Chapter 10

Civil Litigation Under the Clean Water Act

Robert G. McLusky
Jeffrey R. Vining
Jackson Kelly PLLC
Charleston, West Virginia

Synopsis

§ 10.01. National Pollutant Discharge Elimination System (NPDES) Permits ................................................................. 339

§ 10.02. Clean Water Act (CWA) Section 404 “Fill” Permits............. 341

§ 10.03. Water Quality Standards .......................................................... 342

§ 10.04. Clean Water Act’s Federal Civil Enforcement Provisions (Section 309)).................................................. 343

[1] — Administrative Enforcement ............................................. 346
  [a] — Administrative Compliance Orders ................................ 346
  [b] — Administrative Penalties ........................................... 346
  [c] — Factors Influencing Penalty Amounts ....................... 347

[2] — Civil Actions ..................................................................... 348
  [a] — Economic Benefit .................................................... 350
  [b] — Seriousness ............................................................. 352
  [c] — History of Violations .............................................. 353
  [d] — Good Faith Efforts at Compliance ......................... 353
  [e] — Economic Impact on the Violator ......................... 354
  [f] — Other Matters as Justice May Require ................. 354

§ 10.05. Defending and Negotiating Penalties with the United States ................................................................. 355

[1] — USEPA Penalty Calculation ........................................... 355

[2] — Mitigating Factors: Use of Supplemental Environmental Projects .................................................. 356

§ 10.06. Settling with State Authorities ................................................. 359


§ 10.07. Clean Water Act Citizens’ Suits ............................................ 361

[1] — Citizens’ Suit Provision ...................................................... 361

  [a] — Standing ................................................................. 362
  [b] — Standing: Other “Prudential” Limits on Standing ............. 363
The modern Clean Water Act (CWA) was enacted in 1972 as the Federal Water Pollution Control Act. The Clean Water Act requires a permit to discharge any “pollutant” to “waters of the United States.” Congress created two distinct permitting programs: the Section 404 program for the discharge of “dredged or fill material” which is administered by the United States Army Corps of Engineers (Corps), and the Section 402 National...
Pollutant Discharge Elimination System (NPDES) permit program for the discharge from “point sources” of all non-fill related pollutants, which is administered primarily by the United States Environmental Protection Agency (USEPA).

In the mining industry, many operators will require both types of permits: Section 404 fill permits to construct excess spoil valley fills, refuse impoundments and the in-stream sediment control ponds required to be located below the toe (downstream end) of valley fills and refuse impoundments, and Section 402 permits for the discharges of water from ponds and impoundments.

§ 10.01. National Pollutant Discharge Elimination System (NPDES) Permits.

Discharge permits for non-fill pollutants, called NPDES permits, are issued either by the United States Environmental Protection Agency (USEPA), or a state agency approved by USEPA to administer the NPDES program.

to include any material which, when placed in water, has the effect of creating dry land or raising the stream bed elevation, regardless of the dischargers’ purpose. Id. Accordingly, spoil and refuse discharged by mine operators to create excess spoil valley fills or refuse disposal facilities fall squarely within the § 404 program as “fill” material. See Kentuckians for the Commonwealth v. Rivenburgh, 317 F.3d 425, 448 (4th Cir. 2003).

5 Rivenburgh, 317 F.3d at 431 (excess spoil valley fills necessary); Bragg v. West Virginia Coal Ass’n, 248 F.3d 275, 286 (4th Cir. 2001)(rock removed to access coal seam swells 15-25 percent, necessitating placement of rock in valleys); West Virginia Coal Ass’n v. Reilly, 728 F. Supp. 1276, 1280-81 (S.D. W. Va. 1989), aff’d 932 F.2d 964 (4th Cir. 1991).

6 The Federal Surface Mining Control and Reclamation Act (SMCRA) requires all drainage from areas disturbed by mining to be routed to a sediment control pond or sump. 30 U.S.C. § 1265(b)(10)(B); 30 C.F.R. § 816.46(b)(2)(2005). The discharges from these structures are regarded as the “discharge of a pollutant” requiring an NPDES permit.

In the case of Ohio Valley Envtl. Coalition v. Bulen, 315 F. Supp. 2d 821 (S.D. W. Va. 2004) reh’g denied 437 F.3d 421 (4th Cir. 2006), citizens groups have claimed that discharges from the valley fills into any stream segment that leads to a treatment pond itself requires an NPDES permit. The United States has taken the position that any such stream segment is a “treatment system,” which is statutorily exempt from the definition of “waters of the United States.” 33 U.S.C. § 328.3(a); United States Memorandum in Opposition to Plaintiffs’ Motion for Preliminary Injunction and in Support of United States Motion for Judgment on the Pleadings, OVEC v. USACE, 2006 WL 2431664 (S.D. W. Va. 2006).

7 See 33 U.S.C. § 1324(a)(authorizing permits) and 1342(b)(authorizing USEPA to approve state programs).
The permit limits in NPDES permits derive from two statutory provisions: one requiring the imposition of “technology-based” effluent limits and one requiring any more stringent limits to ensure that discharges do not cause the concentration of pollutants in the receiving streams to exceed levels established in a state’s “water quality standards” (known as “water quality-based effluent limits”). For industries or mine operations that discharge into large waterbodies, the dilution provided by the large receiving water often ensures there are no problems meeting water quality standards. However, in many areas the mining industry discharges into small headwater streams which provide little or no dilution to the discharger. For these operations, the imposition of water quality-based limits for such substances as selenium and aluminum can present substantial treatment and compliance problems. These problems have only magnified as the “TMDL” and “antidegradation” programs of the Clean Water Act have driven effluent limits lower than ever.

---

8 33 U.S.C. § 1311(b)(2000). Technology-based limits have nothing to do with the quality of the receiving stream. Rather, they represent limits that USEPA has determined are achievable by most of a particular industry—such as coal mining—with the application of the “best available technology economically achievable.” 33 U.S.C. § 1311(b)(2)(A)(2000). USEPA has published such limits for the coal industry at 40 C.F.R. § 434. These “effluent limitation guidelines” prescribe the levels of iron, manganese, total suspended solids and pH allowed in discharges from coal mines.


10 TMDL means “total maximum daily load.” Section 303(d) of the CWA provides that where the imposition of technology-based limitations have proven ineffective in ensuring compliance with in-stream water quality standards, then the state (or USEPA) must develop a TMDL for the receiving stream designed to return water quality to those required by the applicable water quality standard. 33 U.S.C. § 1313(d)(2000). These “loads” take the form of discharge permit limits on existing and future discharges, and often are much more stringent than the technology-based limitations.

The “antidegradation” program, on the other hand, applies to those waters where the quality meets or exceeds the requirements of applicable standards. 40 CFR 131.12(a)(1983). USEPA’s regulatory “antidegradation policy” requires states both to protect existing stream uses and the level of water quality required to maintain them as well as water quality that exceeds regulatory standards unless lowering that quality is necessary to “accommodate important economic or social goals.” 40 C.F.R. § 131.12(a)(2)(1983). Pursuant to this rule,
§ 10.02.   Section 404 “Fill” Permits.

The Section 404 program is administered primarily by the Corps of Engineers. While states can assume primary authority over the “fill” program, only a handful have done so. The Corps issues two types of “fill” permits: general permits (GPs) and individual permits (IPs). General permits, which can take the form of “regional” or “nationwide” permits (NWPs), are issued by rule in five-year increments for discharges that will cause only “minimal adverse environmental effects” both individually and cumulatively.11

The issuance of both types of permits triggers the National Environmental Policy Act (NEPA).12 NEPA requires the Corps to conduct an “environmental assessment” (EA) whenever it proposes to issue either a general permit or individual permit. If the Corps determines that the activities sought to be authorized by the permit will not “significantly affect [] the quality of the human environment,” then the Corps may issue the permit without further review.13 If the Corps cannot make such a finding (commonly called

states may allow limited “degradation” of water quality, but never below the concentrations established by water quality standards.

The application of this policy can have draconian effects. For example, West Virginia’s policy allows “de minimis” degradation without making a showing that there are important social or economic reasons for degrading the water. The West Virginia definition of “de minimis,” however, is limited to 10 percent of a stream’s assimilative capacity. For example, if the in-stream water quality criterion for iron is 1.5 mg/l and the existing water contains 0.5 mg/l, then the remaining assimilative capacity is 1.0 mg/l, and 10 percent of that is 0.1 mg/l. In this case, the permit limit would be 0.6 mg/l, which represents the existing water quality level of 0.5 mg/l plus the 0.1 mg/l.

11 33 U.S.C. § 1344(e)(2000). The coal industry has long relied on Nationwide Permit (NWP) 21, which authorizes discharges of fill material to anyone who holds a surface mining permit if the Corps makes a site-specific determination that use of the NWP will cause only minimal impact. 67 Fed. Reg. 2020 (Jan. 15, 2002). The use of NWP 21 has been under attack by citizens groups. See Ohio Valley Envtl. Coalition v. Bulen, 410 F. Supp. 2d 450 (S.D. W.Va. 2004)(invalidating NWP 21), rev’d.429 F.3d 493 (4th Cir. 2005); Kentucky Riverkeeper, Inc. v. Rowlette, No. 05-CV-181 (E.D. Ky.). The current NWP 21 expires in February 2007. The Corps has not published public notice of a proposed re-issuance, and it is currently unclear whether the scope of the authorization will be substantially diminished by the application of a stream length or acreage condition on its use.


a “FONSI” or “finding of no significant impact”), then the project (or any mitigation to reduce the project’s impacts) must be modified or the Corps must prepare an “environmental impact statement” (EIS). A requirement to conduct an environmental impact statement will likely set the permitting process back by years.

The advantage of a general permit, such as Nationwide Permit 21 used by the mining industry, is that the Corps’ NEPA review is done only when the Corps issues the general permit by a rulemaking, and is not separately triggered when individual dischargers seek the Corps’ authorization to use the Nationwide Permit. When a discharger is forced to use an individual permit, the Corps must conduct an environmental assessment specific to the site to be covered by the permit. Environmental groups are now suing the Corps in West Virginia, claiming that the Corps erred in issuing FONSI’s (findings of no significant impact) for three particular permits and that the Corps should instead have required Environmental Impact Statements.

§ 10.03. Water Quality Standards.

Predecessors to the modern Clean Water Act relied on states to implement standards for the quality of their respective waterbodies. The CWA purports

---

14 *Id.*

15 The Corps claims that it has virtually unfettered authority to require any discharger to obtain an individual permit even though the discharger seemingly qualifies for one of the Corps’ general permits. A number of courts have ruled that a decision by the Corps to require that a particular discharger use the individual permit process is generally unreviewable. *See generally* O’Connor v. United States Army Corps of Eng’rs, 801 F. Supp. 185, 191-94 (N.D. Ind. 1992). This can pose a problem to mine operators that assume they can use the abbreviated processes associated with a general permit only to be told part way through the process that it will have to obtain an individual permit instead. This is a bigger problem in the coal industry than in many others because Nationwide Permit 21, issued for use in the coal mining industry, requires a SMCRA permit as a condition for using the permit. Thus, if a mine operator waits until it receives a surface mining permit before seeking NWP 21 authorization and only then learns that the Corps will require an individual permit, it may have wasted months that it could have used in seeking the individual permit in tandem with the mining permit.

16 *See* OVEC v. U.S. Army Corps of Eng’rs, 2006 WL 2431664 (S.D. W.Va. 2006). There, OVEC claims, among other things, that the impact to in-stream macroinvertebrates from excess spoil valley fills is virtually always significant and that mitigation measures cannot work to reduce the impacts to a level of insignificance.
to recognize the primary rights of states to protect their own waters, but in practice substantially circumscribes their ability to do so. As a result, states are required to revisit their water quality standards every three years, with the result often being the addition of more stringent limitations. As these standards become reflected in NPDES permits, permittees need to review the limits in their proposed permits and challenge the issuing agency to explain precisely how they were calculated and challenge them when they appear too stringent. As discussed below, the failure to do so can result in needless enforcement action later.


There are two general civil enforcement mechanisms under the Clean Water Act: governmental and private. This section discusses federal civil enforcement under the CWA.

---

17 The Clean Water Act provides that “[i]t is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to . . . eliminate pollution . . . [and] to plan the development and use . . . of land and water resources.” 33 U.S.C. § 1251(b)(2000).

18 Water quality standards must designate the use of State waters (e.g., public water supply, propagation of fish and wildlife, agriculture, etc.) and for each use establish “water quality criteria.” 33 U.S.C. § 1313(c)(2)(A)(2000). Thus, for example, the standards may establish a criterion of 1.5 milligrams per liter (mg/l) for iron in streams designated as supporting warmwater aquatic species and 0.5 mg/l in those designated as supporting trout and coldwater species.

State standards in effect prior to 1972 remained in effect until reviewed by USEPA for consistency with federal standards. Existing state standards that were considered inconsistent with federal standards had to be revised by the states, or if they declined, by USEPA. 33 U.S.C. § 1313(a)(3)(A)-(C), (b) & (c)(2000).

USEPA is required to publish “from time to time” “criteria for water quality accurately reflecting the latest scientific knowledge” on the levels of pollutants that will protect fish and wildlife and allow recreational activities. 33 U.S.C. § 1314(a)(2000). USEPA publishes these numbers as “guidelines,” but they frequently take on a life of their own and area regarded by some EPA Regions as virtual requirements that the state must adopt.

19 In addition to civil penalties, Section 309(c) of the Clean Water Act authorizes the assessment of criminal penalties against “any person who” violates the CWA’s statutory requirements. 33 U.S.C. § 1319(c)(2000). Generally, there are three levels of criminal culpability: (i) negligence; (ii) knowing violation; and (iii) knowing endangerment. Id.
Section 309 of the Clean Water Act authorizes the USEPA to enforce violations of state-issued NPDES permits that implement provisions of the Clean Water Act. USEPA has three civil enforcement options: (1) it may issue compliance orders, (2) assess administrative penalties or (3) pursue civil action in federal court. Pursuant to USEPA-approved state NPDES programs, most states have some combination of these remedies in their own laws as well.

To sustain an enforcement action under Section 309, the government must prove the purported violator (1) discharged (2) a pollutant (3) into navigable waters (4) from a point source (5) that was not authorized by one of the specified sections of the Clean Water Act. Since all NPDES permits require self-monitoring and reporting requirements, which are evidenced through the submission of a monthly Discharge Monitoring Reports (DMR), there is generally little debate as to whether an effluent limitation has been

Under the CWA, the definition of a “person” includes “any responsible corporate officer.” 33 U.S.C. § 1319(c)(6)(2000).

Mere negligence requires no element of mens rea and courts hold that ordinary negligence is enough to establish criminal liability. United States v. Hanousek, 176 F.3d 1116, 1121 (9th Cir. 1999); see 33 U.S.C. § 1319(c)(1)(2000). Negligence violations subject a party to a fine ranging from $2,500 to $25,000 per day of violation or imprisonment for not more than one (1) year. 33 U.S.C. § 1319(c)(1)(2000).

A “knowing violation” is considered a felony and the mens rea of knowledge applies to each element of the offense. United States v. Ahmad, 101 F.3d 386 (5th Cir. 1996). A “knowing violation” is punishable up to three (3) years imprisonment or by fine ranging from $5,000 to $50,000 per day of violation. 33 U.S.C. § 1319(c)(2)(2000).

A “knowing endangerment” violation is also a felony and requires proof that the actor (1) knowingly violated a permit condition or Clean Water Act provision and (2) knowingly placed “another in person in imminent danger of death or serious bodily injury.” 33 U.S.C. § 1319(c)(1)(2000). The violation of the CWA must precede the endangerment. United States v. Borowski, 977 F.2d 27, 32 (1st Cir. 1992). A “knowing endangerment” violation is punishable up to 15 years imprisonment and/or a fine not to exceed $250,000. 33 U.S.C. § 1319(c)(1)(2000).

20 33 U.S.C. § 1319 (2000). This section does not authorize USEPA to enforce state provisions which are not inserted in the NPDES permit to implement the Clean Water Act.

21 Stoddard v. Western Carolina Reg’l Sewer Auth., 784 F.2d 1200, 1208 (4th Cir. 1986).
violated. Discharge Monitoring Reports tend to be tracked on computerized databases making “patterns” of violations easily discernable. As a consequence, federal and state enforcement entities typically pursue a civil action armed with multiple instances of permit exceedances.

Furthermore, the Clean Water Act is a strict liability statute for violations of permit conditions. Generally, there are only two affirmative defenses to a noncompliant discharge: “Bypass” and “Upset.” “Bypass” refers to the “intentional diversion of waste streams from any portion of a treatment facility” and may only be used as a defense where the permittee (1) submits timely notice to the regulatory agency and (2) the bypass is the only feasible alternative to “prevent loss of life, personal injury, or severe property damage.” “Upset” is defined as an “unintentional and temporary noncompliance . . .” because of factors beyond the reasonable control of the permittee.

The permittee must establish through authenticated records (1) the cause of the upset, (2) the permitted facility was being properly operated at the time of the noncompliance, (3) proper notice of the upset was supplied to the regulatory agency and (4) the permittee implemented necessary remedial measures.

Accordingly, a defendant often is left with few options to challenge the fact of a violation, and the real fight is generally over the amount of the penalty and the scope of any required injunctive relief.

22 Dischargers are required to “certify” the accuracy of their Discharge Monitoring Reports, a fact which has caused some courts to reject claims that analytic techniques were not sensitive enough to accurately prove a permit violation.
23 40 C.F.R. §§ 122.41(m) & (n)(1980).
24 40 C.F.R. § 122.41(m)(1980).
25 An “upset” defense is unavailable for exceedances caused by “operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventative maintenance, or careless or improper operation.” 40 C.F.R. § 122.41(n)(1)(1980).
26 40 C.F.R. § 122.41(n)(3)(1980). Some courts recognize a third defense of laboratory error or “false positives.” See United States v. Allegheny Ludlum Corp., 366 F.3d 164 (3d Cir. 2004). However, as monitoring and reporting requirements are vested in the permittee, a defendant who wishes to challenge the accuracy of its Discharge Monitoring Reports faces a “heavy burden.” Id. at 173 (citations omitted).
27 In the coal industry, NPDES permits typically contain alternate stormwater limits for samples taken during or after rainfall events. Frequently, mine operators will not

The vast majority of USEPA’s enforcement is accomplished administratively. For example, in fiscal year 2005, the USEPA issued 1,916 Administrative Compliance Orders (ACOs) and 2,229 Administrative Penalty Complaints. During this same period, USEPA referred only 259 cases to the Department of Justice for litigation in federal court.

[a] — Administrative Compliance Orders.

Section 309(a) authorizes USEPA to issue broad orders mandating compliance with the Act. These orders can require such actions as the cessation of unpermitted discharges or restoration of filled wetlands pursuant to a compliance schedule. Some courts have ruled that there is no administrative or judicial review of administrative orders until such time as USEPA seeks to enforce them in federal court. Thus, the recipient of a Section 309(a) order can either comply with the order or wait until the agency seeks judicial enforcement or administrative penalties. This latter course is particularly uninviting, especially in a day of increased reporting obligations to shareholders.

[b] — Administrative Penalties.

Pursuant to Section 309(g), USEPA is authorized to assess two classes of administrative penalties of up to $11,000 per violation, not to exceed $137,500. Class I penalties are chargeable per violation and cannot exceed

avail themselves of these alternate limits by noting the rainfall event on their Discharge Monitoring Reports. Some state agencies, however, will allow operators to correct their DMRs at a later date if it becomes clear that a private group intends to initiate a citizens’ suit.

29 Id.
31 Rueth, 13 F.3d at 231; Browner, 58 F.3d at 566.
32 Id.
33 33 U.S.C. § 1319(g), as adjusted for inflation pursuant to 40 C.F.R. pt. 19.
Before assessing a class I penalty, USEPA or the Corps (for Section 404 violations) must provide the party with written notice of the proposed penalty order and the opportunity to request an “informal” hearing within 30 days of receiving the notice. Although a requested hearing is not subject to the Administrative Procedure Act (APA), a respondent must be afforded “a reasonable opportunity to be heard and to present evidence.”

Class II penalties subjects a violator to fines up to $11,000 per day during which the violation continues, but may not exceed $137,500. Unlike Class I penalties, a respondent is entitled to a hearing on the record in accordance with the APA.

Under both penalty assessments, the public must be afforded with notice and a “reasonable” opportunity to comment. An order assessing either class I or class II penalties becomes final 30 days after its issuance unless a hearing is requested by an “interested person” or the violator files a notice of appeal for judicial review. A penalty order will not be set aside absent insubstantial evidence in the record or an abuse of discretion. The overwhelming majority of these administrative penalty actions are settled.

[c] — Factors Influencing Penalty Amounts.

In pursuing an administrative penalty amount, USEPA is required to take into account such factors as the gravity of the violation; the economic benefit resulting from the violation; the violator’s ability to pay, culpability and his-

---

35 Id.
36 Id.
38 Id.
40 33 U.S.C. § 1319(g)(5)(2000). For class I penalty appeals, jurisdiction arises in either the United States District Court for the District of Columbia or in the district in which the violation is alleged to occur. 33 U.S.C. § 1319(g)(8)(A)(2000). For class II penalty appeals, jurisdiction arises in either United States Court of Appeals for the District of Columbia or the Court of Appeals “for any other circuit in which such person resides or transacts business.”
tory of noncompliance; and “other such matters as justice may require.” USEPA’s calculation of an administrative penalty under the Clean Water Act is not guided by written policy. However, USEPA does utilize a settlement policy, discussed infra, which takes into account these various factors.


Clean Water Act Sections 309(b) and (d) authorize USEPA to bring civil enforcement actions in federal court seeking injunctive relief and civil penalties. For an injunctive action pursuant to Section 309(b), jurisdiction arises in the district in which the defendant resides or is doing business. Federal district courts are vested with “broad latitude in fashioning equitable relief.” Examples include requiring the violator to implement best management practices, ordering the cessation of activities until compliance is achievable, and mandating the clean up of contaminated sediments caused by NPDES violations. However, a federal court may only flex its injunctive powers to enforce standards, limitations or orders that have been violated under the Act and may not impose effluent limitations more stringent than those imposed by USEPA.

Commonly, civil suits filed by the government seek both injunctive relief and the assessment of civil penalties. In civil penalty actions, federal

44  33 U.S.C. §§ 1319(b)(injunctive relief provision) and (d)(civil penalties)(2000).
47  See Southwest Marine, Inc., 236 F.3d at 1000-01 (requiring the installation and construction of structures consistent with best management practices); Oregon State Pub. Interest Research Group v. Pacific Coast Seafoods Co., 374 F. Supp. 2d 902, 908 (D. Or. 2005)(ordering the defendant to cease all processing until such time as they are able to discharge to the Columbia River); United States v. Alcoa Inc., 98 F. Supp. 2d 1031, 1038-39 (N.D. Ind. 2000)(injunction requiring the clean up of contaminated sediments where the sediments are contaminated as a direct result of NPDES Permit violations).
courts labor over determining (1) the number of violations and (2) the penalty amount.

Section 309(d) authorizes the assessment of a “civil penalty not to exceed $25,000 per day for each violation.”49 NPDES permits typically contain three types of limits: daily maximum limits, monthly average loading limits, and monthly average concentration limits. USEPA policy is to cite multiple violations of effluent limits occurring on the same day as a separate day for each violation.50 Indeed, federal courts “will treat each violation of the Permit as a separate and distinct day of violation in assessing a civil penalty under the statute.” Hence, if a permittee’s Discharge Monitoring Reports illustrate violations of both fecal coliform and total suspended solids (“TSS”) occurring on the same day, a permittee may be liable for two (2) daily violations of up to $25,000 each. Additionally, for each violation of a monthly average concentration or loading limit, USEPA and federal courts can count a violation for each day of the month in which the violation occurred.51

Thus, USEPA and judicial interpretation of Section 309(d) accepts the following scenario: Permittee’s Discharge Monitoring Reports show a daily maximum violation of pollutant A on April 6, 2006, and a violation of monthly average of pollutant B for the month of April 2006. The maximum fine that could be judicially imposed on the permittee would equal $775,000—(30 days x $25,000 (for the violation of the monthly average of pollutant B)) plus 1 day x $25,000 (for violation of daily maximum for pollutant A)). While this methodology appears excessive, it only serves to set the ceiling of penalties that may be assessed.52 As will be discussed, penalties are often more closely tied to the perceived economic benefit derived from the violation(s).

51 Smithfield Foods, 978 F. Supp. at 340-42; Atlantic States, 897 F.2d at 1139-1140.
Once the statutory ceiling is identified, assessing the civil penalty requires the consideration of factors found in Section 309(d) of the Clean Water Act. Pursuant to this section, courts and USEPA must consider:

1. the seriousness of the violation or violations;
2. the economic benefit (if any) resulting from the violation;
3. any history of such violations;
4. any good-faith efforts to comply with the applicable requirements;
5. the economic impact of the penalty on the violator; and
6. such other matters as justice requires.

Courts have discretion in determining the manner in which these factors are applied. Some employ the “top-down” method, in which the maximum statutory penalty is first determined then reduced upon consideration of the six “mitigating” factors of Section 309(d). Other courts utilize the “bottom-up” approach, in which the court initiates the penalty calculation by identifying the defendant’s economic benefit of noncompliance and adjusting upward or downward after considering the Section 309(d) factors.

[a] — Economic Benefit.

Perhaps the most controversial and heavily contested factor involves discerning the economic benefit (if any) derived from the violation. Indeed, recapturing economic benefit is a cornerstone of USEPA’s civil penalty program and the agency will usually insist on recovering at least this amount. USEPA posits that recapturing economic benefit is necessary to “level the economic playing field by preventing violators from obtaining an unfair financial advantage over their competitors who made the necessary expenditures for environmental compliance.” In other words, the economic

---

54 Id.
57 64 Fed. Reg. 32948 (June 18, 1999). This contention lacks force unless an agency uniformly pursues all violators that exceed some threshold limit of violations because then the agency is not leveling the playing field at all.
benefit value is intended to reflect the net costs avoided due to noncompliance. Under the “bottom-up” approach, this is where a court’s civil penalty assessment begins.

In determining the appropriate economic benefit penalty to seek from the court, USEPA utilizes a computer model known as the “BEN.” The BEN aims to calculate two types of economic benefit: (1) delayed costs associated with capital investments or one-time expenditures required to comply with environmental regulations; and (2) avoided costs including operation and maintenance costs and/or annually recurring costs. Principal variables input to the model include delayed and avoided compliance costs necessary to achieve compliance. Delayed costs can include “capital investments in pollution control equipment, remediation of environmental damages (e.g., removal of unpermitted fill material and restore wetlands), or one-time expenditures required to comply with environmental regulations (e.g., the cost of setting up a reporting system, or purchasing land).” In comparison, avoided costs include operation and maintenance costs and/or other annually recurring costs such as the cost of labor and raw materials. The model also accounts for after-tax cash flows, inflation and the time value of money.

As an example, assume a company installs $1 million of new infrastructure in order to rectify multiple Clean Water Act violations over a five-year period. USEPA’s starting point for assessing an economic benefit penalty will be the interest the company could have earned on that delayed investment. Thus, in generalized terms, if the USEPA claims the company could have earned five percent per year on that $1 million for five years ($50,000 x 5), then the total cost avoided would equal $250,000. Additionally, if the operation should have spent $100,000 per year on caustic or flocculent to treat

58  64 Fed. Reg. at 32949.
59  Id.
60  Id.
61  Id.
62  Id.
63  The general five-year statute of limitations applicable to actions involving civil fines or injunctions applies to action brought under the Clean Water Act. 28 U.S.C. § 2462 (2000).
water at the site and should have paid for sampling and laboratory analysis, USEPA will seek to recoup every dollar of these savings.

The BEN model is a tool designed to aid the USEPA in settlement negotiations. Accordingly, if a civil action proceeds to trial, the USEPA relies upon expert testimony to prove a company’s economic benefit. Given the inherent difficulty in reaching a precise figure, a “reasonable approximation of economic benefit may be sufficient to meet a plaintiff’s burden for this factor.” Thus, an “elaborate evidentiary showing” by the government is unnecessary. However, a court will consider expert testimony from both sides and make appropriate adjustments to the government’s assumptions if necessary. Thus, in a large case, a company should consider hiring an economist able to testify to the complexities and inadequacies of the BEN model and its underlying factors.

[b] — Seriousness.

Considerations in determining the “seriousness” of the violation(s) include “the frequency and severity of the violations, and the effect of the violations on the environment and the public.” Unlike economic benefit, courts generally do not compute a specific monetary figure for the purported “seriousness” of the violation(s). Rather, the court will attach a level of sig—

64 64 Fed. Reg. at 32949.
65 Public Interest Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 80 (3d Cir. 1990); see Smithfield Foods, 972 F. Supp. at 348 (“since it is difficult to prove the precise economic benefit to a polluter, a reasonable approximation of economic benefit is sufficient”); United States v. Gulf Park Water Co., 14 F. Supp. 2d 854, 863 (S.D. Miss. 1998)(“a reasonable approximation of the economic benefit reaped from the defendants’ noncompliance is sufficient”).
66 Gulf Park, 14 F. Supp. 2d at 863.
67 See Gulf Park, 14 F. Supp. 2d at 863 (court subtracts factors and expenses for the economic benefit calculation which the defendants actually incurred as a result of noncompliance).
68 Smithfield, 972 F. Supp. at 343 (citations omitted); see Hawaii’s Thousand Friends v. City and County of Honolulu, 821 F. Supp. 1368, 1383 (D. Haw. 1993)(courts look to the “(1) the number of violations; (2) the duration of noncompliance; (3) the significance of the violation . . . ; and (4) the actual or potential harm to human heath and the environment”).
nificance, which ultimately influences the overall penalty amount awarded.\textsuperscript{70} For instance, a “substantial reduction in the maximum statutory penalty is warranted where the violations caused minimal environmental damage.”\textsuperscript{71} Likewise, “the court may justifiably impose a significant penalty if it finds there is a risk or potential risk of environmental harm, even absent proof of deleterious effect.”\textsuperscript{72}

[c] — History of Violations.

Courts consider the “duration of the defendants’ current violations, whether the defendants have committed similar violations in the past, and the duration of the nature of all such violations, including whether the violations are perpetual and sporadic.”\textsuperscript{73} The “history of such violations” is generally considered as a mitigatory factor.\textsuperscript{74} However, as USEPA is likely to pursue more minor violations under the Clean Water Act’s administrative penalty provisions, the influence of this factor on mitigating penalties amounts may be negligible.

[d] — Good Faith Efforts at Compliance.

Similarly, “good faith efforts to comply with applicable requirements” or “lack of bad faith” may be considered as a mitigatory factor.\textsuperscript{75} This factor speaks to whether the defendant “took any actions to decrease the number of violations or made efforts to mitigate the impact of their violations on environment . . . .”\textsuperscript{76} Evidence that shows “good-faith” may include proof of insufficient or inadequate efforts to comply, internal audits, the hiring of

\textsuperscript{70} See PIRG, 720 F. Supp. at 1163.
\textsuperscript{71} Smithfield, 972 F. Supp. at 343 (citations omitted).
\textsuperscript{73} Gulf Park, 14 F. Supp. 2d at 862 (citing Smithfield, 972 F. Supp. at 349); see United States v. Mun. Auth. of Union, 929 F. Supp. 800, 807 (“court may weigh all violations . . . not just those regarding which liability has been determined”).
\textsuperscript{74} See Gulf Park, 14 F. Supp. 2d at 864.
\textsuperscript{75} Gulf Park, 14 F. Supp. 2d at 865-66; Smithfield, 972 F. Supp. at 349-52.
\textsuperscript{76} Smithfield, 972 F. Supp. at 349-50 (citations omitted).
consultants, or other efforts that show attempts to comply with applicable requirements.77

[e] — Economic Impact on the Violator.

USEPA “should not seek a penalty that would seriously jeopardize the violator’s ability to continue operations and achieve compliance, unless the violator’s behavior has been exceptionally culpable, recalcitrant, threatening to human health or the environment, or the violator refuses to comply.”78 Consistent with this philosophy, federal courts will balance any penalty against the defendant’s ability to survive as a viable entity following a penalty assessment. Courts will consider such financial indicators as total assets and liabilities, company size, market share, and the financial status of the parent corporation.79 Typically, a court’s analysis of this factor is aided by expert financial testimony from both sides.80

[f] — Other Matters as Justice May Require.

Under the last factor, “courts may either increase or decrease the penalty in light of other matters, such as bad-faith conduct of the violator, a violator’s attitude toward achieving compliance, and the violator’s ability to comply with the Act.” In practice, this factor is generally indistinguishable from the courts “good faith” analysis.

After determining the statutory maximum and balancing the Section 309(d) factors, a penalty assessment is made. Invariably, under either the “top-down” or “bottom-up” approach, penalty awards are closely tied to economic benefit as opposed to the statutory maximum that may be assessed.

For example, in Smithfield Foods, the court found 6,982 violations of the defendants’ permit justifying a maximum penalty of to $174.55 million.81 In weighing the Section 309(d) factors, the court found that the violations

77 See e.g., Smithfield, 972 F. Supp. at 349-52; Gulf Park, 14 F. Supp. 2d at 864-66.
80 See e.g., Smithfield, 972 F. Supp. at 353; Gulf Park, 14 F. Supp. 2d at 866-68.
81 Smithfield, 972 F. Supp. at 353.
were serious, the company had a history of noncompliance, the company was financially healthy, and good-faith efforts to comply were minimal.82 However, utilizing the “bottom-up” method, the court only found that defendants had economically benefited to the tune of $4.2 million and assessed an ultimate penalty of $12.6 million, or approximately seven (7) percent of the statutory maximum.83

In Gulf Park, the court utilized the “top-down” method and initiated its penalty assessment by finding 1,825 violations justifying a maximum penalty of $46 million.84 Again, the court found the violations serious, the defendants had a long history of violations, and good faith efforts to comply were minimal.85 Nonetheless, the court approximated an economic benefit of $600,000 and assessed a $1.5 million penalty, or approximately three (3) percent of the statutory maximum.86

§ 10.05. Defending and Negotiating Penalties with the United States.


For settling all civil judicial and administrative penalties sought under Section 309 of the CWA, USEPA is guided by the following formula, which commingles the Section 309(d) and (g) factors:

\[
\text{Penalty} = \text{Economic Benefit} + \text{Gravity} +/- \text{Gravity Adjustment}
\]

Factors – Litigation Considerations – Ability to Pay – Supplemental Environmental Projects.87

As previously discussed, USEPA utilizes the “BEN” model to calculate economic benefit which attempts to capture the (1) delayed costs associated with capital investments or one-time expenditures required to comply with

82 Id. at 343-53.
83 Id. at 349, 354.
84 Gulf Park, 14 F. Supp. 2d at 857.
85 Id. at 859-66.
86 Id. at 869.
environmental regulations and (2) avoided costs including operation and maintenance costs and/or annually recurring costs.88

The gravity component reflects USEPA’s perceived “seriousness” of the violation after considering the (1) number of violations, (2) duration of noncompliance, (3) significance of the violation(s) (degree of standard exceedance), and (4) actual or potential harm to human health and the environment.89 USEPA assigns point values to each category based upon Clean Water Act penalty policy, which are then added to a monetary multiplier to arrive at a base gravity figure.90

From this figure, USEPA takes into account “adjustment factors” such as history of recalcitrance (to increase gravity), which includes bad faith or unjustified delay in implementing mitigation measures; and quick settlement reduction (to decrease gravity), which is intended to provide the defendant with incentive to settle quickly.91


The resulting figure: Economic Benefit + (Gravity +/- Gravity Adjustments) equals the preliminary settlement amount.92 The demanded penalty amount may decrease based upon (1) litigation considerations, (2) a defendant’s ability to pay and (3) the institution of supplemental environmental projects (SEPs).93

A decrease in preliminary penalty amount based on litigation considerations is intended to reflect weaknesses in USEPA’s case “where facts demonstrate a substantial likelihood that the government will not achieve a

---

88 64 Fed. Reg. 32948 (June 18, 1999).
91 Id.
92 Id. at 12.
93 Id. at 13-22.
higher penalty at trial.”94 In comparison, a decrease based on a defendant’s ability to pay is intended to adjust the penalty amount such that a violator can reasonably pay a penalty, stay in business, and still comply with the Clean Water Act.95

The third and perhaps largest mitigating factor in USEPA settlements is the use of supplemental environmental projects as an offset to civil penalties. Supplemental environmental projects are defined as “[1] environmentally beneficial projects which a defendant/respondent agrees to undertake in [2] settlement of an enforcement action, but which the defendant/respondent is [3] not otherwise legally required to perform.”96 Accordingly, there are three (3) criteria that must be satisfied before a supplemental environmental project can be used as a credit in a penalty assessment.

First, supplemental environmental projects must be “environmentally beneficial,” which is defined as projects that “improve, protect, or reduce risks to public health, or the environment at large.”97 USEPA has identified seven (7) categories of qualifying SEPs: public health, pollution prevention, pollution reduction, environmental restoration and protection, assessments and audits, environmental compliance promotion, and emergency planning and preparedness.”98 Additionally, the supplemental environmental project must have a sufficient “nexus” to the violation and some states will not credit a SEP that is required to abate the violation.99 Nexus exists where:

[1] the project is designed to reduce the likelihood that similar violations will occur in the future; or [2] the project reduces the adverse impact to public health or the environment to which the violation at issue contributes; or [3] the project reduces the overall risk to public health or the environment potentially affected by the violation at issue.100

---

94 Id. at 13. 95 Id. at 21-22. 96 63 Fed. Reg. 24796 (May 5, 1998). 97 Id. 98 Id. 99 Id. 100 Id.
Second, supplemental environmental projects must be created as a consequence of an environmental enforcement action. Specifically, (1) USEPA must be afforded an opportunity to shape the scope of the project before implementation and (2) the SEP cannot be implemented until after USEPA has issued a notice of violation (NOV), administrative order, or complaint.101

Third, the project must be independent and cannot be required as a condition of injunctive relief, a condition of an existing settlement or order in a separate legal action, or by state or local requirements.102

USEPA employs a five-step process to calculate the financial penalty in settlements utilizing supplemental environmental projects. First, the “settlement amount” (economic benefit + gravity) without a SEP is calculated.103 From this amount, the “minimum penalty” is determined, which must reflect the greater of either (1) the economic benefit of noncompliance plus 10 percent of the gravity factor or (2) 25 percent of the gravity component only.104 Next, the “net present after-tax cost of the SEP” is calculated by determining the amount of funding needed to implement the supplemental environmental project.105

After discerning the SEPs net cost, the USEPA determines the “mitigation percentage,” which reflects how much the supplemental environmental project’s cost will reduce the penalty.106 This percentage is entirely within USEPA’s discretion but cannot exceed 80 percent of the SEP’s cost unless two narrow exceptions apply.107 The mitigation percentage of the SEP cost may be set as high as 100 percent for (1) small businesses, government agencies, and non-profit organizations if the project is of “outstanding quality,” or (2) for other defendants if the SEP implements pollution prevention of

101 Id.
102 Id.
103 Id.
104 Id.
105 Id.
106 Id.
107 Id.
“outstanding quality.” 108 Subsequently, the supplemental environmental project’s cost is multiplied by the mitigation percentage to obtain the SEP mitigation amount that may be used to mitigate the preliminary settlement penalty. 109 Lastly, the final settlement penalty is calculated. This penalty equals the greater of (1) the minimum penalty amount or (2) the SEP penalty less the settlement amount. 110

§ 10.06. **Settling with State Authorities.**


State NPDES authorities have their own state enforcement provisions and frequently use them. Resolution with a state, however, is no guarantee that USEPA might not “overfile”—that is, seek penalties or relief for the very same violations addressed in the state actions. The law in this area is relatively unsettled.

“Overfiling” refers to USEPA’s practice of seeking additional penalties from companies for environmental violations after a state resolves an action against the same company for the same violations. USEPA defends its overfiling power in nearly every environmental context. However, the legality of USEPA’s overfiling practice under another environmental statute—the Resource Conservation and Recovery Act (RCRA)—was challenged in *Harmon Industries v. Browner*. 111 There, a Missouri state agency entered into a “full accord and satisfaction” consent agreement with Harmon effectively releasing the company from any claim of monetary penalties under the federally-approved state analog to RCRA. 112 Notwithstanding the consent decree, USEPA instigated an action under the federal RCRA against Har-

---

108 *Id.*
109 *Id.*
110 *Id.*
112 *Harmon Indus.*, 191 F.3d at 897.
mon arising out of the same violations. A federal administrative law judge imposed a civil fine of $587,716.\textsuperscript{113}

Ultimately the case reached the Court of Appeals for the Eighth Circuit, where the court held that based on the language of RCRA and principals of \textit{res judicata}, the State of Missouri’s consent decree precluded a subsequent USEPA enforcement action against Harmon arising out of the same facts and legal issues.\textsuperscript{114} The court relied on the “in lieu of” language of RCRA Section 3006(b) and the “same force and effect” language of RCRA Section 3006(d) to find that privity existed between the Missouri Department of Natural Resources and USEPA when enforcing the provisions of RCRA.\textsuperscript{115}

In essence, a “Reverse Harmon” decision dealing with “state overfiling” was rendered in 2001 by the Virginia Supreme Court in \textit{State Water Control Board v. Smithfield Foods, Inc.}\textsuperscript{116} In \textit{Smithfield}, the Virginia State Water Control Board (VSWCB) brought an enforcement action against Smithfield for violations of a permit issued pursuant to the Clean Water Act.\textsuperscript{117} The VSWCB initiated its action following a successful adjudication by USEPA before the Fourth Circuit for violations of the same permit.\textsuperscript{118} In dismissing VSWCB’s action on \textit{res judicata} grounds, the high court of Virginia reasoned:

\begin{itemize}
  \item \textsuperscript{113} \textit{Id.}
  \item \textsuperscript{114} The State of Missouri was operating pursuant to USEPA approval of the state’s hazardous waste program.
  \item \textsuperscript{115} \textit{Id.} at 903. Unlike RCRA, the Clean Water Act does not expressly indicate that it is enforced and administered by a state “in lieu of” the federal program nor provide that a state action has the “same force and effect” as federal action taken by the USEPA. Nonetheless, the Clean Water Act’s legislative history provides that the “state permit programs . . . are state programs which ‘function in lieu of the federal program.’” State of California v. United States Dept of Navy, 845 F.2d 222, 225 (9th Cir. 1988)(quoting H.R. Rep. No 830, 95th Cong., 1st Sess. 104); see United States v. ITT Rayonier, Inc., 627 F.2d 996, 1003 (9th Cir. 1980)(finding the relationship between a state agency and the EPA under the Clean Water Act “sufficiently ‘close’ under the circumstances to preclude relitigation of the issue already resolved in state court”); William T. Burton, Jr., “Does Res Judicata Prevent EPA Overfiling under the Clean Water and Clean Air Acts?” \textit{Mich. Bar J.} (Oct. 2000).
  \item \textsuperscript{117} \textit{Id.} at 767.
\end{itemize}
There can be no question that by qualifying the state’s water quality protection program under the CWA, the [VSWCB] and the EPA determined that their interests in protecting the quality of water in Virginia would be protected by the permits issued by the Board pursuant to this joint program. Thus, the Board and the EPA share an identity of interest in the permit issued to Smithfield in this case such that the Board’s legal right was represented by the EPA in the federal action when the EPA sought to enforce the provisions of the permit.119

Although not expressly addressing the EPA’s power to overfile, the court relied on the res judicata analysis expounded in Harmon, which was later cited with approval by the Fourth Circuit in Treacy v. Newdunn Assoc.120

Despite the Virginia Supreme Court’s positive treatment of Harmon, almost all federal courts have criticized, expressly rejected or limited Harmon’s preclusion of “overfiling” to RCRA matters.121


Section 505(a) of the CWA provides:

Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf (1) against any person . . . who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by [USEPA] or a state with respect to such standard or limitation, or (2) against [USEPA] when there

119 Id. at 770.
is alleged a failure of [USEPA] to perform [a nondiscretionary act].122

The federal district courts have jurisdiction to enforce effluent limitations, and venue resides solely in the federal judicial district in which the discharge at issue is located.123 The statute also gives the court jurisdiction to “apply any appropriate civil penalty under [33 U.S.C. § 1319(d)].”124 Thus, the civil remedies generally available to the government under the CWA are also available to citizen plaintiffs. Additionally, USEPA may intervene “as a matter of right” in a citizens’ enforcement action.125


[a] — Standing.

The citizens’ suit provision provides that any citizen may commence a suit, but defines “citizen” as “a person or persons having an interest which is or may be adversely affected.”126 The United States Constitution limits the jurisdiction of federal courts to actual “cases or controversies,” a phrase which has given rise to the concept that those seeking to invoke that jurisdiction must have an interest that has been or will be injured. The Supreme Court articulated three requirements for Article III standing in Lujan v. Defenders of Wildlife:127

(i). Injury-in-fact: The plaintiff must have suffered an “injury-in-fact”—an invasion of a legally-protected interest which is (a) concrete and particularized and (b) actual or imminent, not ‘conjunctural’ or ‘hypothetical.’”128 Thus, generalized grievances are insufficient. Although some have argued that there remains a question as to whether proof of injury-in-fact is still required

123 33 U.S.C. §§ 1365(a) & (c)(2000).
128 Lujan, 540 U.S. at 560.
when standing is conferred on “any person” or “citizen” by a statutory “citizens’ suit” provision, the better reasoning is that even Congress cannot dispense with the Article III “minima” for standing.129

(ii). **Causation**: There must be a causal connection between the injury and the conduct complained of—the injury has to be “fairly . . . traceable to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court.”130

(iii). **Redressability**: It must be “likely,” as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision.” If there are other contingencies which must be satisfied for the plaintiff’s “injury” to be redressed, the plaintiff may lack standing.131

[b] — **Standing: Other “Prudential” Limits on Standing.**

In addition to the Article III “minima,” Justice Rehnquist also listed certain “prudential” limits on standing which have been fashioned by the courts:

> Beyond the constitutional requirements, the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing. Thus, this Court has held that ‘the plaintiff generally must assert his own legal rights and interest, and cannot rest his claim to relief on the legal rights or interests of third parties.’ *Warth v. Seldin*, 422 U.S., at 499. In addition, even when the plaintiff has alleged redressable injury sufficient

---


130 *Lujan*, 504 U.S. at 560.

131 *Id.*
to meet the requirements of Art. III, the Court has refrained from adjudicating ‘abstract questions of wide public significance’ which amount to ‘generalized grievances,’ pervasively shared and most appropriately addressed in the representative branches. *Id.*, at 499-500. Finally, the Court has required that the plaintiff’s complaint fall within ‘the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.’ *Association of Data Processing Services Orgs v. Camp*, 397 U.S. 150, 153 (1970).132

These prudential limitations can, however, be overridden by Congress in defining standing requirements in particular statutes.

[c] — Notice.

Before citizens can file a suit to enforce the terms of NPDES permits, they generally must provide 60 days’ notice of their intent to sue to USEPA, to the state in which the alleged violations are occurring, and to the discharger.133 The purpose of this provision is to allow either USEPA or the state to determine whether enforcement action is appropriate and, if so, to initiate an action of their own. This is an acknowledgment that USEPA and the States are to be the primary enforcers of the Act and allows them 60 days in which to initiate their own enforcement action which, as discussed below, may then bar a citizens’ suit.

The contents required in the notice are set forth in regulations at 40 C.F.R. Part 135. Most courts have held that the notice is a *jurisdictional prerequisite* to bringing the suit.134

[d] — Effect of State or Federal Enforcement Action.

The right of citizens to initiate a private enforcement action may be cut off by state or federal enforcement action which is initiated before the expiration of the 60-day notice period (note that USEPA’s regulations provide that, if notice of citizens’ suits are mailed, then the 60-day period starts to run as of the date of the postmark of the notice letter and not from receipt of the notice.)\(^{135}\) Specifically, a citizen’s right is barred if:

(i). “[USEPA] or [the] 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 . . . but in any such action in a court of the United States, any citizen may intervene as a matter of right”; or

(ii). (a) if “[USEPA] has commenced and is diligently prosecuting an [administrative penalty] action under [33 U.S.C. § 1319(g)]”; or

(b) if a state has commenced and is diligently prosecuting an action under a state law comparable to [33 U.S.C. § 1319(g)],” which gives USEPA the right to require compliance and impose penalties through administrative enforcement action.\(^{136}\)

[e] — State Preemption.

Many potential targets of citizens’ suits have tried to rely on federal or state enforcement actions as a bar to a citizens’ suit. Indeed, some targets have even encouraged states to take action prior to the expiration of the 60-day notice period in the hope that the state-initiated action will bar a citizens’ suit. The reasons for doing so include: (1) a desire to avoid litigation with Washington-based environmental groups which will try to recoup legal fees based on Washington, DC rates; and (2) a desire to negotiate with state officials who already understand the operating systems of the discharger without the need for expensive “discovery” in a legal battle.

\(^{135}\) See 40 C.F.R., 135.2(c).

Dischargers should be aware that many attempts to rely on state enforcement actions as a bar to a citizens’ suit have failed. Some of the issues and pitfalls that await any such discharger are:

(i). Is the state action “diligent” and for the purpose of “requiring compliance” with the Act?

In *Friends of the Earth v. Laidlaw Environmental Services, Inc.*,\(^{137}\) the court ruled that a state consent order was not diligent prosecution where:

- discharger asked state to bring action;
- discharger prepared complaint;
- Consent Order was approved by state court one day after complaint was filed, all without the benefit of any public comment or scrutiny;
- state Consent Order did not provide for continuing jurisdiction to enforce order or for stipulated penalties; or
- while discharger paid penalty of $100,000 to state, there was no attempt by state to recoup or even calculate the economic benefit the discharger obtained by virtue of non-compliance.\(^{138}\)

(ii). *Did the state commence enforcement in a timely manner to bar a citizens’ suit?*

As mentioned, a state-initiated civil action must be filed in state court before the citizens file their action. Furthermore, an administrative enforcement action by USEPA or a state cannot bar a citizens’ action unless it either was commenced before notice of the citizens’ suit or more than 120 days passes after notice of the citizens’ suit and the citizens still have not filed.

---

(iii). Was the state-initiated administrative enforcement action undertaken pursuant to “a state law comparable” to USEPA’s administrative authority under 33 U.S.C. § 1319(g)?

This requirement may be frustrating to a citizens’ suit target which has already been heavily penalized by a state-initiated administrative enforcement action, but which, through no fault of its own, cannot rely on the action as a bar because the state law utilized simply is not “comparable” to the federal administrative provisions of 33 U.S.C. Section 1319(g).139

[f] — Damages, Attorneys’ Fees and Expenses.

The Clean Water Act does not create a private right of action for damages.140 The Clean Water Act does, however, provide that the court “may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate.”141 This means that citizens groups will typically obtain fees for successfully pursuing a case. Make sure that if a settlement includes fees, the order expressly discharges your obligation to pay fees to the opposing party. This provision also means that the longer a citizens’ action is prolonged, the more you will likely be paying both your lawyer and opposing counsel.

139 See generally Citizens for a Better Env’t —California v. Union Oil Co. of California, 83 F.3d 1111 (9th Cir. 1996)(state’s action was not undertaken pursuant to a law comparable to 33 U.S.C. § 1319(g) and, therefore, did not bar subsequent citizens’ suits); North and South Rivers Watershed Ass’n, Inc. v. Scituate, 949 F.2d 552 (1st Cir. 1991)(citizen suit barred where state has a penalty provision comparable to 33 U.S.C. § 1319 even if state did not rely on that section in taking enforcement action); Natural Res. Defense Council, Inc. v. Vygen Corp., 803 F. Supp. 97 (N.D. Ohio 1992)(refusing to preempt citizens suits when state administrative action did not provide adequate public notice or opportunity to participate in state enforcement action and civil penalty assessment).

140 See, e.g., Sierra Club v. SCM Corp., 580 F. Supp. 862 (W.D. N.Y.), aff’d 747 F.2d 99 (2d Cir. 1984).


The citizens’ suit statute allows an action against any discharger “who is alleged to be in violation of [the CWA].” Dischargers for years argued that the underlined language required proof of ongoing violations and that the Clean Water Act did not authorize private penalty actions for past violations that were no longer occurring. This view finally gained acceptance in the U.S. Supreme Court in Gwaltney of Smithfield v. U.S.\(^{142}\) There, the Court held that federal district courts have no jurisdiction to hear cases in which plaintiffs have not made a good faith allegation that permit violations are ongoing.

On remand, the Court of Appeals for the Fourth Circuit further required that even if plaintiffs are able to make such a good faith allegation, they must at trial prove either that violations occurred after the filing of the complaint or that there is a likelihood of continued violations, even if sporadic or intermittent in nature.\(^{143}\) The discharger, though, has a right to address each pollutant separately for the purpose of proving there will be no continuing violations.\(^{144}\) Thus, if in the past a discharger has violated permit terms for two pollutants and has since solved its compliance problems with one of the pollutants, then the violations for that pollutant will not be counted in the citizens’ suit.

The “wholly past violations” defense is not, however, a defense in an enforcement action initiated by the United States EPA.\(^{145}\) In several cases, the United States has intervened in private citizens’ suits just to prevent the defendant from interposing this defense.

[h] — Penalties.

The Clean Water Act citizens’ suit provision allows private parties to initiate an action to have a court impose civil penalties on a discharger of


\(^{144}\) Chesapeake Bay Found., 890 F.2d at 697-98.

pollutants. The penalties are payable to the United States and not to the citizen who initiated the suit. However, in the past, such suits were often settled for very reasonable settlement amounts in exchange for agreements either to pay inflated attorneys fees or to make a “donation” to a conservation group. As a result of this practice, all proposed settlements must now be sent to the Department of Justice for its review. The United States has objected, with some success, to settlements which propose large payments to private conservation groups, but which do not include at least a substantial penalty being paid into the U.S. Treasury. The grounds for this objection are that the only penalties contemplated by the Clean Water Act are those payable to the United States.

[i] — Practice Pointers for Establishing State Enforcement Action as Effective Bar to Citizens’ Suits.

There are several benefits to pursuing state enforcement as bar to a citizens’ suit. For instance, state officials typically understand the dischargers operational systems and problems and will not require substantial education, thereby avoiding the need for expensive and time consuming discovery. Additionally, avoiding a citizens’ suit prevents the potential payment of exorbitant attorneys’ fees to Washington, D.C. lawyers who typically represent citizens’ groups. Furthermore, the state tends to be more practical and realistic in negotiating towards a consent order. Even if citizens intervene in a state proceeding, the court may approve a settlement between the state and a discharger over the objection of the citizens’ group. In the alternative, if the citizens’ group is the lead plaintiff in federal court, the discharger will likely be forced to enter into an unreasonable consent order or risk an expensive trial in which it may be forced to pay the opponent’s lawyers. While there are obvious benefits to state initiated enforcement, it is important to be cognizant of the following practice pointers to ensure that any consent order will withstand judicial scrutiny prompted by citizen intervention:

•  *Don’t Get Too Cute or Too Cozy with the State.* While it is likely permissible to request that state officials take action against
your client, avoid drafting the State’s complaint. As one court noted, the State must act as a “prosecutor, not as a pen pal.”

- **Make Sure the State Utilizes a Proper Enforcement Vehicle and Does So in a Timely Manner.** If your state does not have formal administrative penalty authority comparable to USEPA’s under 33 U.S.C. Section 1319, then insist that the state action be taken in a court. Otherwise, there is substantial risk that whatever administrative action the state does take will not be considered pursuant to a state law “comparable” to 33 U.S.C. Section 1319. Furthermore, be aware that the state should commence its action within sixty (60) days of the postmark on the citizens’ notice letter and not sixty days from the state’s receipt. There are cases where the state’s action has been only hours or a day too late to serve as a bar to a citizens’ suit.

- **Justify the Penalty.** Be prepared to pay a substantial penalty and make sure any consent order explains any penalty in terms of the five criteria set out in 33 U.S.C. Section 1319(d).

- **Ensure that Citizens’ Groups Have Right to Review and Comment on Proposed Consent Order.** USEPA’s NPDES program regulations require that states implementing NPDES programs shall provide for public participation in the state enforcement process by providing either:

  (i) authority which allows citizens to intervene in state penalty actions; or

  (ii) assurance that the state will:

    (a) investigate and respond in writing to all citizens’ complaints;

---

(b) not oppose intervention when permissive intervention is authorized; and
(c) publish notice of and provide public comment on any proposed settlement.147

---

147 See 40 C.F.R. § 123.27(d)(1980).