to add anything else for the record, any other comments?

[Witnesses respond in the negative.]

Mr. COSTELLO. Let me then, Mr. Chairman, ask, I have four letters that have been addressed to both of us, Mr. Chairman, one from the Los Angeles City Attorney, another from the Waterkeeper Alliance, a third one from the California Regional Water Quality Control Board and also the California EPA. I ask that they be made a part of the record.

Mr. DUNCAN. Thank you very much, Mr. Costello. Those letters will be made a part of the record.

Mr. Dellinger, I was trying to skim over Section 1319(g), but it's too detailed for me to read right at this time. But is part of the problem that a city starts an action against some violation but then they file a suit that's basically the same violation but they vary it a little bit? Is that right, Mayor, is that what happens?

Mayor MELO. It's right in the case we're in the middle of right now, yes. In fact, there were some violations cited in the filing against us that in one regional plant situation violations haven't occurred for over six years, and another one they haven't occurred for over three years. This was after tens of millions of dollars had been invested in improving the infrastructure and coming up with long term disposal and recycling opportunities for the systems.

Mr. DUNCAN. When you say tens of millions, do you have any idea or estimate of how much you've spent in legal fees and settlements on these types of suits over the last five years or whatever?

Mayor MELO. I don't, I don't know if maybe our attorneys do. I can't really even speak to the one I'm in the middle of right now, because we're in the middle of it and my attorney tells me I can't address that. But one of the problems, and you folks know because you guys have been working on the infrastructure for so long, there was a focus in this country about 15 or 20 years ago, and there was still money left for small communities, and basically the philosophy from the regulatory agencies was, you folks go in and fix your treatment plants and your long term disposal. We got all through that, and now the focus is changing to the collection systems, but there isn't any money attached to it.

I'm not here to ask for money today, but this is going to be a significantly costly, almost bordering on unaffordable way for us to fix the infrastructure, because as these other gentlemen here will tell

you, it's the collection system part of all the wastewater that's the most expensive to build, operate and maintain. So we're not talking about the billions and billions that were invested before. I think we're talking even more than that.

For a small agency like mine, I really don't think it's an appropriate use of funds to pay attorneys fees when we've got to fix problems. If everybody wants clean water, we ought to be putting it into solving the problems.

Mr. DUNCAN. Well, you know, that's a problem. I remember a few years ago I read an article in Reader's Digest that said that at that point, 85 percent of the money that had been spent on the Superfund program had been spent on legal fees, consultants, studies, paperwork, bureaucrats, and only about 15 percent on actual cleanup. These things can get totally out of hand. Now I think we're doing a little bit better on the Superfund. But it's just gotten ridiculous on some of these things.

Do you have anything you want to tell us, any specific instances or detail that you want to add, Mayor Melo? What's the population of your city.

Mayor MELO. Seven thousand, sir.

Mr. DUNCAN. Seven thousand?

Mayor MELO. Yes, sir.

Mr. DUNCAN. Do you have any idea how much you've spent on some of these types of things?

Mayor MELO. We've had the one case by Northern California River Watch, and depending on your attitude as to how to allocate our internal costs, we spent between $150,000 to $200,000 to settle it, all costs including attorneys' fees to the opponents. The estimate by our legal people, our city attorney, was that it was a minimum of a quarter of a million dollars to fight the thing, and that there were some risks in fighting it. So what we made was a good business decision, it was at the marginal diminished return.

Mr. DUNCAN. OK.

Anybody else? Yes, Mr. Dellinger.

Mr. DELLINGER. I just want to say a thank you to Congressman Thompson for his assistance and the rest of the Committee for seeing this problem and giving us the time to express it to you. Thank you.

Mr. DUNCAN. Mr. Westhoff, how do we correct this?

Mr. WESTHOFF. Well, I would like to say one thing about our lawsuit. I don't think the Baykeeper was intending to extort anything from the City of Los Angeles. I think they had good motives going out after it. But there has to be a better process. There has to be a way of doing it without the litigation.

Six years, our own attorneys' fees were close to $5 million, $1.6 million for theirs, $400,000 for intervenors and all of the penalties. I can tell you that we would have sat down with them and developed many of the things, there isn't anything in the settlement about our program that is vastly different than what existed before the lawsuit was filed.

We could have sat down and discussed it with them. We have relationships with environmental groups in Los Angeles that go back many, many years. We are cooperatively working with them and we would have welcomed the Baykeeper into that discussion. But

the litigation obviously carries with it a ticking clock that has dollars attached to it. The longer you litigate, the more it costs you. But if you don't litigate, if they're asking for more up front, you're caught in betwixt and between.

So there needs to be a better process, there needs to be a better process. There needs to be a cooperation between municipalities and environmental groups that stays out of the courtroom.

Mr. DUNCAN. Well, we'll see where this goes. This probably is the start of a pretty long process, but these types of things have to start some place. I think that you all are on the very forefront of calling to our attention what could potentially be a very big, very serious problem all across this Nation if we don't begin to take corrective action.

I think it's very important what you've done, coming here this morning to present this testimony and respond to questions and comments in the way you have. This has been a very informative and good hearing, I think, and that will conclude this hearing.

[Whereupon, at 10:55 a.m., the Subcommittee was adjourned.]

CALIFORNIA ASSOCIATION of SANITATION AGENCIES

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TESTIMONY OF THE

CALIFORNIA ASSOCIATION OF SANITATION AGENCIES

Presented by

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Submitted to the

SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
U.S. HOUSE OF REPRESENTATIVES

WASHINGTON, DC

September 30, 2004

Ensuring Clean Water for California

Good Morning, Mr. Chairman and Members of the Subcommittee:

I am Mark Dellinger, Special Districts Administrator for the Lake County Sanitation District in Northern California. It is my privilege to address the Subcommittee today on behalf of the California Association of Sanitation Agencies (CASA). CASA is a statewide nonprofit association of over 100 local public agencies that provide wastewater collection, treatment, disposal and water recycling services to millions of Californians. Lake County Sanitation District is a member of CASA.

There is no question that citizen enforcement has played an important role in the implementation of the Clean Water Act and other environmental statutes. Congress envisioned that the role of the citizen lawsuit would be to supplement, not supplant, the primary enforcement function of the States and the federal government. In recent years in California, however, we have seen a cottage industry develop in which plaintiffs' attorneys file citizen suit after citizen suit against numerous local agencies without regard to the magnitude or the environmental impact of the alleged violations, and despite the fact that communities may already be taking steps to rectify their situations, either voluntarily or because the State or USEPA has already undertaken administrative enforcement action.

The Clean Water Act imposes strict liability upon regulated entities. Local public agencies are required to conduct thousands of analytical tests each year, so it is not surprising that there may be a few exceedances. The results must be reported in the form of public records. Thus, establishing a Clean Water Act case is generally very simple. And no matter how strong a showing the local agency can make that it is doing everything it can to comply with its permit and protect water quality, proof of even a handful of violations over a five year period is sufficient to render the plaintiff a "prevailing party" entitled to payments of attorneys fees and costs. As local agencies strive to comply with ever changing, increasingly stringent regulatory requirements, every violation, however minor, is accompanied by the specter of possible administrative enforcement and citizen litigation.

I would like to briefly discuss the Lake County Sanitation District's experience, summarize the experiences of several other communities around the State, and close by offering the Subcommittee some suggestions for reform that we believe will help to reinforce the original intent that citizen litigation serve as a "gap filler," to provide a safety net for the enforcement of real environmental violations where the government fails to step in.

The Lake County Sanitation District manages and operates four wastewater treatment plants and is responsible for 200 miles of sewer collection pipes. We serve a large geographic area that is relatively rural, with a low population density, which makes it more difficult and costly to manage. The median household income in the communities we serve is 62% of the statewide average. In recent years, the District has undertaken a number of capital improvement projects, implemented an enhanced spill response program and made staffing changes to reduce overflows of treated effluent from our

treatment facilities as well as to control overflows from our sewer system. Our Board recently approved a series of rate increases to raise revenues to improve our entire system. In addition, the District has received federal and state grant funding for our Full Circle project, which involves supplying our treated effluent to recharge the Geysers steam field. We see this as a win-win situation; water quality is improved due to the beneficial reuse of our effluent as an alternative to discharge, and the Geysers project generates clean energy for California residents and businesses.

These types of improvements do not happen over night, of course, and unfortunately, as the District has worked to implement its long-range plans, violations of its state discharge permits have occurred, some of which may also be violations of the Clean Water Act. The State regulatory agency, the Regional Water Quality Control Board, placed one of the District's two largest treatment systems under an enforcement order, which requires that certain actions be taken by specified dates. The Regional Board was contemplating taking similar enforcement action for the District's Southeast Regional system, but had not yet issued an administrative order when a so-called "citizen group," Northern California River Watch, sued the District in October 2003 for alleged violations of the Clean Water Act at both of the treatment plants and the associated sewer collection systems. Because the District had not paid a monetary penalty as part of the State enforcement and compliance actions, under Ninth Circuit case law, River Watch's suit was not barred by Clean Water Act Section 1319(g). After River Watch's suit was filed, the Regional Board issued a complaint for monetary penalties against the District for some of the same violations, and the District is now faced with the worst of both worlds: expending its limited resources to defend a citizen lawsuit and paying potentially duplicative penalties in a parallel administrative enforcement action. This is surely not what Congress envisioned.

Other witnesses you will hear from today will tell their similar stories. I would just like to mention a couple of other examples of citizen lawsuits against public agencies to assist the Subcommittee in understanding that Lake County's experience is not unique.

In January 2000, in response to a significant sewer overflow from **the City of Pacific Grove's** collection system into surface waters, the Regional Board levied a $70,000 fine, required payment toward a supplemental environmental project, and set forth specific directives to upgrade and enhance Pacific Grove's sanitary sewer collection system. The City paid the fine and began implementing the programs and asset improvements as directed. In June, 2003, the Ecological Rights Foundation filed a citizen suit against Pacific Grove for alleged violations of the Clean Water Act based on very small sewer overflows, overflows that most likely did not reach navigable waters, and the 2000 overflow in response to which Pacific Grove had already undertaken several new programs to address the prevention of sewer overflows. The resulting consent decree largely memorialized the work the City was already undertaking and did not measurably enhance water quality protection. All but two of the overflows alleged in the complaint were less than 100 gallons. The majority of the alleged violations were less than 20 gallons and did not make it to the Bay. Pacific Grove will pay plaintiffs $300,000. The amount of fees and costs the plaintiff requested were over $400,000, all of which were

allegedly incurred within one year and without going to trial. The aggressive pursuit of litigation versus meaningful settlement negotiations was the major factor in the large fees incurred.

The El Dorado Irrigation District, located in the Sierra foothills, experienced a series of wastewater compliance issues caused by growth in the local service area, combined with a wastewater treatment facility which – unknown to the District until it was too late – was not capable of functioning to its designed capacity. The facility discharged treated water into a seasonal stream that would not have existed without the facility's discharge. Despite the facility's difficulty in meeting all of its permit requirements, the water it discharged into the stream had allowed a thriving ecosystem of native fish, plants, animals, and birds to develop and to survive and flourish through the dry summer months.

In order to meet its permit requirements more consistently, the District embarked on a fourteen million dollar treatment plant upgrade project. The project was proceeding under the oversight of the Regional Water Quality Control Board, which was also processing an enforcement order for penalties for past violations, when the California Sportfishing Protection Alliance filed a citizens' suit seeking penalties for exactly the same permit violations.

Even after the District paid a $105,000 penalty to the Regional Board, the Sportfishing Protection Alliance refused to dismiss its suit. The District was ultimately compelled to pay an additional $140,000 for a supplemental environmental project in lieu of penalties and $160,000 in costs and attorneys fees to settle the citizens' suit simply to avoid the continued cost of litigation. Although supplemental environmental projects are supposed to bear some relationship to the harm caused by the violations, the project selected by the citizen's group was for riverbank restoration tens of miles away from the wastewater treatment facility in an area that had never been affected by the District's facility.

The City of Healdsburg, located in the Northern California wine country, instituted a state-of-the-art sewer maintenance program to eliminate any risk of sewer system overflows. Although it had no sewer system overflows for over three years, and there had been only two overflows in the two years before that (each of which was due to blockages in private laterals, not in the public system), Northern California River Watch filed a notice of intent to file a citizens' suit seeking affirmative injunctive relief and penalties for sewer system overflows. Healdsburg met with River Watch's attorney and made their entire set of public records available for review to demonstrate the effectiveness of their program. Nonetheless, the citizen group filed the lawsuit and, after Healdsburg had defended itself for over a year and spent tens of thousands of its taxpayers dollars on it own attorneys, the citizen's group settled for no penalties and only $7,500 in attorneys fees.

In 1995, a citizen group filed its first lawsuit against **the City of Santa Rosa**. The City won the first lawsuit at trial and on appeal. The same citizen group sued the city again in 1998 and then settled after the city agreed to pay for environmental remediation and a

portion of the attorneys' fees and costs. The citizen group agreed not to sue the city for violations that might occur before a date in the future. In 2000, **the City of Santa Rosa** was sued for a third time by the same attorney representing substantially the same plaintiffs. Throughout the time all three lawsuits were initiated and pending, the City was under a Cease & Desist Order issued by the Regional Water Quality Control Board, under which the City was required to develop and implement a reclaimed water disposal project within a specific time schedule. That project was later implemented in compliance with the state-issued enforcement order.

Prior to the filing of the third lawsuit, the State commenced a comparable enforcement action (seeking monetary penalties) against the City by publishing notice and scheduling a hearing regarding the issuance of a complaint for administrative penalties against the City. However, because the penalty order was not issued until *after* plaintiffs' lawsuit was filed, the Federal District Court found that the state's comparable enforcement action did not bar the plaintiffs' lawsuit.

The City was not only fined $98,350 by the RWQCB for violations alleged in the third lawsuit but also settled the third lawsuit for a total of $195,000 ($75,000 in attorneys fees and $120,000 to fund a grant program). Under the terms of the settlement of the third lawsuit, plaintiff Northern California River watch agreed not to sue the City pursuant to the Clean Water Act for a period of four years. On July 15, 2004—exactly two months after the expiration of the stipulated moratorium on litigation-- River Watch filed a Notice of Intent to Sue Santa Rosa for what can best be described as "creative" interpretations of the Act and the City's permit,. This will be the fourth Clean Water Act lawsuit against the City in less than 10 years.

There are many more examples like these. I want to emphasize that none of these communities were "perfect," in that each of them had experienced compliance problems and did not have spotless records. The important point is that in each case, either the community was already acting by itself or the State had already stepped in and programs were being implemented to guard against similar future violations. Just as the citizen suit was intended to supplement government action, it was also intended to be "forward looking." Citizens may not sue for wholly past violations. Given the length of time it takes to plan, finance and construct improvements, many agencies find themselves in a gray area where even though they have committed to a specific set of improvements, they cannot avoid occasional violations while these upgrades are being made.

From CASA's point of view, reform is needed to ensure that citizen suits serve their intended purpose of supplementing limited government enforcement resources and preventing future violations. I would like to briefly mention several potential reforms for the Subcommittee's consideration.

Clarify Availability of Attorneys Fees:

The availability of attorneys fees is without question a significant motivation for some third party plaintiffs to bring or threaten lawsuits. Under the Clean Water Act, a

"prevailing" citizen plaintiff is entitled to attorneys fees and costs; a prevailing defendant may only recover fees if it can demonstrate that the plaintiff's suit was frivolous or entirely without merit. Thus, except in the most ill advised cases, there is very little downside to pursuing litigation for a third party plaintiff. Contrast that with the circumstance of a local public agency defendant that knows it has a strong case against sizeable penalties but nonetheless has some exposure because of a few minor violations. If the defendant goes all the way through trial, even if it significantly reduces the penalty assessed, it may find itself on the hook for not only its own attorneys' fees, expert fees, and costs, but also similar costs and fees incurred by the plaintiff. These facts place the plaintiff's attorney in a very strong bargaining position with regard to settlement.

Of all of the possible reforms, revisions to the attorneys' fees provisions of the Act are most likely to bear fruit, as the availability of these fees is what is motivating many of the abuses. With that in mind, CASA recommends that the Subcommittee consider the following:

- Limit attorney fee awards to the degree of success on the claims included in the complaint. For example, if a plaintiff alleges 100 violations and proves 10, plaintiff should able to recover only a proportionate amount in fees.

- Issue a clear statement of congressional intent that the attorney fee provision of the Act be read as reciprocal, so that attorneys' fees are available to the prevailing party-- period. The language of the Act supports this reading, but the Courts have interpreted the language to allow prevailing plaintiffs to recover fees while prevailing defendants are held to a much more difficult standard.

- Place a cap on the amount of fees that may be obtained in a lawsuit against a public agency. The cap could be set as either an absolute cap or as a percentage of any penalties assessed. In the latter case, a proportionate cap would insure fees are not disproportionate to the nature of the violations actually proven. While these steps may not prevent "nuisance" suits, they would limit a community's potential exposure to exorbitant fees and make it less of a target.

Reinforce Primary Role of the States

Congress specified that no citizen suit could be maintained where the State or the USEPA is "diligently prosecuting" an action against the alleged violator. Given the time it takes to process a State enforcement action, the fact that the State is already "diligently prosecuting" is not enough to bar a citizen suit. In addition, the Ninth Circuit has determined that only a State enforcement action requiring the payment of monetary penalties will serve as a defense to a citizen lawsuit. Because achieving compliance rather than punishment is generally the goal of water quality enforcement actions, the State or USEPA will often choose not to require payment of monetary penalties preferring to allow the agency to spend its limited resources on fixing the problem. In light of this, we ask the Subcommittee to consider:

- Requiring courts to consider the improvements and actions already being undertaken by the community either on its own initiative or pursuant to an enforcement order, a capital improvement program, or master plan, etc. The citizen suit should not go forward unless it can be shown it is likely to "trigger" further, significant and necessary improvement or redress the violations in a manner supplemental to those already underway. Courts could be authorized and encouraged to stay citizen litigation while the improvements already contemplated by the community are developed and implemented.

- Clarifying that where the State has already taken, or is in the process of taking, an enforcement action for violations, citizen litigation for the same or similar violations is barred, whether or not the State action is complete or included the assessment of monetary penalties. The 60 day window within which government is supposed to act is simply not adequate time for a state regulatory agency to investigate alleged violations, evaluate the appropriate enforcement approach, issue a complaint, provide an opportunity for public notice and comment, hold any required hearing and complete the action. It should be sufficient for the State or USEPA to make a determination as to whether it intends to enforce within a specified number of days. If the government decides to bring an action, the citizen suit should be stayed pending initiation and resolution of the agency enforcement action. If the State enforcement action is not completed within a reasonable period of time, the third party plaintiff could then proceed with its suit.

There may be other reforms suggested here today. CASA is very appreciative of the Subcommittee's interest and leadership in finding solutions to the citizen suit abuses. We urge the Subcommittee to consider carefully the various options for improving the law and ensuring that citizen suits against local government only proceed where they will promote real environmental solutions. Local agencies want to be partners with the federal government and the states in achieving water quality improvements. Diverting attention, limited resources, and energy to defend third party lawsuits where compliance solutions are already underway is counterproductive and disheartening.

Thank you for your time. Melissa Thorme, an Attorney with the Sacramento law firm of Downey Brand, LLP, and a Member of CASA's Attorneys Committee, is here with me and we would be pleased to answer any questions that the Subcommittee may have.

CITY OF FORT BRAGG

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TESTIMONY PRESENTED BY

JERE MELO
MAYOR
CITY OF FORT BRAGG, CALIFORNIA

Submitted to the

SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
U.S. HOUSE OF REPRESENTATIVES

WASHINGTON, DC

September 30, 2004

Mr. Chairman and Members of the Subcommittee:

Thank you and your staff for the invitation to present testimony to the Subcommittee today.

My name is Jere Melo, and I am the Mayor, City of Fort Bragg, California. The City is located about 150 miles north of San Francisco, right on the Pacific Ocean. Fort Bragg is a city of about 7,000 residents, and it serves a population of 18,000 to 20,000 persons who live and work along about 65 miles of the California coast.

I refer you to the details in the "City of Fort Bragg Case Study", which is attached hereto. My presentation will be as a small town mayor, not as an NPDES permit or Clean Water Act legal expert.

"Are Citizen Suit Provisions of the Clean Water Act Being Misused?"

To get right to the point of this hearing, I believe the citizen suit provisions of the Clean Water Act are being misused. The City of Fort Bragg has been damaged by the provisions for citizen suits. We were faced with the uncertainty and expense of a threatened citizen lawsuit against the discharges from our waste water treatment plant. We believe we were in compliance with our NPDES permit for nearly all of the alleged violations listed in the citizen complaint, but the time and cost to defend the charges was beyond the diminished return. And so, we came to a settlement with the citizen group in order to cut our losses.

I believe it is important to state that in our case, the citizen group was not made up of local, concerned citizens. The group was from a city about 100 miles from Fort Bragg and located in a different county.

Citizen Suits Have Been Used Against Many Cities, Sanitation Districts and Businesses in the Redwood Empire and Across California.

Fort Bragg's experience is not unique. Nearly all of the cities in our part of California have encountered citizen suits. One particular, larger city, Santa Rosa, has been challenged several times, all with the same result. Each city, or sanitation district, settled before the matter went to court. The potential cost of defending the suit and the uncertainty of prevailing on all points raised makes a settlement the most cost- effective solution.

Businesses are also not exempt from citizen suits. There are some manufacturing operations that have an NPDES permit and a waste water treatment process. The same group that challenges publicly-owned treatment plants is the group that threatens suit against business. To some degree, the citizen suit can be a job-killer, in that the cost to settle makes the cost of production rise, and plants become marginal with increases in costs.

I am very active in environmental policy matters through the League of California Cities. I tell you that the experience I relate to you about Fort Bragg and its neighboring cities is becoming more frequent throughout California. As more plaintiff's attorneys see the possibility of easy money in settlements, there are more threats of citizen suits. It is a matter that deserves at least the attention this subcommittee is giving.

Citizen Suits Come From Small Groups

Earlier I indicated that the group that threatened our city with a citizen suit is located about 100 miles away. It is also a very small group. The membership of this group, Northern California **Riverwatch**, seems to consist of less than 10 persons. **Riverwatch** has threatened and collected settlements from all of the cities in our area. In one case of the larger city being challenged multiple times, **Riverwatch** changed its name, but the persons involved were the same. And so, the citizen suit provisions of the Clean Water Act have been co-opted as a new business of threatened litigation and a real goal of extracting money from entities that treat waste water.

Riverwatch Does Not Promote Water Quality Improvements

Once a settlement is complete, there is little interest from our so-called citizen group. The "book" on a **Riverwatch** threat is to suggest a settlement as soon as possible. While the first reaction to a settlement is a rejection, no one has waited long for the settlement negotiations to begin. And they always begin with discussion about their cost to prepare the threat, some costs for their board members to review your plant and process and some other funding for public groups or pet projects.

In Fort Bragg's case, we paid $12,000 to a **Riverwatch** selected consultant to review our plant. In an unmitigated promotion of his private business, his recommendation was to purchase his brand of water treatment chemicals, the "White Knight" brand, as I recall. Now this consultant is a **Riverwatch** board member.

Another provision was to set aside $35,000 in an educational fund, which we did. A group known locally as "Noyo Watershed Alliance" (the Noyo River is the primary water source for Fort Bragg) was given control of the funds for education or land use improvement. The group has unanimously agreed to work to relocate a county road in three locations where very substantial amounts of sediment are now placed in the river. **Riverwatch** is objecting to the use of funds for this work. My best guess is that **Riverwatch** wants the $35,000 to end up in someone's pocket of its choosing, rather than eliminating three substantial sources of sediment to a stream providing habitat for coho salmon and steelhead trout.

RECOMMENDATION

The citizen suit provisions of the Clean Water Act need amendment to prevent misuse. The current system, as applied in the Redwood Empire of California, essentially allows allegations of water quality violations to lead to cash settlements, even where the public agency is already subject to a compliance order and has made commitments toward better operation and maintenance or constructing new facilities or processes.. There is no consideration for a record of otherwise good performance, no consideration for a record of investment for improvements, and no consideration for working with regulatory agencies to achieve consistent compliance and to make continued improvements. Some additional burden of reason and proof needs to be placed on those who threaten a federal suit, prior to filing the 60-day notice, and such suits should be forbidden where a city or other permittee is already under a compliance order, notwithstanding that penalties were not paid. We look forward to any help you can provide to us in this regard.

Thank you,

Jere Melo
Mayor of Fort Bragg (CA)

City of Fort Bragg Case Study:

The City operates a small trickling filter sewage treatment plant rated for 1 million gallons per day in dry weather, but can reach as high as 5-7 million gallons per day in wet weather due to large rain events.

State Action: On January 23, 1997, the Regional Water Quality Control Board issued Cease and Desist Order No. 97-2, which required repairs to the City's collapsed bio-filtration process. The secondary biofilter was repaired in September, 1997.

On December 10, 1998, another Cease and Desist Order ("CDO") No. 98-126 required the preparation of a plan to meet the City's effluent limitations, which were not based on the type of treatment plant operated by the City. The City submitted the plan in February, 1999 and included a time schedule for proposed improvements.

On March 22, 2001, the City's permit was scheduled to be renewed by the Regional Water Quality Control Board, including proposed changes to reflect limits for "treatment equivalent to secondary treatment" applicable to the City's trickling filter plant. However, following comment by RiverWatch, the Board took no action on the permit, but rescinded CDO No. 98-126 and adopted CDO No. R1-2001-23, which modified the time schedule for improvements. Because the permit was never changed, the City remained subject to permit limits not appropriate for the type of treatment plant it operated and made the City vulnerable to citizen suits for permit violations.

The Citizen Suit: In February of 2001, after the Regional Water Board had already issued enforcement orders, RiverWatch sent a 60-day notice letter alleging continuing violations of effluent limits, failure to comply with NPDES permits and reporting requirements, and discharge of raw sewage and pollutants into the Pacific Ocean. The case, which was settled prior to litigation, resulted in a Consent Decree issued July 9, 2002.

Case Results: As a result of the citizen suit filed by River Watch, the City of Fort Bragg:

- As part of the RiverWatch requirements during the settlement process, the City had to retain Bob Rawson, selected by Jack Silver, to conduct an audit/ evaluation of Fort Bragg's collection system and treatment facility at a cost of $12,000. Bob Rawson proceeded to review and make recommendations for treatment plant improvements. One of his recommendations was that the City use a biological product that Rawson just happened to sell. Mr. Rawson is a current member of the RiverWatch Board.

- Paid $25,000 in attorneys fees and costs to Jack Silver plus an equivalent amount in fees to the City's own attorneys.

- Set up a Public Education fund in the amount of $35,000, currently being overseen by the Noyo Watershed Alliance, and now being disputed by Jack Silver.

- The City developed and implemented a grease trap ordinance and inspection program to reduce the risk of improper disposal of grease by restaurants in the City.

- Hired Nute Engineering to complete a pre-chlorination study of the wastewater treatment facility for a cost of $5,000.

- Began the process of addressing inflow and infiltration (I/I) issues. The City has authorized expenditures of $50,000, which was necessary to secure grant funding totaling nearly $720,000 to perform the work. Complete by May 30, 2007, all sewer line repairs identified in a report prepared by the City in 2000.

- Nute Engineering nearly completed the design of the Sand Filter Project as required by the Cease and Desist Order at a cost of approximately $35,000. This project is no longer necessary because of the City's implementation of a permanent chemical feed process that has brought the City into compliance.

The full cost of the suit was in the range of $150,000 to upwards of $200,000 and required the City to do things already obligated to do under the Cease and Desist Order or to do things not required or not related to compliance with the City's permit requirements.

Federal Clean Water Act
Citizen Lawsuits
February, 14, 2002

League of California Cities
1400 K Street, 4th Floor
Sacramento, CA 95814

Introduction

The federal Clean Water Act (Act) authorizes citizens to file suit against any person or entity for an alleged violation of its National Pollution Discharge Elimination System (NPDES) permit. While this provision of federal law is intended to be a safety net when the responsible regulatory agency does not enforce the water quality laws, it has resulted in frivolous lawsuits and out of court settlements involving cities in California. In many instances, the violations are minor and are not the subject of an administrative penalty action. Most jurisdictions facing the threat of a lawsuit settle out of court because of the high cost of litigation and the fact that there is little defense for violations under the strict liability standard. As a result of a provision in the Act which allows the plaintiff to recover attorney's fees and costs, these out of court settlements usually provide very little money for necessary infrastructure and environmental remediation projects.

State Authority Under the Federal Clean Water Act

The Act uses water quality standards and technology-based effluent limitations to protect water quality. Technology-based effluent limitations are specific numerical limitations established by the federal Environmental Protection Agency (EPA) and placed on pollutants from certain sources. The Act prohibits the discharge of pollutants to surface waters, unless the discharge is authorized by, and in compliance with, a National Pollution Discharge Elimination System (NPDES) permit. In California, Regional Water Quality Control Boards (Regional Board) issue such permits, which typically contain: 1) effluent limitations, and 2) reporting and monitoring requirements.

The Act requires state governments to establish overall water quality standards for all bodies of water in the state. These standards should consist of a designated beneficial use and corresponding maximum concentrations for various pollutants which impact that use. Additionally, these standards should reflect the unique environmental characteristics of a region (e.g. the prevalence of rainwater with a ph level more acidic than allowable standards for the impacted water body). In waters where industrial and municipal sources have achieved technology-based effluent limitations, though water quality standards are not met, the state may require discharges to meet additional pollution control requirements.

A Violation of the Clean Water Act

A violation of the Act entails the discharge of a pollutant to navigable waters from a point source by any person in violation of an NPDES or other Clean Water Act permit. Courts have held that essentially any substance other than water is capable of classification as a pollutant under the Act. A discharge requires the collection and channeling of a pollutant through the development of a discernable, confined and discrete conveyance system. This conveyance system forms a "point source" which is capable of regulation under the Act by the Regional Boards. Navigable waters include any natural body of water or adjacent waterway. Such a definition is intended to capture those non-navigable adjacent waterways such as wetlands.

Civil Lawsuits Under the Act

The Act allows any citizen to file a civil lawsuit against any person *or* entity alleged to be in violation of an effluent standard or limitation of its NPDES permit. The Act requires that a potential plaintiff issue a permittee a 60-day notice of intent to file in order that the permittee has an opportunity to bring its facilities into compliance with the conditions of its permit and/or so that the Regional Board or the Environmental Protection Agency (EPA) may bring an enforcement action. If the Regional Board has issued an Administrative Civil Liability mandating penalties or facility compliance, citizen suits are not allowed for those violations causing issuance of the ACL. The citizen filing the suit may do so for violations occurring during the five years previous to the date that the lawsuit is filed, and at minimum, must be for a violation that is occurring at the time of filing.

The nature of the relationship between the plaintiff and the violation(s) in question is important in determining "standing" in a court of law. The United States Constitution requires that a plaintiff satisfy three criteria in order to file a lawsuit in federal court. The plaintiff must suffer from an actual or imminent injury, the injury must reasonably relate to the defendants actions, and a decision in the plaintiff's favor must remedy the injury. The Supreme Court recently issued a decision in the case of Friends of Earth Inc. v. Laidlaw Environmental Services, which held that citizen groups have standing to seek civil penalties as a deterrent against future Act violations. Moreover, the Court held that if citizens reasonably believe the discharges impact their recreational or aesthetic use, then citizens have standing to seek injunctive relief under the Act regardless of whether the violation(s) harm the environment.

Impact on California Cities

While the purpose of the citizen lawsuit provision in the Act is that of an enforcement tool for the benefit of the environment, California municipalities are experiencing significant financial repercussions that seem to have little correlation to that end. The costs of litigation are so high that many municipalities involved in or facing the threat of a lawsuit have settled out of court. The following is a brief outline of the real-world impacts of this citizen lawsuit provision on specific cities.

- Redding: After the city entered an agreement with the California Integrated Waste Management Board (CIWMB) to clean an abandoned dumping ground adjacent to the Sacramento River, the California Sport Fishing Protection Alliance sued the city for a violation of their discharge permit requirements following a heavy rain that washed mud from the burn dump into the river. The city has spent approximately $200,000 for engineering studies, plaintiff and defendant attorney fees, and settlement costs.

- City B: Following a recent investment of approximately $5.5 million in the city's wastewater treatment facility, "Riverwatch" sued the city for numerous unfounded violations of their NPDES permit over the preceding five years. The city did have a number of violations, was subject to a cease and desist order and is currently working with the Regional Board to solve its problems. Currently, the city is mediating the dispute and expects to pay $100,000 in plaintiff's attorney fees, $80,000 in attorney fees, and $60,000 in "monitoring fees."

- City C: This city operates a wastewater treatment facility that discharges water into the Pacific Ocean. The city is under a Cease and Desist Order issued by the RWQCB and is working closely with the Board to prepare and design improvements to the wastewater treatment plant facility. "Riverwatch" has notified the city that it plans to file a lawsuit over suspended solids violations.

- City D: After the city missed state-imposed deadlines for development of their wastewater treatment plant, the California Sport Fishing Alliance filed a citizen lawsuit against the city. The city settled with the Alliance for $20,000 (in attorneys fees). The Central Valley Regional Water Quality Control Board then fined the city $30,000 for these same violations.

- City E: In 1995, a citizen group filed its first lawsuit against this city. The city won the first lawsuit at trial and on appeal. The same citizen group sued the city again in 1998 and then settled after the city agreed to pay for environmental remediation and a portion of the attorneys fees and costs. The citizen group agreed not to sue the city for violations that might occur before a date in the future.

  In 2000, the same citizen group, joined by a second citizen group, filed a third lawsuit against the city, alleging, among others, violations which were settled in the second lawsuit. The second citizen group was founded by the plaintiffs' attorney (same attorney in each of the three cases). He served as president and chief executive officer for the citizens group. His legal secretary served as secretary and chief financial officer. This lawsuit has now been settled.

  The second citizen group also served 60-day notices on farmers using the city's reclaimed water for irrigation. These notices were settled as part of the settlement of the third lawsuit.

Conclusion

Few argue against the fair and appropriate actions of regulatory agencies to enforce state and federal clean water laws. Additionally, few argue against the need for citizens to have the ability so file a lawsuit when those regulatory bodies do not meet their responsibilities. However, as the above examples demonstrate, the original intent of the citizen lawsuit "safety net" has been distorted, and as long as more money is collected by plaintiff's attorneys than is spent on water quality projects, the regulatory provision will remain inefficient.

Note: Much of this document has been adapted from Rick W. Jarvis' The Clean Water Act: A Citizen Suit Survival Guide.

Subcommittee on Water Resources
Hearing on "Are Citizen Suit Provisions of the Clean Water Act Being Misused?"
September 30, 2004, 10:00 a.m.
Opening Statement
Congressman Gary G. Miller

Mr. Chairman, thank you for holding a hearing on this important matter. As a result of misinterpretation of the citizen suit provisions of the Clean Water Act, public sanitation companies and municipalities throughout California are burdened by a flood of frivolous lawsuits filed against them, resulting in increased utility costs for consumers and results in the diversion of critical funding away from needed system improvements. I commend you for your attention to this serious problem for California sanitation agencies and I look forward to working with you to alleviate this growing problem.

I believe that if we want to sustain America's economic growth and provide for a rapidly increasing population, we must ensure efficient and reliable access to water resources and pursue a modernized sanitation infrastructure.

As a representative of Southern California, wastewater treatment and water scarcity issues are particularly important to me. Many states, especially California, face the challenge of providing sanitation and water resources for their growing population. Southern California, home to 17 million people, is the most populous metropolitan region in the country. It is estimated that the Southern California population is likely to grow by more than 6 million people by 2025.

With increased demand, decreased availability of imported water and higher water quality requirements, future water supplies will become even more limited and expensive.

California is faced with the formidable task of providing reliable and safe water resources for its growing population of more than 30 million people. A *1996 Clean Water Needs Survey* put the state's infrastructure needs at $11.5 billion, and the next needs-survey is expected to double that amount.

Unfortunately, even when state regulators are in the process of working with municipalities to come into compliance with the Clean Water Act, citizen lawsuits are allowed to be filed in California and the price of these lawsuits is often passed on to everyday citizens.

The Clean Water Act – Congressional Intent

Growing public awareness and concern for controlling water pollution led to the enactment of the Federal Water Pollution Control Act Amendments of 1972, commonly known as the Clean Water Act. This act established the basic structure for regulating the discharge of pollutants into our nation's bodies of water. Specifically, the Clean Water

Act gives the Environmental Protection Agency and the Army Corps of Engineers authority over our nation's pollution control programs.

Given the limited resources of federal and state enforcement agencies, Congress was concerned that enforcement of the Clean Water Act provisions might not be vigorously pursued. As a safeguard, Congress included citizen enforcement language in Section 505 of the Clean Water Act in order to *supplement* federal and state government agency oversight in cases where the government has not intervened.

Numerous citizen lawsuits have been filed under Section 505 of the Clean Water Act and many have played a positive role in addressing water quality issues. However, a growing number of these lawsuits are brought while municipalities are already working with their regulators. These lawsuits do little or nothing to enhance water quality. They have no economic or environmental value, and the substantial costs associated with them only serve to divert funding from necessary infrastructure and environmental projects.

This is the problem we seek to investigate today.

Ninth Circuit Court of Appeals Ruling

Frivolous lawsuits are severely hampering small communities who can ill-afford costly litigation. This problem has been exacerbated by a misinterpretation of Congress' intent of citizen lawsuits by the Ninth Circuit Court of Appeals. As a result of this ruling, California municipalities are forced to divert scarce resources to combating frivolous lawsuits, undermining their ability to ensure our nation's wastewater treatment plants are in compliance with the Clean Water Act.

Based on the Ninth Circuit Court ruling, it is impossible for any sanitation agency to completely protect itself against citizen lawsuits. In fact, many lawsuits have been brought against municipalities that are already working with state and federal agencies to bring their infrastructure into compliance with the Clean Water Act. Even in cases where a municipality is doing everything it can to rectify shortcomings in its infrastructure and protect water quality, the Ninth Circuit Court has opened the door to an influx of citizen lawsuits. When regulators are working with municipalities to improve infrastructure in order to prevent future violations and protect water quality, citizen lawsuits serve only as a costly diversion to these efforts.

I firmly believe that we should work to assist municipalities to comply with the Clean Water Act, instead of allowing the endless abuse of power currently exhibited by third party lawsuits.

Conclusion

It is my hope that this hearing will help us return to the original intent of the citizen lawsuit provisions of the Clean Water Act in order to protect municipalities and sanitation agencies from costly, frivolous lawsuits. Only then will our sanitation agencies be able to appropriately address the clean water needs of our growing population.

Association of
Metropolitan
Sewerage Agencies

TESTIMONY OF THE

ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES
(AMSA)

September 30, 2004

Presented by

CHRISTOPHER M. WESTHOFF
Assistant City Attorney
Public Works General Counsel
Los Angeles, California

Submitted to the

SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT

in

WASHINGTON, DC

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Testimony of Christopher Westhoff
Assistant City Attorney, Public Works General Counsel,
Los Angeles, California
on behalf of the
Association of Metropolitan Sewerage Agencies

Introduction

Good morning Chairman Duncan, Congressman Costello, Congressman Thompson, and members of the Committee, my name is Chris Westhoff. I am an Assistant City Attorney for the City of Los Angeles and I have served as General Counsel to the City's Department of Public Works for over 20 years. I am also a Board member of the Association of Metropolitan Sewerage Agencies ("AMSA") and serve as AMSA's Secretary and as Chair of AMSA's Legislative Policy Committee. AMSA represents nearly 300 clean water agencies across the country. AMSA's members treat more than 18 billion gallons of wastewater each day and service the majority of the U.S. sewered population.

On behalf of AMSA and the City of Los Angeles, I would like to thank you, Chairman Duncan, and the members of this Committee for your continued commitment to clean water issues – in California and nationwide. Your dedication to solving the challenges our communities face across the nation, including in Los Angeles, is essential to achieving the goals of the Clean Water Act.

Our nation's streams, rivers, lakes and oceans are cleaner today than they have been in over half a century. This has been accomplished by the unparalleled efforts of the many cities, special districts, municipalities, and industries that discharge treated effluent into the waters of the United States. The backbone of the transformation of America's waters has been the Federal Clean Water Act.

Hundreds of billions of dollars have been spent by the federal government, states, industries, and cities around the country to bring our nation's waters to their current condition. And, we must continue to spend billions more to maintain the improvements we have achieved to date and to continue moving forward in the pursuit of improving the quality of our receiving waters.

Without question, the efforts of the governmental regulators entrusted with enforcement authority under the Clean Water Act – and in cases, the actions of citizens and environmental organizations stepping in when governmental regulators neglected to act – have contributed to our national water quality improvements. However, the natural tension between appropriate governmental regulatory action and citizen enforcement frequently has placed permitted entities like my City in a losing battle.

The drafters of the Clean Water Act clearly saw governmental enforcement against permitted dischargers as the critical element in the ultimate success of the intent of the Act. In the Act itself, citizen enforcement was designed to play a secondary, supplementary role, allowed only when the appropriate governmental regulators failed to diligently prosecute a permit holder for violations.

Yet today, the combination of court precedent and the U.S. Environmental Protection Agency's ("EPA's") narrow interpretation of its own regulations has skewed the intent of Congress concerning citizen enforcement. Today, permitted dischargers like my City, in California and across the country, routinely suffer the indignity, negative publicity, and substantial financial burden of having to respond to third party lawsuits brought by environmental activist groups for substantially the same violations addressed in prior enforcement actions by our regulators.

The concept of "double jeopardy" is fundamental in American jurisprudence. While not rising to the level of actually violating this foundational cornerstone, when a permitted discharger has already answered to its governmental regulator in an enforcement action, it is patently unfair for the permit holder to be required to address the same issues in a third party lawsuit filed under the citizen suit provisions of the Clean Water Act. When regulators diligently enforce, citizen suits should be precluded.

Nonetheless, Los Angeles just finished six years of litigation initially filed in 1998 by a third party citizen group, the Santa Monica Baykeeper, and ultimately joined years later by the EPA and the U.S. Department of Justice. This citizen suit was brought notwithstanding the fact that the City had settled an enforcement action for the same violations with our state permitting entity in the month immediately prior.

Because of its size and reputation, Los Angeles may not engender a lot of sympathy when it finds itself as the victim of a lawsuit filed by an environmental group. However, if it can happen to Los Angeles, it can happen to any other permitted discharger – industrial, special district, or municipality – large or small across this nation.

Los Angeles has a municipal wastewater collection system that consists of close to 7,000 miles of pipe ranging from six inches to over 12 feet in diameter. In the winter of 1998 Los Angeles experienced an "El Nino" climatic condition which resulted in one of the wettest winters in 120 years of recording such statistics. In the month of February 1998 alone, we received over 14 inches of rain, the rainiest February on record. To put this in perspective, the average total rainfall for a year in Los Angeles is just over 15 inches.

Needless to say, the City's wastewater collection system was overtaxed and experienced overflows during this rainy winter. Close to 50 million gallons of wastewater spilled from the City's pipes in Winter 1998. The good news in this experience was that even with the incredible amount of rain we experienced, the wastewater that spilled from the system was confined to six distinct locations in the City – and projects to remediate these six locations were already underway. I know 50 million gallons seems like a large number, but to give you a frame of reference, Los Angeles transports close to 190 billion gallons of wastewater a year – so even in this extraordinarily wet year, the City still only spilled less than ½ of one percent (.005 percent) of all the wastewater collected that year, and kept 99.995 percent of the wastewater in the pipes.

The City's permitting regulator sought to enforce against the City for these spills as well as other small spills caused by root and grease blockages. In September 1998, the City agreed to settle the enforcement action by agreeing to a Cease and Desist Order from the regulator and paying an $850,000 penalty ($200,000 in cash and $650,000 in environmental projects). Further, Los Angeles agreed to construct major sewer projects totaling over $600 million on an accelerated schedule of just over six years. One project alone was the largest single public works project ever awarded by the City of Los Angeles at just over $250 million for a 12 foot diameter mainline sewer tunnel. This project was built in a compressed timeframe through the simultaneous use of four tunnel boring machines, the first time this was ever done.

In October of the same year, the Santa Monica Baykeeper held a press conference and announced their lawsuit concerning the exact same sewer spills addressed by the Cease and Desist Order issued by the City's permitting regulator just one

month before. You may wonder why the Baykeeper's suit was not precluded by our prior settlement. Because all they had to allege is that the City would have future spills – while our remediation projects were underway – and their case could proceed. To complicate matters, in January 2001, the EPA, through the Department of Justice, filed yet another lawsuit – this one covering the same spills as the Cease and Desist Order and the Baykeeper lawsuit, and adding on small spills that had occurred between 1998 and 2001.

It is important to note that in the six years since the 1998 "El Nino" winter, Los Angeles has had only four wet weather related spills. All other spills during that time frame have been caused by root and grease blockages. Also, in the six years since 1998, the average yearly volume of wastewater spilled out of the Los Angeles collection system has been one ten thousandth of one percent (.000001%) of the total volume collected. That is a pretty good batting average in any league except the Clean Water Act. You see, EPA's interpretation of its own Clean Water Act regulations is that all spills from a separate sanitary sewer collection system are flatly prohibited, regardless of volume, cause, or impact on water quality.

Even with our comprehensive maintenance program, a municipal wastewater collection system works at its heart like your pipes at home – only our systems are dramatically larger with more potential spill points. When do you call Roto Rooter® out to your house, before or after you have a backup? And, unlike a homeowner who can stop running water when they have a blockage in their line to prevent a spill out of a toilet, sink or bathtub; the wastewater in our pipes keeps coming 24 hours a day, seven days a week, and 52 weeks a year.

EPA has publicly documented that even the best run, best maintained separate City sewer systems will overflow. And yet, using a strained regulatory and legal analysis, EPA and enforcement authorities take a strict liability approach to these inevitable overflows. This makes every community with separate sewers an easy target for enforcement by third party plaintiffs.

The hard dollar cost to my City of our recent citizen suit experience – and let me reiterate that we were sued after we had been diligently enforced against by our regulator – reads like this: City's outside attorney fees, almost $5 million; Baykeeper attorney fees, $1.6 million; other citizen intervenors attorney fees, over $400,000; penalties, $800,000 (cash), $8.5 million (environmental projects). And this figure does not account for the incredible amount of staff time spent supporting the litigation effort and diverting staff from their core responsibilities. I can attest that this duplicative citizen suit did not yield additional environmental benefit to the citizens of Los Angeles – although it is the citizens' money that ultimately pays for needless litigation and attorneys fees through rising sewer rates.

Let me be clear. No one is asking that citizen suits go away. As responsible environmental stewards, we realize that the citizen suit provision of the Clean Water Act is a powerful and necessary tool – to fill enforcement gaps. Where a regulator is not diligently enforcing the Clean Water Act, citizen suits are a critical and important secondary source of Clean Water Act enforcement. However, where Congress' intended prime Clean Water Act enforcer has done or is doing its job, municipalities need protection from redundant third party lawsuits that will raise the cost of the clean water services we provide.

Let me conclude by stating that AMSA would welcome the opportunity to work with this Subcommittee to discuss ways to focus future third party lawsuits against municipalities where Congress intended them – where there is an enforcement gap. I note that some of the witnesses today will offer the Subcommittee specific reforms to begin this dialogue. We will be pleased to contribute to the process.

Again, I thank you for your attention to this important issue. At this time, I would be happy to answer any questions.

California Environmental Protection Agency

Air Resources Board • Department of Pesticide Regulation • Department of Toxic Substances Control
Integrated Waste Management Board • Office of Environmental Health Hazard Assessment
State Water Resources Control Board • Regional Water Quality Control Boards

Terry Tamminen
Agency Secretary

Arnold Schwarzenegger
Governor

September 29, 2004

The Honorable John J. Duncan, Chairman
The Honorable Jerry F. Costello, Ranking Member
Water Resources and Environment Subcommittee
Transportation and Infrastructure Committee
House of Representatives
Washington, DC 20515

Re: *Clean Water Act Hearing*

Dear Chairman Duncan and Congressman Costello:

I understand that tomorrow the Water Resources and the Environment Subcommittee plans to hold a hearing on Citizen Suit provisions of the Clean Water Act. I am told that testimony will be presented at this hearing regarding the recently settled case against the City of Los Angeles initiated by the Santa Monica Baykeeper for thousands of illegal sewage spills. As the former Executive Director of the Santa Monica Baykeeper and the current Secretary of the California Environmental Protection Agency, I am uniquely positioned and experienced to comment on this particular matter, and on the value of citizen lawsuits based on the Clean Water Act in general.

At my direction, in August 1998 Santa Monica Baykeeper submitted a 60-day notice letter that the organization intended to file suit against the City because of its sewage spills. In 2001, the U.S. Environmental Protection Agency and the State of California filed a lawsuit against the City of Los Angeles, and the Baykeeper case and the government cases were soon consolidated, and the Baykeeper and the government plaintiffs began working together. Also in 2001, local homeowner organizations representing neighborhoods that had been significantly affected by sewage spills and odors joined the plaintiffs. The Federal Department of Justice and the State believed in the need for additional relief beyond the Regional Board's original action in 1998, and vigorously worked with the Baykeeper attorneys and technical experts and the homeowners' organizations to resolve the expanded case.

In August 2004, a meaningful and precedent-setting settlement agreement was reached that will greatly benefit the citizens of Los Angeles. I believe that any attempt to describe this litigation as an inappropriate use of the citizen suit provision is false. Indeed, this is exactly the type of case for which Congress created this provision. This particular case demonstrates how citizen groups and government can work together to resolve local pollution problems.

Thank you for your consideration and I welcome your questions or comments regarding this issue.

Sincerely,

Terry Tamminen
Agency Secretary

1001 I Street • Sacramento, California 95814 • (916) 445-3846 • Fax: (916) 445-6401

California Regional Water Quality Control Board

Los Angeles Region

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Terry Tamminen
Secretary for Environmental Protection

Arnold Schwarzenegger
Governor

September 29, 2004

The Honorable John J. Duncan, Jr., Chairman
The Honorable Jerry F. Costello, Ranking Member
Water Resources and Environment Subcommittee
Transportation and Infrastructure Committee
U.S. House of Representatives
B-376 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Duncan and Representative Costello:

U.S. HOUSE COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE, WATER RESOURCES AND ENVIRONMENT SUBCOMMITTEE: SEPTEMBER 30, 2004, HEARING ON CLEAN WATER ACT CITIZEN SUITS

It has come to our attention that the Subcommittee on Water Resources and Environment will conduct a hearing on Thursday to consider whether Clean Water Acts citizen suits are being abused. A committee document indicates that a focus of discussion will be a Clean Water Act lawsuit recently settled involving thousands of sewage spills in the City of Los Angeles. In our opinion, the Los Angeles sewage spill litigation and its resolution serve as an example of why Clean Water Act citizen suits are not only a good idea from the viewpoint of public policy, but are necessary to achieve the Clean Water Act's goals.

As the Chair and Vice Chair of the Los Angeles Regional Water Quality Control Board, we can offer a unique perspective to your colleagues on this issue. In addition to our other responsibilities, our agency has primary responsibility for issuing and enforcing Clean Water Act permits in the Los Angeles region. In our experience, the very limited number of citizen suits that have been brought in our region have provided important public benefits: supplementing the resources of state and federal agencies, as well as pursuing avenues of improvement regulators may not have considered.

The Los Angeles sewage spill case is an example of such a success. The Regional Board had previously brought a limited enforcement action against the City of Los Angeles. The Clean Water Act citizen plaintiffs, including Angelinos forced to endure raw sewage flowing through their streets and yards, recognized that more could and needed to be done. The citizen plaintiffs, led by the Santa Monica Baykeeper, pursued a broader enforcement action designed to ensure that Los Angeles' aging sewage system was modernized and public health protected.

Ultimately, the Regional Board and the U.S. Environmental Protection Agency agreed with the citizens that Los Angeles needed to do more. The regulatory agencies then filed suit drawing in great part on the claims made by the citizens. The cases were joined with the citizens' lawsuit. Throughout the remainder of the litigation, the citizens, Regional Board, and U.S. Environmental Protection Agency worked closely and collectively to pursue the litigation and to protect Angelinos, particularly in economically challenged neighborhoods, from a sewage collection system that was endangering their health.

Simply, the September 30, 2004, hearing seems to be addressing an issue that we have not seen in the Los Angeles region. Clean Water Act citizen suits have been few and far between in our region. Further, the one notable exception is the Los Angeles sewage spill case. In that case, the citizen plaintiffs served an instrumental roll in implementing the Clean Water Act.

Sincerely,

Francine Diamond
Chair

Susan Cloke
Vice Chair

cc: Mr. Jonathan Bishop
Interim Executive Officer
Los Angeles Regional Water Quality
Control Board
320 West 4th Street, Suite 200
Los Angeles, CA 90013

OFFICE OF THE CITY ATTORNEY
ROCKARD J. DELGADILLO
CITY ATTORNEY

September 29, 2004

The Honorable John J. Duncan, Chairman
The Honorable Jerry F. Costello, Ranking Member
Water Resources and Environment Subcommittee
Transportation and Infrastructure Committee
House of Representatives
Washington, DC 20515

Dear Chairman Duncan and Congressman Costello:

On September 30, 2004, the Water Resources and the Environment Subcommittee will conduct a hearing regarding the Citizen Suit provisions of the Clean Water Act, wherein reference may be made to the City of Los Angeles' prior lawsuit with citizen plaintiffs over sewage issues. The City of Los Angeles would like to express to the Committee our ongoing support for the principles contained in the settlement agreement for this case, which was initially brought by citizen plaintiffs Santa Monica Baykeeper and later joined by the State of California and the U.S Environmental Protection Agency.

The recent settlement is a win-win for everyone in Los Angeles, and the undersigned remain committed to moving forward with a successful rehabilitation of our sewer system and the resulting environmental benefits from such action.

Sincerely,

Rockard J. Delgadillo
City Attorney

Jack Weiss
Councilmember, District 5

Eric Garcetti
Councilmember, District 13

Wendy Greuel
Councilmember, District 2

Jan Perry
Councilmember, District 9

Antonio Villaraigosa
Councilmember, District 14

EARTHJUSTICE * ENVIRONMENTAL INTEGRITY PROJECT
FRIENDS OF THE EARTH * NATIONAL WILDLIFE FEDERATION
NATURAL RESOURCES DEFENSE COUNCIL * SIERRA CLUB * U.S. PIRG

October 18, 2004

Representative John J. Duncan, Jr.
Chairman, Water Resources and
Environment Subcommittee
House Transportation and Infrastructure Comm.
U.S. House of Representatives
Washington, D.C. 20515

Representative Jerry F. Costello
Ranking Member, Water Resources and
Environment Subcommittee
House Transportation and Infrastructure Comm.
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Duncan and Ranking Member Costello:

We write to express our concern regarding the issues discussed at the recent House Water Resources and Environment Subcommittee hearing, "Are Citizen Suit Provisions of the Clean Water Act Being Misused?" We believe that some of the information presented at this hearing was based on misunderstandings about the role of citizen suits under the Clean Water Act as well as the nature of the statutory provisions that govern current law. We ask that this letter and its attachments be added to the record to clarify some of the issues discussed at the hearing.

Specifically, we are submitting for the record information concerning the importance of Clean Water Act citizen suits in general, existing provisions of the Clean Water Act barring citizen suits that are duplicative of diligent agency enforcement efforts, and federal rules of civil procedure that bar any action—including a citizen suit—that is frivolous or filed in bad faith. We also wish to submit for the record the following law review articles: "*Now More Than Ever: Trends in Environmental Citizen Suits at 30*," published by James R. May in the 2003 Widener Environmental Law Review and an excerpt from "*Who's Suing Whom?: A Comparison of Government and Citizen Suit Environmental Enforcement Actions Brought Under EPA-Administered Statutes, 1995-2000*," published by Kristi M. Smith in the 2004 Columbia Journal of Environmental Law. These articles are attached.

Citizen Suits are an Integral Part of Clean Water Act Implementation and Enforcement.

Citizens' right to sue for violations of the law is among the most meaningful tools under the Clean Water Act (as well as other federal environmental laws) for ensuring that statutory protections for public health and the environment are effective. Given scarce resources at the federal and state levels, citizen suits are increasingly important to ensuring that Congress' intent in passing fundamental environmental laws—like the Clean Water Act—is actualized.

But even if federal and state environmental agencies had both the resources and resolve to meaningfully implement and enforce the law, environmental citizen suits would still be critical to realizing the goals of our environmental and public health statutes. Citizens have a right to a seat at the table in matters that affect their families and communities, and citizen suits often spur much-needed agency enforcement actions as well as ensure that settlements with polluters are structured to actually solve problems.

In the current climate of agency enforcement shortfalls, citizen suits are filling a growing enforcement gap and make not just polluters but the government accountable to the promises it has made to this

nation's communities: clean water, clean air, and a healthy place to live. According to the study by Jim May:

- From 1995 to 2002, the number of Clean Water Act cases referred to the Justice Department by EPA declined by more than half (55%).
- Citizen suit enforcement notices under the Clean Water Act exceeded EPA referrals to DOJ from 1995-2002 by 54%.
- Citizen suit consent decrees under the Clean Water Act outnumbered DOJ consent decrees for the statute by an average of 13% from 1995-2001.

Clean Water Act Provisions Already Bar Against Citizen Suits that are Duplicative of Diligent Agency Enforcement Actions.

Witnesses representing municipalities and associations at the Subcommittee hearing expressed the need for provisions that would bar citizen suits that are duplicative of federal or state agency enforcement actions. Such provisions already exist in Sections 505 and 309 of the Clean Water Act. Section 505(b)(1) of the Act precludes commencement of a citizen suit action prior to the end of a sixty-day notice period or for violations that are already being diligently prosecuted by federal or state government:

> No action [under the Clean Water Act's citizen suit provision] may be commenced...
> (A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator [of the EPA], (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation or order, or
> (B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

Section 309(g)(6) further limits citizen suit civil penalty actions where federal or state agencies are diligently prosecuting against the same violations under the Act or comparable state law, or have issued a final order containing a civil penalty. Specifically, under this provision, such violations shall not be the subject of any further civil penalty action under the Act if the following conditions have been met:

> (i) with respect to which the Administrator [of the EPA] or the Secretary [of the Army] has commenced and is diligently prosecuting an action under this subsection,
> (ii) with respect to which a State has commenced and is diligently prosecuting an action under State law comparable to this subsection, or
> (iii) for which the Administrator, the Secretary, or the State has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under this subsection, or such comparable State law, as the case may be . . . . (Emphasis added.)

Congress clarified the role of citizen suits under the Clean Water Act and the circumstances in which such actions are barred by government prosecutions in the 1987 Federal Water Pollution Control Amendments. The amendments to the statute itself and the legislative history of the 1987 amendments explicitly address the issue of what qualifies as "diligent prosecution" by a state government proceeding under state law to address a violation of both state and federal law. In such a case, Congress held that the state-level enforcement process and standards must be comparable to those under federal law in order to preclude a federal enforcement or a Clean Water Act citizen suit for the federal violation:

> [I]n order to comparable, a State law must provide for a right to a hearing and for public notice and participation procedures similar to those set forth in 309(g) [the federal Clean Water Act]; it must include analogous penalty assessment factors and judicial review standards; and it must include provisions that are analogous to the other elements in 309(g).

Senate debate on H.R. 1, *reprinted in* A Legislative history of the Water Quality Act of 1987, Volume 1 (U.S. Senate Committee on Environment and Public Works, 361, 100th Cong., 2nd Sess. (1987).

That is, any state action brought for a violation of state and federal law that fails to meet this standard of comparability does not preclude a citizen suit. This approach was upheld by the Ninth Circuit Court of Appeals in *Citizens for a Better Environment v. Union Oil Co.*, 83 F.3d 1111 (9th Cir. 1996), noting that "had Congress intended that administrative compliance orders preclude citizen suits, it could have done so—as it has in other instances." *Id.* at 1118. While another federal circuit reached a different conclusion, see *North and South Rivers Watershed Ass'n v. Scituate,* 949 F.2d 552 (1st Cir. 1991), we believe the statute itself is quite clear on the issue of what constitutes a "comparable" and diligent state or federal enforcement action.

The standard of diligence is key to protecting both defendant and plaintiff interests. The preclusion of citizen enforcement when diligent prosecution is ongoing or has concluded protects defendants from duplicative actions and penalties. The requirement that prosecution be diligent to preclude a citizen suit protects the public interest from "sweetheart deals" that might be struck to protect industry and avoid citizen suit enforcement.

Unfortunately, such situations are not hypothetical. Examples of cases in which states took administrative actions for the sole purpose of trying to preclude citizen suits and protect local industries include *Atlantic States Legal Foundation, Inc. v. Universal Tool & Stamping Co., Inc.*, 735 F. Supp. 1404, 1416 (N.D. Ind. 1990). In this case the violator responded to the notice of a citizen suit by "walking through" an administrative consent decree for approval in the office of the state environmental agency in a single day. According to the court reviewing the case, "This procedure was highly unusual as the approval and signing of such decrees often takes four to six weeks to accomplish." *Id.* Another example is *Friends of the Earth v. Laidlaw Environmental Services*, 890 F. Supp. 470, 479 (D.S.C. 1995). Here the violator's attorney responded to the notice of a citizen suit by drafting the state's judicial complaint and consent order, obtaining the state's signatures on those documents, filing the complaint, paying the state's filing fee, and leaving the consent decree in the judge's chambers for signature. This agreement was reached one business day after the initial enforcement conference, a time period that the state described as "exceedingly fast," and for the sole purpose of beating the deadline imposed by the citizens' 60-day notice letter. *Id.*

Citizens (and EPA) should be able to seek penalties when a state-assessed penalty is inadequate to vindicate the federal interest in consistent and diligent enforcement. Otherwise, polluters have an incentive to pay the state whatever penalty amount is necessary to reach an agreed settlement. This allows polluters to buy "insurance" from a state against a citizen suit, regardless of whether the penalty recovers the violator's economic benefit or deters future violations.

Further, both DOJ and EPA have a statutory oversight role to ensure that citizen suits further the purposes of the Clean Water Act. EPA receives notices of intent to sue and both DOJ and EPA receive citizen suit complaints and proposed consent decrees. 33 U.S.C. 1365(b) & (c). DOJ and EPA use this authority to become involved in citizen suits when they deem intervention or overfilling to be necessary and to ensure that any settlement of the action obtains appropriate injunctive relief to correct the violation and a penalty sufficient to deter future violations.

Courts Already Have Rules Barring Frivolous Citizen Suit or Other Civil Action.

Some of the witnesses at the hearing suggested that certain Clean Water Act citizen suits that have been filed lack merit. Without attempting to address the substance of these matters—our organizations were not involved in the cases cited and no witnesses were called to testify on behalf of the citizen plaintiffs—federal and state courts already have rules that bar frivolous actions.

For example, Rule 11(b) of the Federal Rules for Civil Procedure requires that representations to the court (pleadings, written motions or other papers) bear the following good faith certification with regard to the action brought:

> (1) it is not being presented for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation;
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on the lack of information or belief.

Federal Civil Judicial Procedure and Rules (2004 Revised Edition), Federal Rules of Civil Procedure for the United States District Courts, Rule 11(b).

A party may bring a motion for sanctions to the case or the court itself may initiate such an order. Representations to the court that violate this rule must be corrected or withdrawn and sanctions may be imposed "sufficient to deter repetition of such conduct."

Conclusion

Current Clean Water Act citizen suit provisions and the federal rules on civil judicial procedures provide a balanced approach to both preserving citizens' right to sue for enforcement of the statute and protecting public and private entities from frivolous or duplicative actions. We do not believe that Congress needs to amend the Act to clarify the provisions on diligent prosecution, as the statute is already clear on this issue.

Indeed, should Congress choose to reopen the Clean Water Act citizen suit provisions for reconsideration, we believe the goals of the Act would be better served by increasing opportunities for citizen involvement in the enforcement process, including the removal of limitations on bringing citizen suits for past violations. The Clean Water Enforcement and Compliance Improvement Act (H.R. 1624) would close this and other court-created loopholes, strengthening the law's citizen enforcement tools.

The goal of the Clean Water Act and its citizen suit provisions are one and the same: to eliminate water pollution and ensure that all of the nation's waters are safe for fishing, swimming, drinking water supply, and other uses. Citizen suits play a vital role in achieving this goal and should only be precluded in situations where diligent and comprehensive governmental enforcement action has been taken that will achieve the same purposes.

Thank you for consideration of our concerns. Please feel free to contact us if you need any additional information.

Maria Weidner
Legislative Associate
Earthjustice

Jim Murphy
Wetlands & Water Resources Counsel
National Wildlife Federation

Sara Zdeb
Legislative Director
Friends of the Earth

Michele Merkel
Senior Counsel
Environmental Integrity Project

Richard Caplan
Environmental Advocate
U.S. PIRG

Nancy Stoner
Director, Clean Water Project
Natural Resources Defense Council

David Bookbinder
Senior Attorney
Sierra Club

WIDENER
LAW REVIEW

Volume 10 2003 Issue 1

NOW MORE THAN EVER: TRENDS IN ENVIRONMENTAL CITIZEN SUITS AT 30

JAMES R. MAY*

"Government initiative in seeking enforcement . . . has been restrained. Authorizing citizens to bring suits for violations . . . should motivate governmental . . . enforcement and abatement proceedings."
S. Rep. No. 91-1196, at 36-37 (1970).

"Congress made clear that citizen groups are not to be treated as nuisances or troublemakers but rather as welcomed participants in the vindication of environmental interests."
Friends of the Earth v. Carey, 535 F.2d 165, 172 (2d Cir. 1976).

I. INTRODUCTION

Environmental citizen suits matter. In 1970, borne in a fulcrum of necessity due to inadequate resources and resolve, and borrowing a bit from common law *qui tam* without the bounty, Congress experimented by providing citizens the remarkable authority to file federal lawsuits as "private attorneys general" to enforce the Clean Air Act (CAA).[1] Unless precluded, forestalled, unconstitutional or otherwise unwise, the archetypal citizen suit provision allows

* Jim May is an Associate Professor of Law at Widener University School of Law. Earlier versions appeared at James R. May, *Now More Than Ever: Recent Trends in Environmental Citizen Suits*, *in* Environmental Citizen Suits at Thirtysomething: A Celebration and Summit 555 (2003) [hereinafter Widener Symposium], and in a curtailed version at 33 ENVTL. L. REP. 10,704 (2003). The research assistance of Jennifer Murphy and Amy Shellenberger, L'03, and the typesetting wizardry of Lena Mooney, is acknowledged with gratitude. This Article reports legal developments from November 2001 and statistical trends since 1995 to May 2003. The U.S. Department of Justice's (DOJ's) Policy, Legislation and Special Litigation Section and the U.S. Environmental Protection Agency's (EPA's) Office of General Counsel provided some of the background data upon which this Article relies. The author thanks Jim Payne, DOJ, Carol Ann Siciliano, EPA, and Charlie Garlow, EPA, for providing statistical information. Please direct comments or questions to James.R.May@law.widener.edu.

1. 42 U.S.C. §§ 7401-7671q (2000). Professor Miller tells the story of how citizen suits came about in CITIZEN SUITS: PRIVATE ENFORCEMENT OF FEDERAL POLLUTION CONTROL LAWS 3-6 (1987).

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School of Law Columbia University

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Who's Suing Whom?: A Comparison of Government and Citizen Suit Environmental Enforcement Actions Brought Under EPA-Administered Statutes, 1995-2000

Kristi M. Smith

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September 30, 2004

The Honorable John J. Duncan, Chairman
The Honorable Jerry F. Costello, Ranking Member
Water Resources and Environment Subcommittee
Transportation and Infrastructure Committee
House of Representatives
Washington, DC 20515

Re: "Are Citizen Suit Provisions of the Clean Water Act Being Misused?"

Dear Chairman Duncan and Congressman Costello,

On Thursday September 30, 2004, the Water Resources and the Environment Subcommittee will hold a hearing on Citizen Suit provisions of the Clean Water Act. Waterkeeper Alliance and our 124 member programs nationwide depend on these provisions in our work to improve public health and safety. As you know, the Santa Monica Baykeeper recently settled a suit with the City of Los Angeles to substantially reduce illegal sewage spills throughout the city. This is just one of many examples where our member programs used these provisions to protect human, economic and environment health of communities that depend on their local rivers, lakes, and coastal waters.

We understand from the September 27, 2004 summary of this hearing that this committee will hear testimony that the case against Los Angeles was potentially a misuse of the citizen suit provision as "duplicative citizen action." The report appears critical of citizen participation in the case, stating that a witness will testify that "the settlement addressed the same violations already dealt with in the 1998 settlement between the City and State, and imposed much the same requirements that the City had already agreed to in the 1998 settlement." To the extent such testimony is given, it is simply false. Waterkeeper Alliance respectfully requests that the subcommittee considers all the facts of this case in your deliberation of this issue.

In 1998, Santa Monica Baykeeper founder Terry Tamminen notified the City of Los Angeles that he was fed up with raw sewage spills – nearly two a day that contaminated neighborhoods and beaches – and that he intended to file suit against the City. A 60-day notice letter was sent as required by the Clean Water Act.

The City responded by approaching the Regional Water Quality Control Board ("Regional Board"), a state agency. This was an attempt to block Baykeeper's action. The result of this was a Cease and Desist Order requiring certain upgrades to the sewage system, which the City and Baykeeper supported. A penalty, which the City and Baykeeper also supported, was also levied by the Regional Board. Unfortunately, the action taken by the Regional Board – while important – only resolved a limited number of the City's sewage problems. Soon thereafter, Baykeeper filed suit to address the remaining sewage spill issues, alleging some 20,000 violation of the Clean Water Act.

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After conducting their own audit of the system, **the Regional Board and U.S Environmental Protection Agency agreed that deficiencies were far more significant than those covered by the prior state enforcement order.** In 2001 – nearly two and half years after Baykeeper's action was filed – USEPA and the State filed suit against the City of Los Angeles. The Baykeeper and government cases were consolidated, and the Baykeeper and the government plaintiffs began working side-by-side on a daily basis to prosecute the City's violations of the Clean Water Act. The Department of Justice and the State never once questioned the validity of Baykeeper's participation in the suit or the obvious need for relief beyond that contained in the Regional Board's action. The problems were clear; more needed to be done to correct Los Angeles's on-going pattern of sewage spills throughout the City. Santa Monica Baykeeper's attorneys and technical experts contributed significantly to the evaluation of alternatives to sewage spills and the ultimate resolution of the matter.

Nonetheless, the City attempted to dismiss Baykeeper as a plaintiff in the case. However, the City failed to convince a judge that the violations in the complaint were covered by the prior government action. Instead, the City of Los Angeles was found to have violated the Clean Water Act on several hundred occasions – violations that were not covered by the Regional Board's prior enforcement action. Soon thereafter, the City acknowledged liability for nearly 3,670 violations of the Act – again, violations that were not covered by the Regional Board's prior enforcement action.

Waterkeeper Alliance and Baykeeper are confused and surprised by statement's in the subcommittee's September 27 summary regarding potential testimony from the City representatives. At a press conference announcing the settlement, Mayor James Hahn, City Attorney Rocky Delgadillo and numerous Los Angeles City Councilmembers applauded Baykeeper's participation in the case, even thanking Baykeeper and other citizens for "holding their feet to the fire." The City publicly acknowledged that it was Baykeeper who forced the city into the agreement.

After six years of difficult litigation, the Santa Monica Baykeeper looks forward to a productive working relationship with the City of Los Angeles in improving water quality. However, for anyone to characterize the Santa Monica Baykeeper sewage litigation as an inappropriate use of the citizen suit provision is simply wrong. Indeed, we believe that Baykeeper's sewage litigation is exactly the type of case for which Congress created the citizen suit provision. This case should be held out as a model of how citizen groups and government can work together to resolve local pollution problems.

Waterkeeper Alliance and the Santa Monica Baykeeper thank the Chairman and Ranking Member for holding this hearing. As a coalition representing tens of thousands of citizens who rely on the Clean Water Act, we will remain available to you at any time to answer any questions or provide additional information that will help your deliberation of this very important issue. Thank you.

Sincerely,

Steve Fleischli
Executive Director
Waterkeeper Alliance

Tracy Egoscue
Executive Director
Santa Monica Baykeeper

○